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Code of Criminal Procedure, 1973 -Section 397- **Drugs and Cosmetics Act, 1940-** Revision petition filed against order of Additional Sessions Judge confirming the conviction and sentencing order of trial court under Sections 27 & 28 of the Act – **Held** - Petition allowed and accused/ petitioner acquitted. Prosecution carried a very heavy burden to prove its case beyond all

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Code of Criminal Procedure, 1973- Section 482 - Inherent Power - FIR filed U/S 376,376(2)(n),452,497 and 506 **Indian Penal Code, 1860** - Petitioner came in her contact - Decided to marry - She became pregnant - But he refused to marry - **Held** - High Court has inherent power to quash criminal proceedings which are not compoundable - Power to be exercised sparingly and with great caution to examine whether the possibility of conviction is remote and bleak - Interest of respondent appears to be more important than of the society - Quashing of FIR - Prayer accepted.(Paras 10,11) Title: Gurminder Singh vs. State of H.P. & others Page-547

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Code of Criminal Procedure, 1973- Sections 397, 125 – Maintenance – Mis-treatment and Second marriage by petitioner- During the pendency of the Criminal Revision Petition, the parties reached a compromise- Petitioner sought to set aside the compromise, alleging coercion- **Held**- Petition not maintainable as the petitioner willingly entered into a compromise - Failure to fulfill the terms of the compromise led to the revival of the maintenance order - Upheld Maintenance order, but modified the amount. (Para 6, 8, 12) Title: Nagender Pal Sharma vs. Vidya Sharma Page-109

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Code of Criminal Procedure,1973 - Section 374 - **Indian Penal Code,1860** - Sections 363, 366 -**Protection Of Children from Sexual Offences Act, 2012** - Section 4 - Appellant allured and enticed a 16 year old victim to marry - made her to leave the house - Both of them spotted and apprehended by police - **Held** - Sentence imposed u/s 4 POCSO reduced to sentence already undergone - No need to reduce sentence u/s 363 and 366 IPC - Exceptional case having special and adequate reasons for reducing less than maximum prescribed sentence - Short difference in the minimum prescribed sentence and sentence already undergone - (Paras 16,19) Title: Jitender Singh alias Jitu vs. State of H.P. Page-483

Constitution of India, 1950 - Article 226 - Petition filed for the grant of benefit of contract employment and regularization of services; and release of arrears of grants in aid in favour of the petitioner - **Held** - Petition allowed. Petitioner was duly qualified from the very inception of his joining as DPE in GSSS, Lalpani, Shimla in October, 2005. There is no allegation of petitioner being incompetent to discharge his duties. Respondent No.1 as a model employer cannot be allowed to indulge in exploitative actions towards the citizens of the country. The administrative failure of respondents to sanction a post despite requirement cannot be allowed to be used as a shield for such exploitative action.(Para 14) Title: Kishore Kamta vs. State of H.P. Page-591

Constitution of India, 1950 - Article 226 - Petitioner appointed as a Computer Instructor in the respondent-Academy in terms of the interviews, which were held by the competent authority pursuant to the advertisement-matter of regularization in service-**Held**-This Court is alive to the fact that the post of Clerk has to be filled by way of Recruitment and Promotion Rules - The respondents are directed to appoint the petitioner against the post of Clerk lying with the respondent Academy-Petition allowed (Para 13). Title: Ravinder Nath vs. State of H.P. Page-723

Constitution of India, 1950 - Article 226 - **Recruitment and Promotion Rules-** Rule 7- Writ petition for quashing and setting aside of clause whereby the minimum educational qualification under Rule 7 of the Rules, is not in consonance with the Regulations issued by the Pharmacy Council of India and being illegal, discriminatory and ultra-vires to the provisions of the Constitution of India, besides being in conflict with All India Council of Technical Education norms- **Held-** Regulations issued by the statutory bodies

like Pharmacy Council of India, AICTE or the NCTE are binding upon the State and all the subsequent actions of the State should be in conformity with such guidelines/regulations- Petition allowed with directions. (Para 24) Title: Vinay Thakur & another vs. State of H.P. Page-352

Constitution of India, 1950 - Article 226- Petition filed to order direction to the respondents to provide proportionate reservation to OBC (UR) category against 10 posts requisitioned and to offer appointment to petitioner from the same date i.e. July, 2021 when similarly situated persons were offered appointment - **Held** - Petition allowed. As recruitment to the post of Supervisor from amongst Anganwari workers is a direct recruitment out of non-Governmental employees, who have been engaged as Anganwari workers on honorarium basis under the Project/Scheme, therefore, reservation applicable to direct recruitment at the time of initial appointment shall also be applicable to vacancies/posts available to be filled by way of Limited Direct Recruitment from amongst Anganwari workers as applicable for other direct recruitment and therefore, candidates belonging to Other Backward Classes working (engaged) as Anganwari workers are also entitled for reservation in Limited Direct Recruitment to the post of Supervisor through Limited Direct Recruitment. Thus, omission or commission on part of respondents No.1 and 2 by not providing reservation to OBC category (UR) in 10 additional posts is unconstitutional, arbitrary, unreasonable and irrational. (Para 12) Title: Chander Kala vs. State of H.P. Page-604

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Constitution Of India, 1950 - Service Law - Promotion denial based on

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Constitution of India, 1950 - Service Law - Promotion denied despite submission of Master's degree provisional certificate – **Held** - Denial of promotion was unjustified, especially when the petitioner's qualification was established before the DPC meeting - Ordered the respondents to grant petitioner the promotion from the date her juniors were promoted, along with all consequential benefits. (Para 15,17) Title: Usha Chauhan vs. State of H.P. & others Page-242

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Constitution of India, 1950 - Writ of Certiorari- Petitioner challenged the appointment process undertaken by the State- Challenged it on the basis that it is not in compliance of Recruitment and Promotion (R&P) Rules Clause 10- **Held**- As per clause 10 of R&P Rules there are three sources of recruitment. The first source is 'Panchayat Veterinary Assistants', the second source is 'open market' and the third source is 'feeder cadre', from which recruitment has to be made by way of promotion- recruitment can either be on regular basis or on contract basis- petitioners are not eligible to participate in the process of batch-wise recruitment, for the reason that they are not serving as Panchayat Veterinary Assistants- Petition was dismissed. (Paras 13 and 14)

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Constitution of India, 1950 - Writ of Mandamus- Article 226 - Service of Respondent was not regularized by Registrar- Industrial dispute was raised before the Labour Court wherein, the Court passed an order of regularization of service- Regularization of service despite completion of only 8 years of service was challenged in writ petition- **Held**- Order of regularization passed by Labour Court was not valid- Writ jurisdiction cannot be invoked to direct an employer to regularize the service of daily wage of workers or those who joined through back door. (Paras 10 and 12) Title: Chaudhary Sarwan Kumar vs. Bhari Lal Page-640

Constitution of India, 1950 -Article 226 - **Himachal Pradesh Municipal Act, 1994** - Present petition filed against the final Notification dated 27.10.2020 whereby the Nagar Panchayat, Ani, has been created out of the different revenue estates - **Held** - Petition allowed and notification quashed. In terms of Section 4, the State Government is required to issue a Notification whereby it proposes any local area to be a municipal area under the Act. The Notification so issued under sub-section (1) of Section 4 is to define the limits of the local area to which it relates, in case, the statutory provisions are not complied with as is the case in hand, then obviously the establishment and declaration of the Nagar Panchayat by a Notification cannot be countenanced and is thus liable to be set aside. Record reveals that the aforesaid procedure has not at all been followed.(Paras 13-18). Title: Chet Ram & others vs. State of H.P. **(D.B.)** Page-629

Constitution of India, 1950- Article 226**- Himachal Pradesh Revenue Department (Mohal Class-III, Non- Gazetted) Recruitment & Promotion Rules, 1992**. **-** Petition filed to quash letter dated 20.2.2020 and to order the respondents not to disturb the seniority of petitioners as kanungo of district Una and at the same time to quash the executive instructions dated 30.6.1997 and the seniority list issued on 08.05.2020.- **Held-** Petition allowed. Before the 2009 Rules came into force, the seniority of Patwaris was not to be determined on the basis of Patwar Examination and practical training and it was to be determined solely on the basis of merit obtained in the selection test as prescribed in Rule 15(A) (1) for Patwari candidate. The Executive Instructions dated 10.07.1997 are held to be bad in law and ordered to be quashed as they supplant the provisions of 1992 Recruitment & Promotion Rules and not

supplement the same. The seniority list subsequently issued on the basis of said Executive Instructions are also ordered to be set aside with a direction to the respondents to redraw the fresh seniority as was being done earlier without referring to the annulled Executive Instructions.(Paras no. 20 & 28) Title: Kuldeep Kumar & others vs. State of H.P. & others Page-611

Constitution of India, 1950- Article 226- Petition filed against grievance with arbitrary and discriminatory action with regard to rejection of requests of petitioner to permit switching over to new pension scheme- **Held-** Employees falling in third category repeatedly requested respondent to be governed under 1997 Pension Scheme- in the event of non-exercise of option, were to be covered under the GPF-cum-Pension-Gratuity Scheme, 1997- Rejection quashed- Set- aside- Petition allowed. (Para 29) Title: Dr. Suresh Chander Negi & others vs. Chaudhary Sarwan Kumar Page-366

Constitution of India, 1950- Article 226- Petition to direct the respondents to grant seniority and to regularize the petitioner w.e.f. 01.04.1998 along with all consequential benefits – Issue as to whether the period for which petitioner was in police custody shall be counted as break in service- **Held-** Petitioner was arrested for alleged commission of certain offences- was acquitted and such acquittal was confirmed by the High Court – Labour Court held that in case of acquittal by High Court, period of custody shall not be considered as break in service- Accordingly, the petition is allowed as petitioner has been in continuous service except for the period of custody- Petitioner to be regularized with all consequential benefits including seniority (Paras 13-16) Title: Mangal Singh alias Narinder Singh vs. State of H.P. Page-515

Constitution of India, 1950- Article 227**- Code Of Civil Procedure-** Order VII, Rule 11- Rejection of the plaint by Trial Court – Petitioner asserts before Hon'ble High Court that the suit is barred by res-judicata and plaint lacks cause of action- Held- Hon'ble High Court dismissed the plea of res-judicata as being premature, requiring evidence- Attempt to delay litigation- Petition dismissed for lack of merit (Para 8,9) Title: Asha Kumari & others vs. Rattan Lal & others Page-12

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 1 Rule 10- **HP Urban Rent Control Act, 1987-** Aggrieved by the order of Rent Controller dismissing the application filed by the present petitioners, filed under Order 1, Rule 10 of the Civil Procedure Code, for impleading them

as party respondents in the case- **Held-** Filing of the application at the belated stage was just an attempt to delay the adjudication of the rent petition- Findings returned by the learned Rent Controller are neither perverse nor contrary to the record- No merit- Petition dismissed. (Para 12) Title: Pawan Sharma & another vs. Sanjay Kumar Sharma Page-459

Constitution of India, 1950- Article 227- Protection of Women from Domestic Violence Act, 2005- Section 12- Application by respondent/applicant for release of maintenance amount-Petition filed against the release of the maintenance amount in favour of the respondent/applicant as per prayer in applications filed- **Held-** No reasons to disallow the prayer of the respondent to release the amount in her favour- Applications for release of maintenance amount allowed- Registry directed to release amount- Petition dismissed. (Paras 15, 16, 17) Title: Subhash Chand vs. Sarla Devi Page-448

Constitution Of India, 1950- Service Law - Appointment Dispute - Petitioner, the only SC/IRDP candidate was denied appointment based on residency criteria - **Held** - Court examined the legality of the notification and reservation policy - Found the petitioner eligible as the sole SC/IRDP candidate for a vacant post – Emphasized on eligibility based on merit and category - Ruled that the petitioner should be appointed within two weeks as PET, with seniority but no financial benefits for the intervening period. (Paras 7,8,9) Title: Ramesh Chand vs. State of H.P. Page-297

Constitution of India, 1950- Service Law - Petition was filed on the ground that persons junior to him were promoted to the post of Executive Engineer despite his seniority and previous ad hoc promotion to the same position- Also claimed that ACR was not properly assessed- **Held**- No one has a fundamental right of promotion and there is only a fundamental right of consideration for promotion – Promotions are based on merit-cum- seniority basis- Merit is the primary criteria followed by Seniority- Ad hoc promotion does not confer right to regular promotion- Assessment of ACR was held to be valid- Petition dismissed (Paras 10 and 11) Title: Ramesh Kumar Verma vs. State of H.P. Page-692

Constitution of India, 1950- Service Law - Petitioner was terminated from service due to lodging of FIR against him for embezzlement- He challenged his termination in Writ petition- **Held**- Principles of Natural Justice were not followed as no show cause notice was given to him before termination-

Termination was held to be bad in law- Petition was allowed (Para 10) Title: Bisan Lal & others vs. State of H.P. Page- 686

Constitution Of India, 1950- Service Law - Suspension of the Petitioner from his post for making indecent remarks against Divisional Manager - Alleged procedural irregularities **-Held** - Biases in the inquiry and appellate processes, questioning the legitimacy of penalties imposed - Adhering to the principles of natural justice - Ruled in favor of the petitioner- Quashing penalties and directing entitlement to consequential benefits. (Para 26, 27,28, 30) Title: Rajesh Kumar vs. Himachal Road Transport Corporation & others Page-276

Constitution of India, 1950- Service Law- Local Audit department excluded the Secretariat Pay from calculation of petitioner's pension and other benefits- Whereas, University had decided to include such pay- It was claimed that exclusion of such pay affected their pension and retiral benefits- **Held** Secretariat Pay must be included as part of Basic pay for calculating allowances and pecuniary benefits- Executive council of University was the highest decision making body to adopt the State Govt's decision regarding Secretariat Pay- Once decision was taken to grant the service, petitioner's had a legal vested right to it. (Paras 9 and 10) Title: Durga Ram vs. H.P. University Page-699

Constitution of India, 1950- Service Law- Petitioner was working from 1991- His services were regularized in 2002- He superannuated in 2010- Pension was not granted to Petitioner after superannuation despite 8 years of service- Petitioner claimed that since he worked from 1991 the required criteria was met- **Held**- CCS (Pension) Rules, 1972, which governs grant of pension, do not envisage counting of daily wage service towards pension. Period of daily wage service, therefore, cannot be computed towards qualifying service for pension- petitioner did not possess minimum required qualifying service of 10 years for grant of pension- Petition was dismissed (Para 5) Title: Roop Lal vs. State of H.P. Page-663

Constitution of India, 1950-Art 226-Initial appointment of petitioner as Conductor in HRTC-promoted to the post of Inspector- attained the age of superannuation-Matter of consideration of the promotion of applicant to the post of Chief Inspector-**Held**- The promotion to a vacant post is said to have been made from the date, the promotion is granted and not from the date on which, the post fell vacant or vacancy was created-Petition dismissed.(Para

15). Title: Rajesh Kumar vs. Himachal Road Transport Corporation Page-490

Constitution of India, 1950-Art 226-the petitioners engaged in the respondent-Board on daily wage basis as T-mates-Matter of promotion of the petitioners from the due date along with all consequential benefits with interest-**Held**- petitioners have been discriminated vis-à-vis the private respondents-the provisional and final seniority list are ordered to be read down by issuing a direction to the respondent-Board to re-fix the work charge status as also the date of regularization of the petitioners by construing their initial date of engagement to be the date of their first engagement in the respondent-Board-Petition allowed-(Para 11). Title: Shyam Lal vs. H.P. State Electricity Board Ltd. & others Page-501

Constitution of India, 1950-Artcile 226- **Code of Criminal Procedure, 1973**- Section 173-204 - Vigilance Manual of Government of Himachal Pradesh - Petition filed to quash the amendment made in Para 6.4 of Vigilance Manual of Government of Himachal Pradesh and to grant promotion to the petitioner as Additional Excise and Taxation Commissioner- **Held**- As per amendment to the manual, Vigilance clearance certificate shall not be issued if chargesheet has been filed against the government servant-amendment to be read to mean "framing of charge" in light of settled judicial position and scheme of CrPC– adoption of sealed cover procedure by DPC impermissible, as no charges framed against petitioner - direction for sealed covers to be opened forthwith- petitioner to be granted the Clearance Certificate and to be considered for promotion. (Paras 22-23) Title: Rajeshwar Dyal Janartha vs. State of H.P. & others Page-776

Constitution of India, 1950-Article 226- Petition filed by the petitioner to order the respondent to take into account the service rendered by him on daily wage basis/temporary basis w.e.f. 1987 till 1998 for the purpose of pension - **Held-** Petition dismissed. Respondent No.1 maintains four types of establishments i.e. Regular establishment, Work-charge establishment, Casual establishment and Apprentices. As per his own admission, petitioner was placed in work-charge establishment w.e.f. 01.01.1998. It being so, the petitioner cannot claim to have worked in regular establishment prior to 01.01.1998 because a person working in regular establishment will not be again taken on work charge establishment, whereas vice versa can be true. Having accepted the work charge status w.e.f 01.01.1998, petitioner cannot

subsequently turn around and claim that his employment prior to 01.01.1998 was in regular establishment. The petitioner has otherwise failed to lay any factual foundation to establish his claim. (Paras 8 & 9) Title: Babu Ram vs. HPSEB Ltd. Page-598

Constitution of India, 1950-Article 226- Petition filed for writ of mandamus directing regularization of services of the petitioner and for giving him seniority of Senior Assistant above respondents No. 2 to 8, with all consequential benefits- **Held-** The DPC has decided against the regularization of the petitioner in 1996- petitioner suppressed the same- he cannot be said to have come to court with clean hands- petitioner failed to challenge the order of DPC for 17 years- unexplained delay- Petition dismissed as it was sans merit (Paras 6-8) Title: Om Chand vs. HP Khadi & Village Industries Board & others. Page-796

Constitution of India, 1950-Article 226-Claim of the petitioner that he was engaged as a Daily Wage Surveyor-claims for being entitled for being regularized against the post of Junior Engineer-Matter of regularization in service-**Held**- Neither the petitioner fulfilling the criteria of ten years of service as a Junior Engineer as contemplated in Mool Raj Upadhyaya Versus State of H.P. and others, 1994 Supp (2) Supreme Court Cases 316, nor completing eight years of service in terms of the subsequent policy of regularization which was brought into force by the State Government from time to time-Petition devoid of merits.(Para 10). Title: Kuldeep Singh Thakur vs. State of H.P. Page-495

Constitution of India, 1950-Article 226-**F.R -** F.R. 22 (1) (a)(i)-petitioner an Ex-serviceman- After discharge of petitioner from Armed Forces, got himself registered with Ex-Servicemen Cell, Hamirpur for the purpose of re-employment-Matter of re-fixation of the pay and pension of the petitioner after his retirement-**Held**-Respondents are directed to re-fix the pay of the petitioner by granting him the benefit of F.R. 22 (1) (a) (i) from 01.01.2-also directed to consequently re-fix the pension of the petitioner-Petition allowed (Para 17). Title: Mani Ram vs. State of H.P. Page-730

Constitution of India, 1950-Article 226-Invitation for the posts of Drawing Master in the Department of Elementary Education-Online applications were invited for direct recruitment for the categories mentioned in the advertisement-Matter of consideration of the candidature of the applicant for

the post of Drawing Master against General (BPL) category in District Shimla-**Held**- that eligibility of a candidate or applicant for a public post or service, is to be adjudged as on the last date of receipt of applications for such post or service, in terms of the relevant advertisement, and the prevailing service rules-Petition allowed(Para 22). Title: Upasana Devi vs. HPSSC, Hamirpur Page-737

Constitution of India, 1950-Article 226-Petitioner initially appointed as Road Inspector on daily wage basis in the respondent-Department in the year 1982-services regularized-Matter of consideration of the case of the petitioner for promotion to the post of Junior Engineer (Civil) as per the Recruitment and Promotion Rules, 1979-**Held**- It is a matter of record that when the earlier DPC took place in the year 2003, the higher qualification acquired by the petitioner was not reflected in his service record. Unfortunately, the petitioner neither agitated this fact at the relevant time, nor in this Writ Petition also, this fact has not been agitated-Petition devoid of merits-Petition dismissed.(Para 11). Title: Om Prakash Sharma vs. State of H.P. Page-507

'H'

HP Urban Rent Control Act, 1987- Section 24(5), 14- Petition against the order passed by the Appellate Authority-II dismissing the application filed by the tenant/petitioner stating that the petitioner had ample opportunities to prove his contention- **Held-** Application not maintainable- Abuse of process of law- Petition dismissed. (Paras 36, 37) Title: Dev Raj Duggal vs. Harish Kumar Page-468

'I'

Indian Evidence Act, 1872- Section 101-Section 102-Section 106; **Code of Civil Procedure, 1908**- Section 100 - Second appeal filed against order of first appellate court reversing trial court's decision – Prayer made to set aside the gift deed executed by mother in favour of respondent-son as vitiated by fraud, undue influence and misrepresentation – **Held-** Onus to prove fraud etc lies on the party who so alleges its existence as per Section 102- reverse onus under in case of fiduciary relations – relationship between son and mother cannot be generalized as a fiduciary relation – no reverse onus in the present case- witnesses of appellants have testified as to love and affection of mother for respondent – large part of property transferred to appellant son's descendants as well- nothing on record to prove absence of free consent-Decision of first appellate court affirmed (Paras 15-17) Title: Jeet Ram vs. Liaq

Ram & others Page-801

'M'

Motor Vehicles Act, 1988- Section 166- Section 173 - Appeal filed by Insurance Company against the award of Motor Accident Claims Tribunal directing the appellant to pay compensation- Principal ground for assail was that the claimants could not prove rash and negligent driving as per Section 166- **Held-** Claimants have on touchstone of preponderance of probability proved that the accident in question had taken place due to the rash and negligent driving – the examination in chief and cross examination of Claimant clearly explains the manner of driving and factum of accident – no scope for adverse inference to be drawn – excessive reliance on infirmities in FIR erroneous as FIR not made on oath, informant not examined in the present case- Appeal dismissed. (Paras 31, 38-40) Title: HDFC Ergo General Insurance Co. vs. Kalpna & others Page-757

'N'

Narcotic Drug & Psychotropic Substances Act, 1985- Section 20- Bail petition filed by the petitioner in case registered under the Act- **HELD-** Petition dismissed. Where the allegation against the petitioner is that she was apprehended with commercial quantity of Charas on the fateful night, she cannot be ordered to be released on bail, simply on the ground that she happens to be a lady and further that she has been in custody for more than two years. These pleas do not satisfy the test of Section 37 of the Narcotic Drug & Psychotropic Substances Act, in terms whereof, no person accused of an offence/offences punishable under Sections 19, 24 or 27A of the Narcotic Drug & Psychotropic Substances Act and also for the offence involving commercial quantity, shall be released on bail unless*, inter alia,* where the bail petition is opposed by the learned Public Prosecutor, the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. (Para 6) Title: Chhallo Devi vs. State of H.P. Page-579

'S'

Specific Relief Act, 1963 - Section 38 - Suit for permanent prohibitory injunction- Dismissed by the learned Trial Court on the ground that the plaintiff had failed to demonstrate the existence of passage in the plot- Appeal preferred- Findings of the learned Trial Court have been affirmed- Second Appeal preferred - Held - Plaintiff having failed to prove the factum of the

agreement as to the existence of passage in the plot, it cannot be said that the learned Courts below have either mis-read or mis-appreciated the evidence on record- No merit in the present appeal, the same is dismissed.(Para 10,11) Title: Madhu vs. Smt. Suresh & another Page-7

Specific Relief Act, 1963- Section 38 & 39- Suit for permanent prohibitory injunction as well as mandatory injunction decreed to the extent of granting permanent prohibitory injunction restraining the defendants from changing the nature or carving out any road or demolishing any building etc. over the suit land - Appeal preferred against the same by the State- Dismissed by the learned First Appellate Court -Second Appeal preferred- Held -Hon'ble High Court found no perversity with the judgments and decrees, passed by the learned Courts below - No substantial questions of law involved in the present appeal, the same being devoid of any merit is dismissed, so also pending miscellaneous applications -No order as to costs. (Para 10) Title: State of H.P. vs. Kartar Chand Page-1

'W'

Workmen Compensation Act, 1923- Section 4- Section 12 – Section 22 - Appeal filed against order of Commissioner, Employees Compensation granting compensation in favour of the respondent on the ground that deceased was not an employee of the appellants- **Held-** As per Section 12 of the Act, direct employment of the deceased by principal is not necessary- if deceased was engaged through a contractor who was so engaged by the principal to execute the work in issue – he is deemed to be an employee – contention of petitioners as to absence of direct employment of deceased by appellants is meritless- Appeal dismissed.(Paras 14-17) Title: Executive Engineer, HPPWD vs. Poonam Devi & others Page-768

Writ Jurisdiction- Petitioner claimed that his service was terminated by respondent without compliance of the provisions of Industrial Disputes Act- Labour Court rejected the claim on the ground that claim had become stale- Decision of Labour Court was challenged in Writ petition-**Held**- In case of delay in raising the claim, Court can mold the relief but the delay must be explained- Delay was unexplained by the petitioner- Rejection of claim by Tribunal was held to be valid- Petition was dismissed. (Para 17) Title: Shayamanand vs. H.P. Road Transport Corporation Page-655

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'W'

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

BETWEEN:-

1. STATE OF H.P. THROUGH DISTRICT COLLECTOR, HAMIRPUR, DISTRICT HAMIRPUR, H.P.

2. EXECUTIVE ENGINEER, HP PWD, DIVISION BARSAR, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P.

3. ASSISTANT ENGINEER, STATE ROADS PROJECT, CMU, HAMIRPUR, DISTRICT HAMIRPUR, H.P.

...APPELLANTS

(M/S SUMESH RAJ & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

AND

KARTAR CHAND, AGED 51 YEARS, SON OF SH. MAHANT RAM, RESIDENT OF VILLAGE KAROHTA, TAPPA MEHALTA, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

...RESPONDENT

(BY M/S TARUN K. SHARMA AND BISHAV SHARMA, ADVOCATES)

REGULAR SECOND APPEAL
No.52 of 2022
Decided on: 10.10.2022

Specific Relief Act, 1963- Section 38 & 39- Suit for permanent prohibitory injunction as well as mandatory injunction decreed to the extent of granting permanent prohibitory injunction restraining the defendants from changing the nature or carving out any road or demolishing any building etc. over the suit land - Appeal preferred against the same by the State- Dismissed by the learned First Appellate Court -Second Appeal preferred- Held -Hon'ble High Court found no perversity with the judgments and decrees, passed by the learned Courts below - No substantial questions of law involved in the present

appeal, the same being devoid of any merit is dismissed, so also pending miscellaneous applications -No order as to costs. (Para 10)

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

J U D G M E N T

By way this Regular Second Appeal, the appellants have assailed the judgment and decree dated 27.02.2016, passed by the Court of learned Civil Judge (Junior Division), Court No. II, Hamirpur, H.P. in Civil Suit No. 30 of 2012, titled as *Kartar Chand Vs. State of H.P. and others* as well as judgment and decree dated 25.05.2019, passed by the Court of learned District Judge, Hamirpur, H.P. in Civil Appeal No. 38 of 2016, titled as *State of H.P. and others Vs. Kartar Chand*, respectively, in terms whereof, the suit for permanent prohibitory injunction as well as mandatory injunction filed by the respondent/plaintiff was decreed to the extent of grant of permanent prohibitory injunction and the appeal preferred against the same by the State was dismissed by the learned First Appellate Court.

2. I have heard learned Additional Advocate General as also learned counsel for the respondent. I have also gone through the judgments and decrees passed by both the learned Courts below.

3. Respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent prohibitory injunction restraining the defendants from changing the nature or carving out any road or demolishing any building etc. over the suit land comprised in Khata No. 66 min, Khatauni No. 66 min, Khasra No. 335/11, measuring 0-08 Marlas, as per Jamabandi for the year 2006-07, situated in Tika Karoh, Tappa Mehalta, Tehsil Bhoranj, District Hamirpur, H.P. and also for mandatory injunction, *inter alia*, on the ground that the plaintiff was owner in possession of the suit property alongwith other

co-owners and though the adjoining land to the suit land was acquired for the purpose of construction of a road and compensation of land as well as structure was duly paid to the owners, but the suit land was not acquired for the said purpose and defendants being strangers qua the suit land, having no right, title or interest over the same, be restrained from demolishing the building of the plaintiff and other co-owners, situated over the suit land in the course of up-gradation/improvement of Una-Ner-Chowk road till due compensation thereof was paid to the plaintiff and other co-owners.

4. The suit was resisted by the defendants, *inter alia,* on the ground that the defendants were neither trying to demolish the building of the plaintiff or otherwise without paying any compensation and the facts were that work of construction of Una-Ner-Chowk road was awarded to C & C Company and the defendants were to hand over hindrance free vacated site to the Company for completion of work and for this purpose, the building of the plaintiff was required to be demolished, as the same was falling within the corridor of impact and the same was thus required to be removed in order to improve road geometrics and curves of the road. It was further the case of the defendants that plaintiff had already been paid Rs.8,40,900/- and Rs.28,700/- in lieu of complete existing structure/building as per World Bank guidelines and in this view of the matter, the defendants were not strangers to the land and it was rather the plaintiff, who had encroached upon part of the suit land approximately 1.5 meters belonging to HP PWD,for seeking eviction whereof of the plaintiff, proceedings were initiated before the SDM concerned.

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

> *"1. Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for? OPP.*
>
> *2. Whether the plaintiff is entitled for decree of mandatory injunction, as prayed for? OPP.*

3. Whether the suit of the plaintiff is not maintainable in the present form, as alleged? OPD.
4. Whether the plaintiff has got no cause of action to file the present suit, as alleged? OPD.
5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct, as alleged? OPD.
6. Whether the suit of the plaintiff is not well within time, as alleged? OPD.
7. Relief.

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

"Issue No. 1: Yes.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: No.
Issue No. 6: No.
Relief: The suit of the plaintiff is partly decreed as per operative part of the judgment."

7. Learned Trial Court decreed the suit of the plaintiff partly qua grant of permanent prohibitory injunction, whereas suit for grant of mandatory injunction was dismissed. In appeal, learned Appellate Court upheld the judgment and decree passed by the learned Trial Court.

8. Feeling aggrieved, the appellants have preferred this Regular Second Appeal.

9. A perusal of the judgment and decrees passed by both the learned Courts below demonstrates that concurrent findings have been recorded to the effect that the suit land comprised in Khasra No. 335/11 was not acquired by the defendants for the purpose of up-gradation/improvement of Una-Ner-Chowk road. Learned Trial Court had returned definite findings that Ex. DW5/B and other documents on record demonstrated that the road

was situated over Khasra No. 334/11 and defendants had not brought any evidence on record to prove that the same was to be constructed over land comprised in Khasra No. 335/11, which belonged to the plaintiff and that the same for this purpose stood acquired by the defendants. These findings have been upheld by the learned Appellate Court also.

10. During the course of his submissions, learned Additional Advocate General could not bring to the notice of this Court any exhibit, in terms whereof, the suit land stood acquired and/or compensation in lieu thereof stood paid to the plaintiff after acquisition of the same. To be fair to the learned Additional Advocate, he has submitted that the defendants had placed on record Ex. DW2/A to Ex. DW2/F to prove that payments were made with regard to a double storeyed building, but a perusal of the judgment passed by the learned First Appellate Court demonstrates that this point has been considered by the learned First Appellate Court at length in Para No. 18 onwards of the judgment while coming to the conclusion that reliance cannot be placed upon the said report to conclude that the house of the plaintiff is situated over Khasra No. 335/11. To the contrary, both the learned Courts below have concurrently held that Jamabandi Ex. DW1/B demonstrates that plaintiff and other persons are co-owners in possession of the suit land and the entry in the copy of Jamabandi carries with it a presumption of truth and no evidence was led to rebut this presumption and this demonstrates that the version of the plaintiff that he is co-owner in possession of the suit land has to be accepted as correct. Both the learned Courts below also held that as it was an admitted fact that defendants had issued a notice for demolition of the structure of the plaintiff and as there was a serious dispute between the parties regarding the fact whether the structure was in the suit land or in the Government land, therefore, the plaintiff had a reasonable apprehension of interference over the suit land and was entitled to protect his possession. This Court is of the considered view that these findings which have been returned

by the learned Courts below, besides being findings of fact, are clearly borne out from the record and are not perverse findings, in view of the fact that the defendants failed to prove on record that the suit land was in fact acquired for the purpose of up-gradation/improvement of Una-Ner-Chowk road.Therefore, this Court finds no perversity with the judgments and decrees, passed by the learned Courts below and further, as this Court finds no substantial questions of law involved in the present appeal, the same being devoid of any merit is dismissed, so also pending miscellaneous applications, if any. No order as to costs.

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

BETWEEN:-

MADHU, WIFE OF ATMA RAM, R/O VILLAGE BHANANA, P.O. KIRTI, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

...APPELLANT

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

AND

1. SMT. SURESH, WIFE OF SH. RAJINDER KUMAR, R/O VILLAGE RAGYAN, P.O. BHONT, SHIMLA, TEHSIL & DISTRICT SHIMLA, H.P.

...RESPONDENT

2. SH. AMAR SINGH, SON OF SH. DEVI SARAN, VILLAGE DUDHLI, P.O. BHARARI, TEHSIL & DISTRICT SHIMLA, H.P.

...PROFORMA RESPONDENT

(NONE FOR RESPONDENT NO. 1.
RESPONDENT NO. 2 IS *EX PARTE.*

REGULAR SECOND APPEAL
No.149 of 2008
Decided on: 29.9.2022

Specific Relief Act, 1963 - Section 38 - Suit for permanent prohibitory injunction- Dismissed by the learned Trial Court on the ground that the plaintiff had failed to demonstrate the existence of passage in the plot- Appeal preferred- Findings of the learned Trial Court have been affirmed- Second Appeal preferred - Held - Plaintiff having failed to prove the factum of the agreement as to the existence of passage in the plot, it cannot be said that the learned Courts below have either mis-read or mis-appreciated the evidence on record- No merit in the present appeal, the same is dismissed.(Para 10,11)

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

J U D G M E N T

Heard learned Senior Counsel for the appellant.

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

Appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent prohibitory injunction against the defendants, *inter alia,* on the ground that the plaintiff was owner-in-possession alongwith other co-owners of the land comprised in Khewat/Khatauni No. 4/6 min, Khasra No. 105, measuring 0-13-03 hectares, as per Jamabandi for the year 1998-99. Defendant No. 1 had purchased 4/33 share out of the aforesaid land from Amar Singh (proforma defendant No. 2), measuring 0-01-58 hectares. It was further the case of the plaintiff that topography of the plot was such that the plot of the defendant was abutting the road and nine feet path was leading from the road to the plot of the plaintiff, which was on a higher elevation, as compared to the plot of the defendant. As per the plaintiff, it was agreed between the plaintiff and proforma defendant No. 2 at the time of execution of the sale deed that proforma defendant No. 2 will provide path for egress and ingress to the plot of the plaintiff and the path was provided, but defendant No. 1 put a lintel, measuring about 45 feet to 20 feet without leaving any proper set- backs, thereby encroaching upon all the four sides ofhis plot and she also encroached upon the path by digging pits for columns. According to the plaintiff, only two to four stairs are required by the defendant for approaching from the road side to her plot, whereas, the plaintiff was having no alternative path to approach her land. It was further the case of the plaintiff that Khasra No. 105 was neither partitioned nor divided between the co-sharers, therefore, the defendant was liable to be restrained from making any construction or causing obstruction in the common passage which started from the main road to the plot of plaintiff from the eastern side of the defendant's plot. It was further the contention of the plaintiff that defendant

No. 1 had started encroaching upon the common passage on 4th June, 2002 and was threatening to change the nature of the passage.

3. The suit was resisted by defendant No. 1, *inter alia*, on the ground that defendant No. 2 had sold the entire plot comprised in Khasra No. 105 to different persons and the plot sold by defendant No. 2 to defendant No. 1 abutted public motorable road known as *"Bhont-Shimla road".* It was further the case of defendant No. 1 that on 11th October, 2000, when boundaries of the said plot were identified through the Patwari on the spot, 11 square metres area was found unsold with defendant No. 2 and he agreed to sell the same to defendant No. 1 for a total consideration of Rs.30,000/-. Defendant No. 1 denied that there was any agreement entered between the plaintiff and defendant No. 2 for providing any passage as alleged by the plaintiff. According to defendant No. 1, he had left the set-backs on all sides of his construction for free circulation of air and light. According to her, it was the plaintiff who had tampered the situation by showing 9 feet wide path adjacent to the plot of defendant No. 1.

4. The suit was also resisted by defendant No. 2, who took the stand that land was sold to defendant No. 1 by defendant No. 2 and it was denied that any agreement was arrived at between the plaintiff and defendant No. 2 for providing a passage, as alleged.

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

> *"1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed? OPP*
> *2. Whether the suit is not maintainable? OPD*
> *3. Whether the suit is bad for want of better particulars, if so, its effect? OPD*
> *4. Whether the plaintiff has no cause of action as alleged? OPD*
> *5. Whether the plaintiff is estopped from filing the suit as alleged? OPD*

6. Relief.

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

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*Yes.*
Issue No. 5:	*No.*
Relief:	*Suit is dismissed as per operative portion of the judgment."*

7. The suit was dismissed by the learned Trial Court by *inter alia* returning the findings that the plaintiff had failed to demonstrate the existence of passage in the plot and, therefore, the plaintiff was not entitled for the relief of permanent prohibitory injunction. In appeal, these findings have been affirmed by the learned Appellate Court.

8. This Regular Second Appeal was admitted on 16.03.2009 on the following substantial question of law:-

> *"Whether the Courts below misread and mis-appreciated the oral and documentary evidence with special reference to the statements of PW-1 to PW-5, thereby vitiating the impugned judgments and decrees?*

9. Despite service, as defendants did not put in appearance, accordingly, they were ordered to be proceeded against *ex parte.*

10. Learned Senior Counsel for the appellant has vehemently argued that the judgments and decrees passed by both the learned Courts below were bad in law, as the same were result of mis-reading and mis-appreciation of the evidence on record, both documentary as well as ocular. A careful perusal

of record of the case demonstrates that concurrent findings which have been returned by both the learned Courts below with regard to there being no agreement between the plaintiff and defendant No. 2 qua providing of a passage to the plaintiff as contended by her, are duly borne out from the record. No document was exhibited by the plaintiff to prove the factum of any such agreement, as has been held by both the learned Courts below. As the main limb of the case of the plaintiff was that an agreement was entered into between her and proforma defendant No. 2, therefore, onus was upon her to have had proved this fact by leading cogent evidence. Plaintiff having failed to do so, as is duly borne out from the documents exhibited, it cannot be said that the learned Courts below have either mis-read or mis-appreciated the oral or documentary evidence on record.I have carefully gone through the statements of PW-1 to PW-5.During the course of arguments, learned Senior Counsel for the appellant could not pin point to any part of the statements of said witnesses, which was mis-read or mis-appreciated by the learned Courts below. On the contrary, record demonstrates that the plaintiff herself stated in the witness box that there was a passage otherwise leading to the plot of the plaintiff which was being used by her and further there was no reference of any passage in the sale deed entered into between her and defendant No. 2, i.e., Ex. PW-5/A. The substantial question of law is answered accordingly.

11. In view of the above discussions, as this Court finds no merit in the present appeal, the same is dismissed, so also pending miscellaneous applications, if any.

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

Between:-

1. ASHA KUMARI, WIFE OF SH. HANS RAJ, AGE 55 YEARS.

2. SANGITA DEVI, D/O SH. HANS RAJ, AGE 33 YEARS.

3. DEEPAK KUMAR, S/O SH. HANS RAJ, AGE 28 YEARS.

ALL R/O VILLAGE DAMEHRA, PARGNA AJMERPUR, SUB TEHSIL BHARARI, DISTT. BILASPUR, H.P.

...PETITIONERS

(BY SHRI AMAN PARTH SHARMA, ADVOCATE)

AND

1. RATTAN LAL, S/O SH. SHRI RAM, RESIDENT OF VILLAGE DAMEHRA, PARGNA AJMERPUR, SUB TEHSIL BHARARI, DISTRICT BILASPUR, H.P.

...RESPONDENT

2. RAM LAL, S/O SH. DHANI RAM, R/O VILLAGE DAMEHRA, PARGNA AJMERPUR, SUB TEHSIL BHARARI, DISTT. BILASPUR, H.P.

3. AMAR SINGH, S/O SH. VILLAGE DAMEHRA, PARGNA AJMERPUR, SUB TEHSIL BHARARI, DISTT. BILASPUR, H.P.

...PROFORMA RESPONDENTS

(SHRI VIJAY SINGH BHATIA, ADVOCATE, FOR R-1.
NONE FOR R-2.
SHRI VIJAY KUMAR VERMA, ADVOCATE, FOR R-3)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 322 of 2022
Decided on: 14.10.2022

Constitution of India, 1950- Article 227**- Code Of Civil Procedure-** Order VII, Rule 11- Rejection of the plaint by Trial Court – Petitioner asserts before Hon'ble High Court that the suit is barred by res-judicata and plaint lacks cause of action- Held- Hon'ble High Court dismissed the plea of res-judicata as being premature, requiring evidence- Attempt to delay litigation- Petition dismissed for lack of merit (Para 8,9)

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

O R D E R

By way of this petition filed under Article 227 of the Constitution of India, the petitioners have laid challenge to order dated 25.03.2022, passed by the Court of learned Civil Judge, Court No. 3, Ghumarwin, District Bilaspur, H.P., passed in CMA No. 493-6/2021-18, filed in Civil Suit No. 184-7/21-12, titled as *Rattan Lal Vs. Asha Kumari and others*, whereby, an application filed under Order VII, Rule 11 of the Code of Civil Procedure by the present petitioners has been dismissed.

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

Respondent No. 1 herein, namely, Rattan Lal has filed a suit claiming that he is exclusive owner in possession of the suit land described in the head note of the suit. According to the plaintiff, he and his brother late Sh. Hans Raj inherited the suit land from their father Sh. Shri Ram by virtue of a Will, as the suit property was self acquired property of their late father. Late Sh. Hans Raj relinquished half of his share in the suit property in favour of the plaintiff by virtue of a Relinquishment Deed on 16.03.1989. Defendants No. 1 to 3 filed a suit for declaration and injunction in the Court, i.e., Civil Suit No. 511/1 of 1994 on false and concocted facts and obtained a decree from the Court on 09.06.2003, which decree as per the plaintiff, was a result of fraud and thus not binding upon him. It is further the case of the plaintiff

in the suit that defendants No. 1 to 3 on the basis of said wrong and illegal entries in the revenue record alienated part of the suit land vide sale dated 25.07.2012 in favour of defendant No. 4, qua which mutation was subsequently entered in favour of defendant No. 4 on 27.07.2012. Further as per the plaintiff, defendants No. 1 to 3 also allotted the suit land by virtue of exchange only in favour of defendant No. 5, which transaction according to the plaintiff is illegal andin violation of the provisions of the Transfer of Property Act. This is the background, in which, the suit has been filed praying for the reliefs as stand mentioned in the plaint, which, in brief, are that a decree be passed to the effect that the plaintiff is owner in possession of the suit land and that the suit land was self acquired property of late father of the plaintiff which devolved upon the plaintiff and his late brother in terms of a Will executed by their late father and that the judgment and decree dated 09.06.2003, passed in Civil Suit No. 511/1 of 1994 in case titled as *Asha Kumari Vs. Hans Raj* was illegal, wrong, null and void being a result of fraud. Further relief sought in the plaint is that sale deed dated 25.07.2012 and mutation entered as a result thereof be declared illegal, wrong, null and void and the oral exchange dated 20.08.2012 in favour of defendant No. 5 by defendants No. 1 to 3 be also declared as illegal, wrong, null and void and further a decree for permanent prohibitory injunction restraining the defendants from interfering with the suit land or from dispossessing the plaintiff from the suit land be passed.

3. The Civil Suit has been filed in the month of October, 2012. It is in this Civil Suit that in the month of November, 2018, an application was filed under Order VII, Rule 11 of the Code of Civil Procedure by the petitioners herein praying for rejection of plaint on the ground that the suit was barred in law, as it was repeated litigation, because subject matter thereof already stood adjudicated by the competent Civil Court. As per the averments made in the application, the issue which stood raised by the plaintiff, already stood

adjudicated by the Court of learned Sub-Judge First Class, Ghumarwin in Civil Suit No. 511/1 of 1994 and, therefore, the suit was barred by the principle of *res judicata*.It was also mentioned in the application that son of the plaintiff, namely, Tilak Raj had filed another suit on similar facts, which was being adjudicated before the Court of learned Civil Judge (Junior Division), Court No. 2, Ghumarwin, i.e., Civil Suit No. 192/1 of 2013. On these grounds, rejection of the plaint was sought.

4. The application was resisted by the non-applicant/plaintiff. In terms of the impugned order dated 25.03.2022, this application has been dismissed by the learned Trial Court. The reasons assigned by the learned Court below while dismissing the application*, inter alia*, are that in the Civil Suit, the issues were framed on 09.01.2015 and thereafter, one PW was also examined on 26.11.2018, when the application was filed under Order VII Rule 11 of the Code of Civil Procedure, without there being any explanation in the application as to why there was such a delay in filing the same. Learned Court observed that written statement was filed as far back as on 20.10.2013 and there is no mention in the application filed under Order VII, Rule 11 of the Code of Civil Procedure as to why defendants waited for more than five years after filing of the written statement to apply for rejection of the plaint. Learned Court also observed that settled law was that rejection of a plaint was to be based on the basis of averments made in the plaint and not on the basis of pleadings of the defendants and there were limited grounds on which the plaint could be rejected and the same did not include the ground of previous litigation. Learned Court further observed that the ground of *res judicata* has to be construed in terms of the provisions of Section 11 of the Code of Civil Procedure and further as written statement stood filed to the plaint and as Issues stood framed, this means that defendants had accepted that evidence shall have to be adduced to decide the suit on merit. On these basis, the application was rejected by the learned Court below.

5. Learned counsel for the petitioners has argued that the impugned order is not sustainable in the eyes of law for the reason that the learned Court below has erred in not appreciating that as the suit filed by the plaintiff was hit by the principle of *res judicata*, therefore, the application filed under Order VII, Rule 11 of the Code of Civil Procedure was maintainable. He has further argued that the observations of the learned Court below why the application was preferred after five years as from the date of filing of the written statement were uncalled for, because an application under Order VII, Rule 11 of the Code of Civil Procedure can be preferred by a party at any stage and the Court cannot question the wisdom of the litigant with regard to timing of filing of the application. Learned counsel has further submitted that the learned Court below has erred in not appreciating that a bare perusal of the plaint demonstrates that it does not disclose any cause of action and, therefore, the plaint was liable to be dismissed in terms of provisions of Order VII, Rules 11 of the Code of Civil Procedure. Accordingly, a prayer has been made that the present petition be allowed and the impugned order be quashed and set aside.

6. The petition is opposed by learned counsel appearing for respondent-Rattan Lal on the ground that there is no infirmity in the impugned order and the application has been rightly rejected by the learned Court below by assigning reasons, as are borne out from the order passed. Learned counsel has submitted that the provisions of Order VII Rule 11 of the Code of Civil Procedure are very clear as to on what grounds the plaint can be rejected and those grounds are not satisfied in terms of application filed under Order VII, Rule 11 of the Code of Civil Procedure in the present case by the petitioners. Learned counsel further submitted that neither there was any explanation as to why there was delay in filing the application under Order VII, Rule 11 of the Code of Civil Procedure nor the contention of the petitioners that the plaint does not disclose any cause of action is correct because the

plaint does disclose the cause of action and whether or not the plaintiff is entitled for the relief being prayed for shall be decided by the learned Court below on the basis of pleadings and evidence which may be led by the parties. Accordingly, he prayed that the present petition being devoid of any merit, be dismissed.

7. I have heard learned counsel for the parties and have also gone through the pleadings as well as the documents appended therewith including the impugned order.

8. The contents of the plaint have already been referred to by me in the above part of the order. A perusal of the plaint demonstrates that the plaintiff has filed the suit on the cause which is stated to have arisen in his favour on 10.10.2012, when defendants No. 4 and 5 started threatening the plaintiff to dispossess him from the suit land and openly declared that they have obtained interest in the suit land from defendants No. 1 to 3 on the basis of revenue entries etc. Now, whether or not the plaintiff is entitled for the relief which has been prayed for in the Civil Suit is not to be confused with the cause of action. It is settled law that though cause of action has not been otherwise defined, but the cause of action is nothing but a bundle of facts which a party has to prove to have a decree in its favour. Now, in the present suit, the plea of the plaintiff is that the suit land was self acquired property of his father, which after death of his father devolved upon him as well as his brother in equal share on account of a Will, which was duly executed by his late father. It is further his contention that half of the suit property was relinquished by his late brother in his favour and the decree which was obtained by the plaintiff in Civil Suit No. 511/1 of 1994 is bad in law, as the same is a result of fraud and further his contention is that part of the suit land which has been bequeathed in favour of defendant No. 5 by way of an exchange deed is also notpermissible in law, as the same is hit by the provisions of the Transfer of Property Act. Whether or not these contentions of

the plaintiff are sustainable on merit, obviously the plaintiff has to lead cogent evidence to prove these facts, but on the basis of what is contained in the plaint, it cannot be said the plaint does not disclose any cause of action. Further, as far as the plea of the petitioners herein that the suit is hit by the principle of *res judicata* is concerned, this Court is of the considered view that if that is so, then obviously this plea must have been taken by the petitioners in the written statement and an issue to this effect must have been framed by the learned Trial Court and this issue obviously will be decided by the learned Trial Court on the basis of evidence which shall be produced by the petitioners, demonstrating that the suit is hit by the principle of *res judicata.*But, the contention of the defendants in a reply that the suit is hit by the principle of *res judicata*, obviously cannot lead to rejection of the plaint, because in order to ascertain as to whether the suit is hit by the principle of *res judicata* or not, obviously Court will have to look into evidence which shall be led by the defendants. But on such a plea which has been taken by the defendants, the plaint obviously cannot be rejected. In this background, if one peruses the impugned order, the only conclusion which can be arrived at by the Court is that there is no infirmity therein. It is not in dispute that despite the fact that the suit was instituted in the year 2012, the application under Order VII, Rule 11 of the Code of Civil Procedure was filed more than five years even after filing of the written statement. Though there is no limitation period or stage prescribed in the Code of Civil Procedure when an application under Order VII, Rule 11 of the Code of Civil Procedure has to be filed, but settled conventions are that such an application has to be filed at the earliest and obviously, if a party has not approached by way of an application under Order VII, Rule 11 of the Code of Civil Procedure at the first available instance and has filed such an application later on, then the Court can question the party as to why there has been delay in filing the application and such a query of the Court cannot be brushed aside by the party by taking the plea that the

Court has no right to put such a query to the party. This Court is of the view that delay in filing the application under Order VII, Rule 11 of the Code of Civil Procedure can be questioned by the Court and if such a question is posed by the Court to a party, then the query of the Court has to be satisfactorily answered, which the petitioners have failed to do in the present case, as there is no cogent explanation in the application as to why there was delay of more than five years after filing of the written statement in filing the application under Order VII, Rule 11 of the Code of Civil Procedure. Further, the reasoning which has been given by the learned Trial Court with regard to Section 11 of the Code of Civil Procedure as to whether the plea of *res judicata* can be made a ground for rejecting the plaint under Order VII, Rule 11 of the Code of Civil Procedure is cogent reasoning and the same in the considered view of this Court calls for no interference. In fact, it appears that the intent of filing the application under Order VII, Rule 11 of the Code of Civil Procedure was nothing, but to delay the adjudication of the litigation.

9. Accordingly, in view of what has been observed hereinabove, as this Court finds no merit in the present petition, the same being devoid of any merit is dismissed, so also pending miscellaneous applications, if any.

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

Between:-

HIMMAT SINGH, SON OF SH. GIAN CHAND, AGED 32 YEARS, RESIDENT OF VILLAGE AND POST OFFICE KHILIYAN, TEHSIL NALAGARH, DISTRICT SOLAN (H.P.)

...PETITIONER

(BY SHRI T.S. CHAUHAN, ADVOCATE)

AND

DEVINDER SINGH, SON OF SH. KHUSHI RAM, RESIDENT OF VILLAGE AND POST OFFICE BEHAL, TEHSIL SH. NAINA DEVI JEE, DISTRICT BILASPUR.

...RESPONDENT

(M/S H.S. RANA, A.S. RANA & KAMLESH KUMARI, ADVOCATES)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 511of 2022
Decided on: 11.10.2022

Code of Criminal Procedure, 1973 - Section 482- **Negotiable Instruments Act 1881**- Section 145(2)- Petitioner challenges a court order dismissing the application regarding re-cross-examination of the complainant- **Held** - Further cross-examination/re-examination of the complainant, who has already been cross-examined by the accused and, that too, at length, cannot be permitted by the Court on the asking of the accused in order to fill up the lacunae in the case - Expressed concern over potential abuse of court procedures if such requests were granted - Upheld the validity of the impugned order- Petition devoid of merit- Petition dismissed.(Para 7,8)

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

O R D E R

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has challenged order dated 28.05.2022, passed by the Court of learned Chief Judicial Magistrate, Bilaspur, H.P. in Cr. MA No. 27/4 of 2020 filed in Case No. 33/3/2019/2015, titled as *Devender Singh Vs. Himmat Singh*, in terms whereof, an application filed under Section 145(2) of the Negotiable Instruments Act by the present petitioner to call the complainant for re-crossexamination has been dismissed.

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

A complaint has been filed under Section 138 of the Negotiable Instruments Act by the respondent herein against the present petitioner, who is accused in the case. The allegation in the complaint, copy whereof is appended with the present petition as Annexure P-1, is that financial assistance to the tune of Rs.2,75,000/- was provided by the complainant to the accused and in order to make good the said amount, the petitioner-accused issued a cheque for an amount of Rs.2,75,000/- dated 27.02.2014 drawn upon State Bank of Patiala, Branch Office Nalagarh, District Solan, H.P., which cheque when presented for encashment was dis-honoured by the Bank on the ground of 'insufficient funds'. The complaint was filed in the year 2014. The application filed under Section 145(2) of the Negotiable Instruments Act, copy whereof is on record as Annexure P-5 was preferred by the petitioner-accused, *inter alia*, on the ground that while preparing the case of arguments, it transpired that counsel for the applicant had not put material questions to the complainant which were necessary for proper adjudication of the case at the time when the complainant had entered the witness box for the purpose of cross-examination. According to the applicant/accused, this necessitated the re-crossexamination of the complainant, so that it could be proved before the Court that there was no legally enforceable debt due from the accused to the complainant. This application has been rejected by the

learned Trial Court in terms of order dated 28.05.2022, *inter alia*, on the grounds that an earlier application filed under Section 243(2) read with Section 311 of the Code of Criminal Procedure, in which also, a similar prayer for further cross-examination was made, was dismissed by the Court on 03.07.2019 and revision preferred against the order of rejection before the High Court was dismissed as withdrawn. Learned Trial Court has further held that Section 145(2) of the Negotiable Instruments Act even otherwise speaks only about further cross-examination of a witness when an affidavit has been filed in examination-in-chief and there was nothing in this statutory provision to the effect that any party can further cross-examine the witness already examined. Learned Court also held that as earlier application on the same ground stood dismissed, therefore also, the same was not maintainable and by returning these findings, the application has been dismissed.

3. Learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law for the reason that learned Trial Court has erred in not exercising the jurisdiction conferred upon it under Section 145(2) of the Negotiable Instruments Act. Learned counsel has submitted that there is no bar under Section 145(2), more so, an express bar, which debars the Court from ordering re-cross examination of the complainant in case the interest of justice so demands. Learned counsel further submitted that as far as the petitioner earlier also having preferred an application under Section 243(2) read with Section 311 of the Code of Criminal Procedure and the same having been dismissed by the learned Trial Court is concerned, the same though is a matter of record, but the revision petition which was filed by the petitioner against dismissal of said application was withdrawn from the High Court, with liberty to file an application at an appropriate stage, which opportunity was granted to the petitioner. Learned counsel further submitted that otherwise also reasons are well spelled out in the application as to why re-cross examination of the complainant was being sought for and, therefore,

the impugned order being not sustainable in the eyes of law, deserves to be quashed and set aside and the petition be allowed by issuing a direction to the learned Trial Court to recall the complainant for the purpose of re-cross examination.

4. The petition has been opposed by learned counsel for the respondent, *inter alia*, on the ground that learned Trial Court has returned correct findings that the application was neither maintainable nor there was sufficient cause mentioned in the application so as to recall the complainant for re-cross examination. Learned counsel submitted that in fact filing of repeated applications on this account was nothing but an abuse of the process of law, as the endeavour of the accused was only to delay the proceedings, which he was successful in doing, as was evident from the fact that though the complaint was filed as far back as in the year 2014, but the same was hanging fire for last eight years. Accordingly, he submitted that as there is no merit in the present petition, the same be dismissed being devoid of any merit.

5. I have heard learned counsel for the parties and have also gone through the documents appended therewith as well as the impugned orders.

6. It is not in dispute that the complaint filed under Section 138 of the Negotiable Instruments Act relates to the year 2014. It is also not much in dispute that earlier application filed by the petitioner under Section 243(2) read with Section 311 of the Code of Criminal Procedure seeking a direction for further cross-examination of the complainant was dismissed by the learned Trial Court and review petition preferred against the said order was dismissed as withdrawn, with liberty, of course, as has already been mentioned by me hereinabove. A perusal of the averments made in the application filed under Section 145(2) of the Negotiable Instruments Act demonstrates that the reasons assigned therein for summoning of the complainant for his further cross-examination primarily are that at the time of preparing the case for the purpose of arguments, it transpired that counsel for the applicant/petitioner

had not put material questions to the complainant which were necessary for the purpose of adjudication of complaint and it was due to over sight of the counsel for the applicant that material questions regarding legally enforceable debt were not put to the complainant at the relevant time. This Court is of the considered view that when opportunity was duly granted to the petitioner-accused to cross-examine the complainant, then the alleged omission on the part of the counsel cannot be allowed to be made a ground for summoning of the complainant for the purpose of further cross-examination. In case such like pleas of the parties are accepted by the Courts, then flood-gates will open and plethora of applications will be filed in the Courts for further cross-examination etc. of the parties on same and similar grounds. This kind of practice needs to be deprecated for the reason that relevant provisions in the concerned Statutes which confer the power upon the Court to re-examine the witness cannot be permitted to be abused by the parties intending to fill up the lacunae in their respective cases.

7. Coming to the facts of this case, the intent of the present petitioner obviously is to fill up the lacunae, which as per him, exist on account of the alleged over sight of his counsel, who did not put material questions to the complainant at the time of cross-examination. However, this Court is of the considered view that on this count, further cross-examination of the complainant cannot be permitted, as the provisions cannot be allowed to be used or abused by a party to fill up the lacunae. At this stage, it is relevant to mention that application preferred by the petitioner-accused under Section 145(2) of the Negotiable Instruments Act was otherwise also not maintainable, as has been rightly held by the learned Trial Court. Section 145 of the Negotiable Instruments Act*, inter alia*, provides that notwithstanding anything contained in the Code of Criminal Procedure, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceedings

under the said Code and the Court may, if it thinks fit and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein. A plain reading of this statutory provisions demonstrates that after the complainant has given evidence by way of an affidavit, then it is not as if there is an automatic right which stands vested in the accused to cross-examine the complainant and in case the accused intends to cross-examine the complainant, then appropriate request has to be made to the Court and if Court deems it appropriate, it can give opportunity either to the prosecution or the accused, as the case may be, to examine any person giving evidence on affidavit as to the facts contained therein. This provision does not confer any power upon the Court to allow an application seeking further cross-examination of the complainant, who has been cross-examined by the accused earlier.Be that as it may, taking into consideration the fact that procedural law is for the purpose of advancing the cause of justice, even if the statutory provision does not create any bar in this regard, then also, this Court is of the considered view that further cross-examination/re-examination of the complainant, who has already been cross-examined by the accused and, that too, at length, cannot be permitted by the Court on the asking of the accused, simply to give an opportunity to the accused to fill up the lacunae in the case.

8. In the background of what has been held hereinabove, as this Court finds no infirmity in the impugned order which has been passed by the learned Court below, this petition being devoid of any merit is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

HONEY BANSAL ALIAS HONEY SON OF SH. SANJAY KUMAR BANSAL RESIDENT OF HOUSE NO. A-63, GURU NANAK COLONY NEAR HDFC BANK SANGROOR, TEHSIL AND DISTRICT SANGROOR, PUNJAB AGED 30 YEARS..

..PETITIONER

(M/S AJAY KOCHHAR AND BHAIRAV GUPTA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH.

...RESPONDENT

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No. 2220 of 2022
Decided on: 18.10.2022

Code of Criminal Procedure, 1973- Section 439**-** Bail**- Indian Penal Code -** Sections 419, 420, 465, 467, 468, 471, 201 read with Section 120B- Similar Bail Application dismissed by Session Court – Application made to Hon'ble High Court - **Held** - Hon'ble Court considers limited evidence linking petitioner to one transaction- Lack of direct criminal intent and petitioner's familial relationship with the main accused- Proposes imposing strict bail conditions- Bail granted to petitioner. (Para 4,5,6)

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

O R D E R

By way of this petition filed under Section 439 of the Code of Criminal Procedure, the petitioner has prayed for grant of bail in FIR No. 161/2019, dated 02.08.2019, registered under Sections 419, 420, 465, 467, 468, 471, 201 read with Section 120B of the Indian Penal Code at Police StationSadar, District Shimla, Himachal Pradesh.

2. Learned counsel for the petitioner has submitted that initially the FIR was lodged on the complaint of one Sh. Sandeep Dhaul that fraud had been committed upon him and his investments in mutual funds were misused by some persons for opening an account at Axis Bank without his knowledge and the money which has been invested by him, was fraudulently credited into the bank account so opened on different dates without his knowledge by some miscreants and accordingly he sought appropriate action against the miscreants. Learned counsel further submitted that though initially an untraced report was filed by the prosecution before the learned Trial Court on 31.01.2022, but it appears that subsequently, in the course of investigation, one Mukesh Bansal, who was already in custody in Tihar Jail, was investigated by the prosecution, whose investigation revealed that he alongwithAnshulSinghal and JatinTandon were the master mind of the fraud which was played upon the complainant. Learned counsel for the petitioner submitted that as far as the present petitioner is concerned, the allegation against him is that an amount of Rs.1,00,000/- was deposited in his bank account on 7th June, 2019 through Cash Deposit Machine and this amount was subsequently credited by the petitioner into the account of Mukesh Bansal on the same day and on the said act, the involvement of the petitioner has been construed by the prosecution, which has resulted into his being taken into custody. Learned counsel has further submitted that the petitioner is innocent and is not guilty of the offences alleged against him. He happens to the cousin of Mukesh Bansal. The petitioner is a Medial Representative by profession and the deposition of the amount of Rs.1,00,000/- in his account

was a *bonafide* act done by him on the asking of his cousin Mukesh Bansal, which amount, as per the instructions of Mukesh Bansal,was transmitted by the petitioner into the account of Mukesh Bansal. Learned counsel has submitted that the investigation which has been carried out in the matter,otherwise also, has not attributed any other act to the petitioner and, therefore, in these circumstances, as now challan already stands filed in the Court and further the custody of the petitioner is no more required for the purpose of investigation etc., therefore, it will be in the interest of justice in case the present petition is allowed and the petitioner is ordered to be released on bail.

3. The petition is opposed by the learned Additional Advocate General on the ground that though the investigation has revealed that an amount of Rs.1,00,000/- was deposited into the account of the petitioner on 7.6.2019 through a Cash Deposit Machine, which he credited on the same day into the account of Mukesh Bansal, but in the course of investigation, one accused AnshulSinghal had disclosed that an amount of Rs. 3,50,000/- was also deposited into the account of the petitioner, which demonstrates that the petitioner is not innocent, but is part and parcel of the group, which had defrauded the complainant-Sandeep Dhaul. Learned Additional Advocate General further submitted that otherwise also, as it is a matter of record that Mukesh Bansal at the time of his investigation by the police in the present case was in Tihar Jail, this itself demonstrates that these people are actively involved in criminal offences and, therefore, in these circumstances, the release of the petitioner on bail will not only deter the course of the trial, but the petitioner may otherwise try to influence the witnesses and win over them. Learned Additional Advocate General also submitted that otherwise also, as the petitioner happens to be a resident of Punjab, therefore, there is every possibility that in the event the petitioner being released on bail, he may jump the bail and, therefore,create hurdle in the course of completion of the trial.

4. I have heard the learned counsel for the parties and have also gone through the status report as well as the petition. I have also gone through the order passed by Court of learned Additional Sessions Judge(II), Shimla, District Shimla, dated 20.09.2022, in terms whereof, the similar application has been filed by the petitioner has been dismissed by the learned Court below. The circumstances which have led to the arrest of the petitioner have already been mentioned by me hereinabove. Learned Additional Advocate General,on a query put to him by the Court, has stated on the basis of available record that the investigation which has been carried out in the matter, has revealed the involvement of the petitioner only to the extent that an amount of Rs.1,00,000/- was deposited into the account of the petitioner on 07.06.2019 through Cash Deposit Machine which on the same day, he deposited in the account of Mukesh Bansal. Besides this, as per him, the investigation has not revealed any other involvement of the petitioner in the alleged crime. Learned Additional Advocate General has further apprised the Court that as far as the statement of the accused AnshulSinghal that an amount of Rs.3,50,000/- was deposited into the account of the petitioner is concerned, the same was not substantiated from the bank record of the petitioner. In these circumstances, this Court is of the considered view that as direct criminal intent with regard to the commission of offence is not born*intra* the petitioner and the other accused and it is not much in dispute that the petitioner happens to be the cousin of Mukesh Bansal, one of the main accused and has no previous criminal history, it will be in the interest of justice, in case the present petition is allowed and the petitioner is ordered to be released on bail. As far as the apprehension expressed by the learned Additional Advocate General is concerned, the same can be taken care of by imposing strict conditions upon the petitioner, with further direction that he will report in the concerned police station atleast once in a month and he

shall also furnish his phone number to the investigating officer, on which he can be contacted.

5. According, this petition is allowed and the petitioner is ordered to be released on bail inFIR No. 161/2019, dated 02.08.2019, registered under Sections 419, 420, 465, 467, 468, 471, 201 read with Section 120B of the Indian Penal Code at Police Station Sadar, District Shimla, Himachal Pradesh, subject to his furnishing bail bonds in the sum of one lac with one surety of the like amount to the satisfaction of concerned Chief Judicial Magistrate/Additional Chief Judicial Magistrate/Judicial Magistrate First Class. The petitioner shall also abide by the following conditions:

> *"(a) He shall attend the Trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;*
>
> *(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;*
>
> *(c) He shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer;*
>
> *(d) He shall not leave the territory of India without prior permission of the Court; and*
>
> *(e) He will report in the concerned police station at least once in a month and he shall also furnish his phone number to the investigating officer, on which he can be contacted."*

6. It is clarified that the findings which have been returned by this Court while deciding this petition are only for the purpose of adjudication of the present bail application and learned Trial Court shall not be influenced by any of the findings so returned by this Court in the adjudication of these petitions during trial of the case. It is further clarified that in case the petitioner does not comply with the conditions which have been imposed upon

him while granting the present bail, the State shall be at liberty to approach this Court for the cancellation of bail.

It is made clear that the observations made hereinabove are to be considered only for the purpose of release of the present petitioner and as prayed for by the learned Additional Advocate General, the same shall not be taken into consideration in case the other co-accused do approach the Court for release on bail. The petition stands disposed of.

Downloaded copy of this order is valid for compliance.

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

Between:-
RANJEET KUMAR, SON OF SHRI BALESHWAR PRASAD, RESIDENT OF HOUSE NO. 35, VILLAGE TELYAMAI, POST OFFICE OPPEY, BLOCK ENKANAGAR-SAREY, DISTRICT NALANDA, BIHAR (AGED ABOUT 38 YEARS) (PRESENTLY IN JUDICIAL CUSTODY).

...PETITIONER

(BY SHRI SUNIL AWASTHI, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HOME) TO THE GOVERNMENT OF HIMAHCAL PRADESH, SHIMLA.

...RESPONDENT

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL)

ASI RANJANA, SIT MEMBER IS PRESENT IN PERSON ALONGWITH THE CASE RECORD.

CRIMINAL MISC. PETITION (MAIN)
No. 2223 of 2022
Decided on: 18.10.2022

Code of Criminal Procedure, 1973- Section 439**-** Bail**-** Section 167(2) - Default bail- **Indian Penal Code-** Sections 420, 120-B, 201, and 109- Expiry of statutory period of 60 days - Extension of time granted - Further period of 90 days has been granted to complete the investigation by the Trial Court- Extension of further time is challenged in the High Court - **Held** –Before the expiry of period of 90 days or 60 days, as the case may be, neither there is any provision of filing of any such application for extension of time for completion of investigation nor such an application can be entertained or adjudicated upon by the Courts - Default bail is granted subject to specified conditions - Clarifies potential consequences of non-compliance with bail conditions - No order is required to be passed in the petition preferred under Section 439 CrPC. (Para 9,15)

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

O R D E R

CRIMINAL MISC. PETITION (MAIN) No. 2223 of 2022 and Cr.MP No. 3129 of 2022

This order shall dispose of the petition preferred by the petitioner under Section 439 of the Criminal Procedure Code for grant of bail in FIR No. 05/2022, dated 17.05.2022, registered under Sections 420, 120-B, 201 and 109 of the Indian Penal Code at Police Station Bharari District Shimla Himachal Pradesh as well as an application which has been preferred by the petitioner under Section 167(2) of the Criminal Procedure Code praying for grant of default bail in the said FIR. As the Court shall be first dealing with the prayer of the petitioner for grant of default bail, therefore, the petition preferred under Section 439 of the Criminal Procedure Code will be adjudicated upon in case the Court does not find favour with the submission made by thelearned counsel for the petitioner for grant of default bail.

2. The FIR in issue has been lodged in the concerned Police Station on 17th May, 2022. The petitioner was arrested on 2nd August, 2022 and since then, he is in custody. Till date, no challan under Section 173 Criminal Procedure Code has been filed by the prosecution before the learned Trial Court, though an application preferred by the prosecution for extension of time to file the final report has been allowed by the Court of learned Judicial Magistrate First Class Court No. 7, Shimla, H.P. in terms of order dated 22nd September, 2022.

3. Learned counsel for the petitioner has argued that as the petitioner was arrested on 2nd August, 2022 and investigation has not been

completed by the prosecution within the statutory period, therefore, a statutory right now stands conferred upon the petitioner for his release under Section 167(2) of the Criminal Procedure Code. Accordingly, a prayer has been made for release of the petitioner under the said section, as the petitioner is ready and willing to furnish the bail bonds.

4. The petition has been opposed by the learned Additional Advocate General on the ground that in this case before the expiry of statutory period 60 days, an application was filed by the prosecution before the learned Magistrate and interms of order dated 22nd September, 2022, the prayer of the prosecution for extension of time has been granted and further period of 90 days has been granted to the police of CID Bharari to complete the investigation and file the challan. On these basis, learned Additional Advocate General submits that as the learned Judicial Magistrate extended the time for filing the challan before the expiry of 60 days as from the date on which the right of default bail was to accrue upon the petitioner under section 167 (2)Criminal Procedure Code, therefore, the prayer of thepetitioner for grant of default bail cannot be considered to and the application is liable to be rejected. Learned Additional Advocate General has relied upon the judgment to Hon'ble Supreme Court in *M. Ravindran vs. Intelligence officer, Directorate of Revenue Intelligence* (2021) 2 Supreme Court Cases 485 and by relying upon the same in general and Para Nos. 19 and 25.3 thereof in particular, he has submitted that the present application deserves dismissal.

5. I have heard the learned counsel for the parties and have also gone through the application filed by the petitioner under section 167(2) Criminal Procedure Code as also the order passed by the learned Judicial Magistrate First Class, Court No.7, Shimla, dated 22.09.2022, in terms whereof, the prosecution has been granted extension of time to carry out the investigation in the case by extending the same to 90 days.

6. Section 167 of Criminal Procedure Code prescribes the procedure when investigation cannot be completed in 24 hours. Sub-section (2) thereof, *inter alia,* provides that the Magistrate to whom an accused person is forwarded, may authorize detention of the accused in such custody as the Magistrate thinks fit, for a term not exceeding 15 days in a whole, provided that the Magistrate may authorize the detention of the accused person otherwise than in the custody of police, beyond the period of 15 days, if he satisfied that adequate grounds exist for doing so. Section further provides that, however, no Magistrate shall authorize the detention of the accused in custody in terms of proviso to Sub-section (2), exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term for not less than 10 years and 60 days, where the investigation relates to any other offence. It is further provided that on the expiry of the said period, be it 90 days or 60 days, the accused person shall be released on bail, if he is prepared to and does furnish bail and every person released on bail under the said provisions shall be deemed to be so released under the provisions of Chapter-XXXIII for the purposes of that chapter.

7. Thus, a bare perusal of the statutory provisions makes it amply clear that in the event of non-completion of the investigation within 90 days or 60 days, as the case may be, the accused person "**shall be released on bail"**, if he is prepared to and does furnish bail. This Court is of the considered view that this mandate of law is not a directory provision, but it confers an indefeasible right upon the accused of being released on bail in the event of the investigation not being completed within 90 days or 60 days as the case may be.

8. In the present case, admittedly, the investigation has not been completed within the 60 days as from the date of arrest of the petitioner. In such a circumstance, the question that arises for the consideration of this Court is as to whether an application filed by the Investigating Agency before

the completion of statutory period of 90 days or 60 days, as the case may be, for extension of time to complete the investigation can be entertained or adjudicated by the Court and that too, to defeat the statutory right of default bail?

9. The right of being released on bail, as has been observed by this Court hereinabove also, is a statutory and mandatory right, which accrues upon an accused in the event of the investigation not being completed within 90 days or 60 days, as the case may be. Now, incidentally, the Law Makers, in their wisdom, did not deem it appropriate to make any provision in Section 167 of the Code of Criminal Procedure so as to confer a right upon the Investigating Agency to seek extension of time in certain circumstances and further a right upon the Court to entertain such a request and pass appropriate order thereupon. Therefore, in the absence of the Statute creating and conferring any right upon the Investigating Agency to prefer such kind of application, this Court is of the considered view that before the expiry of period of 90 days or 60 days, as the case may be, neither there is any provision of filing of any such application for extension of time for completion of investigation nor such an application can be entertained or adjudicated upon by the Courts. The reason as to why this Court is making this observation is that in certain Special Statutes, for example, the NDPS Act and the Terrorist and Disruptive Activities (Prevention) Act, 1987, there are express statutory provisions incorporated which, *inter alia,* provide that if it is not possible to complete the investigation within the period as provided in those Acts, then the Special Court can extend the said period up to the days which are mentioned in the Statute on the report of the Public Prosecutor, indicating the progress of the investigation and the reason for detention of the accused beyond the period prescribed in the Statute. However, this is neither provided in the Indian Penal Code nor it is provided in the provisions of the Code of Criminal Procedure, meaning thereby that the Investigating Agency

while investigating an offence alleged to have been committed under the provisions of the Indian Penal Code, but obvious, cannot preempt the Trial Court to extend the period for completing the investigation by moving an application, as has been done in the present case.

10. Now, coming to the judgment being relied upon by the learned Additional Advocate General, in the said case, the Hon'ble Supreme Court was seized with the alleged commission of offence under the provisions of the NDPS Act. Before proceeding further, it is relevant to refer to the provisions of Sub-Section (4) of Section 36A of the said Act, which reads as under:-

> *".....36A Offences triable by Special Courts-*
>
> *..... ....*
>
> *(4) In respect of persons accused of an offence punishable under Section 19 of Section 24 or Section 27A or for offences involving commercial quantity the references in sub0section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days".*
>
> *Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."*

A perusal of the said Sub-section demonstrates that it is expressly provided therein that in respect of persons accused of offences punishable under Sections 19 or 24 or 27A of for offences involving commercial quantity, pertaining to the NDPS Act, the reference in Sub-section (2) of Section 167 of the Code of Criminal Procedure thereof, of 90 days where occurs shall be construed as reference to 180 days, with a further proviso that if it is not possible to complete the investigation within the said 180 days, then the Special Court may extend the said period up to one year, upon report of the Public Prosecutor indicating the progress of the investigation and the specific

reasons for detention of the accused beyond the said period of 180 days. Thus, it is apparent from what has been quoted hereinabove that the said Statute itself provides that on the request of the Public Prosecutor, the time for completion of investigation can be extended by the Special Court, which also entails further detention of the accused beyond 180 days, as prescribed in the Statute.

11. Now, in this backdrop, this Court will refer to Para Nos. 19 and 25 of the judgment being relied upon by the learned Additional Advocate General. In Para-19, the Hon'ble Supreme Court was pleased to hold as under:-

> *"19. It is true that Explanation I to Section 167(2), Cr.PC provides that the accused shall be detained in custody so long as he does not furnish bail. However, as mentioned supra, the majority opinion in Uday Mohanlal Acharya expressly clarified that Explanation I to Section 167(2) applies only to those situations where the accused has availed of his right to default bail and undertaken to furnish bail as directed by the Court, but has subsequently failed to comply with the terms and conditions of the bail order within the time prescribed by the Court. We find ourselves in agreement with the view of the majority. In such a scenario, if the prosecution subsequently files a chargesheet, it can be said that the accused has forfeited his right to bail under Section 167(2), CrPC. Explanation I is only a safeguard to ensure that the accused is not immediately released from custody without complying with the bail order.*
>
> *19.1 However, the expression 'the accused does furnish bail' in Section 167(2) and Explanation I thereto cannot be interpreted to mean that if the accused, in spite of being ready and willing, could not furnish bail on account of the pendency of the bail application before the Magistrate, or because the challenge to the rejection of his bail application was pending before a higher forum, his continued detention in custody is authorized. If such an interpretation is accepted, the application of the Proviso to Section 167(2) would be narrowly confined only to those cases where the Magistrate is able to instantaneously decide the bail application as soon as it is preferred before the Court, which may sometimes*

not be logistically possible given the pendency of the docket across courts or for other reasons. Moreover, the application for bail has to be decided only after notice to the public prosecutor. Such a strict interpretation of the Proviso would defeat the rights of the accused. Hence his right to be released on bail cannot be defeated merely because the prosecution files the chargesheet prior to furnishing of bail and fulfil the conditions of bail of furnishing bonds, etc., so long as he furnishes the bail within the time stipulated by the Court."

Similarly, in Para-25 of the judgment, the Hon'ble Supreme Court has been pleased to hold as under:-

"25. Therefore, in conclusion:

25.1. Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the charge-sheet or a report seeking extension of time by the prosecution before the Court; or filing of the charge-sheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

25.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge-sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take

> cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the Cr.PC.
>
> 25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

12. A harmonious reading of what has been held by the Hon'ble Supreme Court in Paras-19 and 25 thereof demonstrates that the Hon'ble Supreme Court has reiterated the position of law, as has been enunciated by the Hon'ble Supreme Court in *Uday Mohanlal Acharya Vs. State of Maharashtra* (2001) 5 SCC 453 that an accused is entitled to default bail, provided he is willing to furnish bail, as directed by the Court and further that where the accused fails to apply for default bail when the right accrues to him, and subsequently a charge sheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished and the Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the Code of Criminal Procedure. However, what has been held by the Hon'ble Supreme Court in Para-25.3 has to be read by keeping into consideration the fact that this conclusion has been arrived at by the Hon'ble Supreme Court in view of the provisions of Section 36A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985, because that was the controversy with which the Hon'ble Supreme Court was dealing with and it was not asimpliciter case under the provisions of the Indian Penal Code etc. Therefore, Hon'ble Supreme Court has not held that in the event of the

prosecution filing an application for extension of time to complete the investigation, that too, before the expiry of the period of 90 days or 60 days, as the case may be, if the Magistrate allows the application, then the statutory right to claim default bail of the accused is extinguished, if he is charged for commission of offences punishable under the Indian Penal Code, as has been argued by the learned Additional Advocate General.

13. Therefore, in view of what has been held hereinabove, this application is allowed and in view of the fact that the Investigating Agency has not completed the investigation within the statutory period of 60 days, the petitioner is held entitled for default bail and is ordered to be released on bail in FIR No. 05/2022, dated 17.05.2022, registered under Sections 420, 120-B, 201 and 109 of the Indian Penal Code at Police Station Bharari District Shimla Himachal Pradesh, subject to his furnishing bail bonds in the sum of one lac with one surety of the like amount to the satisfaction of concerned Chief Judicial Magistrate/Additional Chief Judicial Magistrate/Judicial Magistrate First Class. The petitioner shall also abide by the following conditions:

> *"(a) He shall attend the Trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;*
>
> *(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;*
>
> *(c) He shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and*
>
> *(d) He shall not leave the territory of India without prior permission of the Court."*

14. As has been agreed by learned counsel for the petitioner, the petitioner shall report in the Police Station concerned at least once in a month and he shall also participate in the course of investigation, if required, as an when directed by the Investigating Officer.

15. It is clarified that the findings which have been returned by this Court while deciding this petition are only for the purpose of adjudication of the present bail application and learned Trial Court shall not be influenced by any of the findings so returned by this Court in the adjudication of these petitions during trial of the case. It is further clarified that in case the petitioner does not comply with the conditions which have been imposed upon him while granting the present bail, the State shall be at liberty to approach this Court for the cancellation of bail. The application stands disposed of.

As prayer of the petitioner for grant of default bail has been accepted by this Court, therefore, no order is now required to be passed in the petition preferred under Section 439 of the Code of Criminal Procedure and the same is accordingly disposed of.

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

Between:-

VIDYA NAMTA, WIFE OF SH. ROSHAN NAMTA, R/O NAMTA SADAN, BELOW MAMU BUILDING, AHUJA COLONY, SANJAULI, SHIMLA-6.

...PETITIONER

(BY SHRI SANJEEV BHUSHAN, SENIOR ADVOCATE, WITH SHRI RAJESH KUMAR, ADVOCATE)

AND

H.P. HOUSING & URBAN DEVELOPMENT AUTHORITY, NIGAM VIHAR, SHIMLA THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, SHIMLA.

...RESPONDENT

(BY SHRI C.N. SINGH, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 4004 of 2019

BETWEEN:-

SMT. VIDYA SHARMA, WIFE OF SHRI GIRISH SHARMA, PRESENTLY POSTED IN HIMUDA, SDA COMPLEX, SHIMLA, DISTRICT SHIMLA, H.P.

...PETITIONER

(BY MS. BHAVANA DUTTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (H.P. HOUSING & URBAN DEVELOPMENT AUTHORITY) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. H.P. HOUSING & URBAN DEVELOPMENT AUTHORITY, THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, NIGAM VIHAR, SHIMLA-2.

3. CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, H.P. HOUSING & URBAN DEVELOPMENT AUTHORITY, NIGAM VIHAR, SHIMLA-2.

...RESPONDENTS

(M/S DINENSH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL & MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR R-1

MR. C.N. SINGH, ADVOCATE, FOR R-2 AND 3)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 4500 of 2019

BETWEEN:-

DEVI PARKASH, SON OF LATE SHRI JEET RAM, RESIDENT OF BLOCK NO. 1, SET NO. A-1, HOUSING BOARD COLONY, SANJAULI, SHIMLA-171006, HIMACHAL PRADESH.

...PETITIONER

(BY SHRI SANJEEV BHUSHAN, SENIOR ADVOCATE, WITH SHRI RAJESH KUMAR, ADVOCATE)

AND

HIMACHAL PRADESH HOUSING & URBAN DEVELOPMENT AUTHORITY, NIGAM VIHAR, SHIMLA THROUGH ITS CHIEF EXECUTIVE OFFICER-CUM-SECRETARY, SHIMLA, H.P.

...RESPONDENT

(BY SHRI C.N. SINGH, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 3291 of 2019AND CONNECTED MATTERS

Reserved on:24.06.2022

Decided on:28.07.2022

Constitution of India, 1950 - Service Law - Reversion of Petitioners from Senior Assistant positions to Clerk positions by Respondent Authority due to purported eligibility criteria violations- Petition filed for Quashing of the reversion orders in the High Court - **Held** – Orders were passed without affording petitioners a chance to be heard, violating the principles of natural justice- The promotion was a conscious decision by the authority, not influenced by the petitioners - Similar cases of eligibility relaxation were granted to others, but not to the petitioners - The authority's failure to exercise its power of relaxation suggests discriminatory intent - Reversion orders lacked legal basis and violated principles of fairness and equality - Reversion orders quashed.(Para 6,10)

These petitions coming on for pronouncement of judgment this day, the Court passed the following:-

J U D G M E N T

As the moot issue involved in these petitions is same and similar, therefore, they are being disposed of by a common judgment.

2. Petitioner-Vidya Namta was serving as a Clerk with the respondent-Authority when vide Annexure P-1, dated 2nd June, 2012, on the recommendation of the Recruitment and Promotion Committee (Lower) in its meeting held on 31.05.2012, she was promoted against the post of Senior Assistant on *ad hoc* basis. However, vide office order, dated 20.02.2015 (Annexure P-2), the petitioner was reverted to the post of Clerk, *inter alia*, on the ground that as on the date when she was promoted to the post of Senior Assistant vide Annexure P-1, dated 2nd June, 2012, she was not fulfilling the eligibility criteria for promotion to the post of Senior Assistant, which required five years of service as a Junior Assistant. Thereafter, the petitioner was promoted to the post of Senior Assistant vide Annexure P-3, dated 26th August, 2017. The petition was filed by the petitioner aggrieved by the issuance of

Annexure P-2 and the operation of Annexure P-2 was stayed by the Court vide order dated 27.02.2015. The relief sought for by the petitioner is for quashing of Annexure P-2 and further for issuance of a direction to the respondent to allow the petitioner to continue against the post of Senior Assistant, as she was doing after the issuance of Annexure P-1.

3. Petitioner-Vidya Sharma was promoted to the post of Senior Assistant purely on *ad hoc* basis vide Annexure P-2, dated 11.07.2012 and in terms of Annexure P-3, dated 20.02.2015, she was also reverted to the post of Clerk, on the same ground that as on the date when she was promoted to the post of Senior Assistant, she was not having 5 years' service as Junior Assistant. In terms of order dated 12.03.2015, the operation of Annexure P-3, dated 20th February, 2015, was stayed by the Court and the Court has been informed that the petitioner thereafter has continued to serve as a Senior Assistant. Said petitioner was also subsequently prompted to the post of Senior Assistant vide office order dated 26.08.2017.

4. Petitioner-Devi Parkash was promoted to the post of Senior Assistant in terms of order, dated 11.07.2012 (Annexure P-1) and he was reverted to the post of Clerk vide order dated 20.02.2015 (Annexure P-6) on the ground that as on the date when said petitioner was promoted on *ad hoc* basis as Senior Assistant, he was not eligible to hold the post in question as per the Recruitment and Promotion Rules. The operation of the impugned order was stayed by the Court vide order dated 13.03.2015 and said petitioner was also promoted to the post of Senior Assistant subsequently.

5. The prayer of the petitioners is for quashing of impugned orders, in terms whereof, they were reverted back to the posts of Clerk and that the respondents be directed to allow the petitioners to continue to work against the posts of Senior Assistants.

6. Having heard learned counsel for the parties and having carefully gone through the pleadings as well as the documents appended with the

petitions, this Court is of the considered view that the orders in terms whereof the petitioners were ordered to be reverted back to the posts of Clerk are *per se* bad in law and liable to be quashed and set aside. The first and foremost reason as to why the impugned orders are not sustainable in the eyes of law, is this that there is no dispute that the impugned orders in all the three petitions were passed by the respondent-Authority at the back of the petitioners without affording them any opportunity of being heard. The impugned orders, admittedly, have civil consequences to the deterrent of the petitioners and, therefore, such orders could not have been passed without adhering to the principles of natural justice. There is one more fact which the Court wants to highlight at this stage itself and the said fact is that at the time when the petitioners were promoted against the posts of Senior Assistant by the respondent-Authority, it is not the case of the Authority that this promotion was conferred by the Authority on account of some misleading at the behest of the petitioners. To the contrary, the record demonstrates that it was a conscious decision taken by the Authority and the issuance of the impugned orders was at the behest of the State Government, i.e., the Secretary (Housing) to the Government of Himachal Pradesh.

7. During the pendency of these proceedings on 04.10.2021, the Court had passed the following order:-

> *"Heard for some time. Learned Senior Counsel while drawing the attention of this Court to Office Order dated 26.08.2017 (Annexure P-3), Minutes of 41" Meeting of the Board of Directors of HIMUDA dated 28.06.2017 and the Minutes of the 41st Meeting of the HIMUDA, (Annexures P-4 and P-5) has submitted that perusal thereof will demonstrate that power of relaxation has been exercised in favour of the incumbents who were not fulfilling the eligibility criteria for being promoted against the post of Senior Assistant and relaxation to the extent of 4 years has been given to some of the incumbents. He further submitted that when the petitioners were promoted against the posts of*

Senior Assistant in the year 2012, it was not on account of some act of favouritism which led to the passing of the orders of their promotions. According to him, it was an act of the respondent-Board totally uninfluenced by the petitioners and since then the petitioners indeed have performed their duties as Senior Assistants. He also submitted that HIMUDA cannot have different yardsticks for similarly situate persons. In case persons similarly situate as the petitioners could have been granted relaxation when they were promoted against the posts of Senior granted Assistant in the year 2017, then after the petitioners were promoted to the said posts in the year 2012, and the HIMUDA subsequently realized that the petitioners stood promoted without their having completed the requisite number of years service in the feeder category, then the power of relaxation ought to have been exercised in their favour also.

Faced with the situation, learned counsel for the HIMUDA submits that the case be taken up after two weeks to enable him to have instructions. Ordered accordingly.

As prayed for, list on 26.10.2021."

This was followed by the passing of following order by the Court on 07.03.2022:-

"Heard for some time. List for continuation on 08.03.2022, on which date Chief Executive Officer of the respondent-Board to remain present in the Court with the relevant record to answer that if the relaxation in service criteria has been given to the incumbents mentioned in Annexure P-5, i.e., the Minutes of the 41st Meeting of HIMUDA, then when the same yardstick cannot be applied to the petitioner and if the relaxation cannot be granted to the petitioner then how it is justified in the case of the incumbents similarly situated as the petitioner."

Thereafter on 08.03.2022, the Court passed the following order:-

"In compliance to order dated 07.03.2022, the Chief Executive Officer of the HIMUDA is present in person in the Court. After discussion, he has submitted that it will be in the interest of

> *justice in case further hearing in the matter is deferred by four weeks so that in the meanwhile, respondent-Board can look into the possibilities of addressing and redressing the grievances of the petitioners. List on 18.04.2022. On the said date of hearing, an affidavit be filed on behalf of respondent-Board by the CEO as to what steps have been taken by the Board to redress the grievances of the petitioners."*

On 18.04.2022, the following order was passed by the Court:-

> *"Learned counsel for HIMUDA has referred to a supplementary affidavit which has been filed on behalf of HIMUDA and has prayed that the hearing of the case be deferred by three weeks.*
>
> *As prayed for, list on 10.05.2022. It is clarified that in case, on the said date, the grievance of the petitioner does not stand redressed by HIMUDA, then the case shall be heard on merit."*

8. As the grievance of the petitioners was not redressed by the respondent-Authority in terms of what was observed in the orders passed by the Court from time to time referred to hereinabove, the cases were heard on merit.

9. At this stage, it is relevant to refer to Annexure P-5 appended with CWPOA No. 3291 of 2019, which are minutes of the 41st meeting of the respondent-authority. In fact, these are the minutes, on the basis of which, the petitioners were subsequently ordered to be promoted against the posts of Senior Assistant during the pendency of the petitions herein. A perusal of these minutes demonstrate that number of incumbents mentioned therein, who had not completed 10 years of service as a Clerk so as to render them eligible for promotion to the posts of Senior Assistant, were promoted as Senior Assistants by giving them relaxation in the service criteria in the existing Recruitment and Promotion Rules for the post of Senior Assistant. In fact, 15 officials were recommended for promotion as per the said minutes and except

first five, all were promoted by relaxing the Recruitment and Promotion Rules. Not only were the Recruitment and Promotion Rules relaxed, they were relaxed to the extent of granting three to four years' relaxation to the candidates, whose names are mentioned therein from Serial No. 11 onwards in the requisite number of years they had put in the feeder category for rendering them eligible for promotion to the posts of Senior Assistant. In other words, the incumbents who had just completed 6 years or 7 years service, in all, as Clerks and Junior Assistants were promoted to the posts of Senior Assistant. That being the case, it is not understood as to why the same yardstick was not followed by the Authority to save the promotions of the petitioners to the posts of Senior Assistant at the first instance. This demonstrates that the petitioners have been discriminated by the respondent-Authority vis-à-vis similarly situated persons when it comes to promotion to the posts of Senior Assistants. Another fact which is necessary to be referred to at this stage is that it is not as if there was no power of relaxation vested in the Authority. If it could have been exercised by the Authority in terms of the minutes of 41st meeting of its (Annexure P-5), then it is not understood as to why it was not exercised in the case of the petitioners, which act has smacks of legal *malafide* on the part of the respondent-Authority vis-à-vis the petitioners. Incidentally, the record does not demonstrate that the promotion of the petitioners against the posts of Senior Assistants was assailed by someone, which led to the passing of the orders of reversion. This Court has already mentioned hereinabove that the order of reversion otherwise also was passed at the back of the petitioners without giving them any hearing. All the abovementioned facts and circumstances clearly demonstrate that the reversion of the petitioners from the posts of Senior Assistants to the posts of Clerks was an arbitrary act of the respondent-Authority, which is not sustainable in the eyes of law. Neither it is sustainable on the ground that reversion has been ordered by violating the principles of natural justice nor it is sustainable on the ground that when

Clerks who were not fulfilling the eligibility criteria for promotion to the posts of Senior Assistant, were given relaxation while being promoted as such, then why the same criteria was not adopted for the petitioners also.

10. Accordingly, these petitions succeed. The impugned orders, in terms whereof, the petitioners were ordered to be reverted back to the posts of Clerk from the post of Senior Assistant, are quashed and set aside.As all the petitioners have continued to serve the respondent-Authority as Senior Assistants on the basis of the interim orders passed by this Court in their favour, it is ordered that the petitioners shall be construed to have been serving the respondent-Department as Senior Assistants right from the date when they were promoted to the said posts initially. The petitions stand disposed of in above terms, so also pending miscellaneous applications.

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

Between:-

VEENA GUPTA,
AGED ABOUT 65 YEARS,
W/IFE OF SH. ASHOK GUPTA,
PARTNER OF M/S JAI HIND FILLING STATION,
RESIDENT OF VILLAGE DHAR KI BER,
POST OFFICE DHARAMPUR,
TEHSIL KASAULI, DISTRICT SOLAN, H.P.

PETITIONER

(BY MR. B.C. NEGI, SENIOR ADVOCATE WITH
MR. UDIT SHOURYA KAUSHIK, ADVOCATE)

AND

1. INDIAN OIL CORPORATION LIMITED
   THROUGH ITS
   SENIOR DIVISIONAL RETAIL SALES MANAGER
   SHIMLA DIVISIONAL OFFICE,
   SDA COMPLEX, BLOCK-21,
   KASUMPTI, SHIMLA-9.

2. SH. MOHINDER NATH
   S/O LATE SH. RAM KRISHAN,
   PARTNER M/S JAI HIND FILLING STATION,
   DHARAMPUR, TEHSIL KASAULI,
   SOLAN (HP)
   R/O VILLAGE ANJI NEAR RADHASWAMI GROUND,
   TEHSIL AND DISTRICT SOLAN (HP.)

RESPONDENTS

(MR. K.D. SOOD, SENIOR ADVOCATE
WITH MR. HET RAM THAKUR, ADVOCATE
FOR R-1)

(MR. SHRAWAN DOGRA, SENIOR ADVOCATE WITH

MR AJAY SIPAHIYA, ADVOCATE
FOR R-2)

ARBITRATION CASE
NO. 55 OF 2022
DECIDED ON: 04.08.2022

Arbitration and Conciliation Act, 1996 – Sections 9,17,36 - Invocation of Arbitration Clause - Arbitration clause remains valid for all disputes existing at the time of invocation - Petitioner invoked arbitration under Clause 17 of the Partnership Deed, citing existing disputes under Dealership Agreement – **Held** - Petitioner cannot claim separate arbitration for new dispute arising from refusal to supply petroleum products - Petitioner allowed to seek interim relief by filing application under Section 17 before the appointed arbitrator within two weeks - Court dismisses petition - Vacates interim directions issued earlier.(Para 33,34)

Cases referred:

Hero Wind Energy Private Ltd. V. Inox Renewables Ltd. and Another 2020 SCC Online Del 720;

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

O R D E R

By way of instant petition filed under S. 9 of the Arbitration and Conciliation Act, 1996, petitioner has prayed for following main reliefs:

> "It is, therefore, most respectfully prayed that this petition may kindly be allowed and the respondent no. 1 may be directed to supply the petroleum products in the name of partnership concern i.e. M/s Jai Hind Filling Station, situated at Village Kumarhada, P.O. Dharampur, Tehsil Kasauli, District Solan (H.P.) consisting of both the partners.
> And/or
> Further respondent no.1 may be restrained from supplying the petroleum products to respondent no.2 in the name of M/s Jai Hind Filling Station on his VAT no. TAN registration no., TIN no., Explosive License, Pollution, NOC/License, Calibration and Stamping License, personnel PAN Card, Bank Account showing him as a sole proprietor.
> And/or

> In the alternative a receiver may be appointed to take control of the aforesaid M/s Jai Hind Filling Station to maintain proper and true accounts or respondent no.1 may be directed to take control and possession of the aforesaid M/s Jai Hind Filling Station, Situate at Village Kumarhada, P.O. Dharampur, Tehsil Kasauli, District Solan (H.P.), in the interest of justice."

2. For having a bird's eye view of the matter, relevant facts necessary for the adjudication of the case are as under.

3. Vide Letter of Intent dated 16.1.2002, I.B.P. Co. Ltd., which subsequently merged with and was taken over by respondent No.1/Indian Oil Corporation Limited (hereinafter, 'IOCL') allotted a filling station in favour of respondent No.2. Respondent No.2 decided to set up a petrol pump/filling station in partnership with the petitioner, with equal investment. After aforesaid partnership, land was purchased to set up the petrol pump. Portion of land measuring 02-12 Bigha was purchased in the name of respondent No.2. Parcel of land measuring 01-11 Bigha was purchased in the name of the petitioner. Land so purchased by the petitioner and respondent No.2 comprised in Khasra Nos. 58 and 59 situate in Mauja Kumarhda was leased out to I.B.P. Co. Ltd. for an initial period of 15 years as per policy and guidelines of I.B.P. Co. Ltd.. On the said land, I.B.P. Co. Ltd. established its petrol pump by installing machinery and structure etc., and further appointed respondent No.2 as its authorized dealer on commission basis. As per policy of the oil company, no reconstitution was permitted for the initial five years as such, retail outlet/petrol pump was to remain in the name of the allottee i.e. respondent No.2. In the aforesaid background, petrol pump was set up and business was carried out in the name of M/s Jai Hind Filling Station. Petrol Pump became functional in the year 2006, vide Dealership Agreement dated 15.11.2006. In the year 2012, after completion of five years, process to induct the petitioner as dealer of respondent No.1/IOCL was initiated. After completion of necessary codal formalities, Partnership Deed dated 25.4.2013

duly registered with Sub Registrar, Solan was executed inter se petitioner and respondent No.2 with respect to functioning of the petrol pump and to avoid any future disputes (Annexure P-1). As per terms and conditions of Partnership Deed, assets and liabilities of the firm were brought forward on their book value as per balance sheet on the date of execution of the Partnership Deed and assets and liabilities of erstwhile firm were taken over by the new firm i.e. partnership firm. As per Partnership Deed, petitioner is partner to the extent of 49% alongwith respondent No.2, who is partner to the extent of 51% in M/s Jai Hind Filling Station.

4. Partnership firm as detailed herein above, is also registered with Registrar of Firms. Aforesaid partnership firm thereafter executed a Dealership Agreement dated 26.4.2013 (Annexure P-2) with IOCL to run the retail outlet as working partners. On execution of Dealership Agreement with the petitioner, respondent No.2 became authorized dealer of IOCL. Though, as per Clause 21 of Partnership Deed and Clause 7 of Partnership Deed, it is paramount condition that both the partners will keep themselves personally and actively engaged in the running and functioning of the retail outlet/petrol pump but it appears that some dispute cropped up inter se them on account of maintaining the accounts. Respondent No.2 filed a Civil Suit No. 49/1 of 2014, titled Mohinder Nath v. Veena Gupta for declaration and permanent prohibitory injunction in the court of learned Civil Judge (Senior Division), Kasauli, however, the said suit was subsequently withdrawn by respondent No.2 by filing an application under Order XXIII, rule (3)(a)(b) CPC. Since the dispute had arisen inter se petitioner and respondent No.2, petitioner filed a petition under S.11 of the Act, before this Court for appointment of an arbitrator invoking arbitration clause of Partnership Deed. This Court vide order dated 31.10.2014 passed in Arb. Case No. 59 of 2014 appointed Mr. G.D. Verma, learned Senior Advocate as an arbitrator to adjudicate the dispute inter se petitioner and respondent No.2, as per Partnership Deed.

Respondent No.2 also filed CWP No. 5417 of 2014 in this Court, praying therein for issuance of direction to respondent No. 1 to continue making supply of petroleum products in the name of retail outlet set up in the year 2005 by the said respondent on NH 22 at Dharampur on Shimla-Kalka Road, which was allotted to the said respondent on 16.1.2002. Alongwith aforesaid writ petition, respondent No.2 also filed an application seeking therein interim directions. Vide order dated 4.8.2014, this Court directed that the supplies be made in the name of respondent No.2 in his individual name. However, subsequently, writ court having taken note of the pleadings adduced on record by the parties to lis, especially IOCL, as well as material documents such as Partnership Deed and Dealership Agreement, dismissed the writ petition vide order dated 29.11.2021. In the aforesaid judgment, learned Single Judge of this Court specifically held that petitioner (respondent No.2 herein) cannot be permitted to run the petrol pump claiming that he is the sole proprietor thereof, especially in view of the fact that the status of the petrol pump is also subject matter of the arbitration proceedings. Aforesaid judgment passed by this Court has not been laid challenge till date as such, same has attained finality.

5. After dismissal of the writ petition having been filed by respondent No.2, as detailed herein above, petitioner vide letter dated 16.12.2021 and email dated 21.12.2021, addressed to respondent No.1 with regard to decision /judgment dated 29.11.2021 passed by this Court, requested to make supply of petroleum products in the name of partnership firm consisting of both the partners and further to stop supply of petroleum products in the name of respondent No.2 alone. But since the needful never came to be done at the behest of respondent No.1/IOCL, rather it gave an evasive reply dated 4.1.2022, petitioner served it with legal notice dated 22.3.2022, which was not replied to, as such, petitioner before resorting to arbitration proceedings in terms of Clause 62 of the Dealership Agreement, filed instant petition under

S.9 of the Act, praying therein for the reliefs, as have been reproduced herein above.

6. It has been categorically stated in para-2 of the petition that the petitioner shall approach court of competent jurisdiction within a period of three months from the date of moving this petition, for appointment of an arbitrator for adjudicating the dispute inter se petitioner and respondents. Three months' time as proposed to be taken by the petitioner for filing arbitration petition is yet to expire.

7. I have heard Learned Counsel appearing for the parties and gone through the record of the case.

8. Before ascertaining the correctness and genuineness of the rival contentions of learned Counsel appearing for the parties, it is pertinent to take note that prior to filing of the petition at hand, petitioner had filed an application under S.9 of the Act before learned District Judge, Solan, seeking an interim relief qua the dispute inter se petitioner and respondent No.2 with regard to Partnership Deed, which was dismissed by learned Additional District Judge-I, Solan. Thereafter an appeal under S.39 of the Act i.e. Arb. Appeal No. 7 of 2014, was preferred by the petitioner, wherein respondent No. 1 was not made a party. However, this Court vide order dated 26.11.2014, (Annexure R-1/2), having taken note of the fact that respondent No.2 is running petrol pump in question, directed him to maintain the records and produce the same before the court, duly verified by a Chartered Accountant after every three months. Aforesaid order was never laid challenge to in the superior court of law, as such, same has attained finality.

9. Having gone through the records and heard learned counsel for the parties, facts as discussed herein above are not in dispute. The question which needs to be determined in the instant proceedings at the first instance is, 'whether present petition under S.9 of the Arbitration and Conciliation Act is maintainable on account of the fact that the dispute now sought to be

raised by the petitioner in terms of Clause 62(a) of the Dealership Agreement already stands referred to learned Arbitrator appointed by this Court vide order dated 31.10.2014 and the parties have already subjected themselves to the jurisdiction of learned arbitrator by filing claims and counter- claims?"

10. Mr. B.C. Negi, learned senior Counsel duly assisted by Mr. Udit Shourya Kaushik, Advocate, while fairly admitting factum with regard to appointment of Arbitrator on the request of the petitioner, submitted that arbitration proceedings pending before learned arbitrator appointed by this Court have arisen out of Partnership Deed dated 25.4.2013 and therein dispute is with regard to partnership inter se petitioner and the respondent No.2 in business concern, M/s Jai Hind Filling Station, whereas, present dispute is with regard to supply of petroleum products by IOCL in the name of respondent No.2 instead of dealership firm, which is in the name of petitioner and respondent No.2. Mr. Negi, while inviting attention of this Court to Dealership Agreement dated 26.4.2013 (Annexure P-2) submitted that a tripartite agreement was entered inter se the petitioner, respondent No.2 and the IOC, whereby IOCL is /was under obligation to supply petroleum products to M/s Jai Hind Filling Station, which is a dealership firm. Mr. Negi argued that as per Clause 62(a) of the aforesaid Dealership Agreement, any dispute or difference of any nature whosoever, any claim, cross-claim, counter claim or set-off or regarding any right, liability, act, omission on account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of Director (Marketing)of Corporation. He submitted that since request having been made by the petitioner to IOCL to supply the petroleum products in the name of the dealership firm, after dismissal of the writ petition having been filed by respondent No.2 has not been considered, petitioner is contemplating to invoke arbitration clause of the Dealership Agreement dated 26.4.2013. He argued that the arbitration clause for appointment of an arbitrator is to be invoked within a period of three months

from the date of filing the present petition, which is yet to expire and as such, instant petition filed under S.9 of the Act, praying therein for interim reliefs as referred to above, is maintainable and deserves to be allowed in the facts and circumstances of the case. Mr. Negi further argued that since there is no dispute that the petitioner alongwith respondent No.2 is a dealer of petrol pump namely M/s Jai Hind Filling Station, Dharampur and this Court vide judgment dated 29.11.2021 passed in CWP No. 5417 of 2014 having been filed by respondent No.2 has already rejected prayer made on behalf of respondent No.2 to direct the IOCL to supply petroleum products in the name of respondent No.2, respondent No.1/IOCL is otherwise under obligation to supply petrol and petroleum products in the name of dealership firm, which comprises of petitioner and respondent No.2 and not in the individual name of respondent No.2 who is only a partner in the firm i.e. M/s Jai Hind Filling Station. Lastly, Mr. Negi, while inviting attention of this Court to the prayer made in the instant petition submitted that since considerable time is likely to be consumed in adjudication of the dispute, arisen inter se parties, with respect to dealership, this court while exercising power under S. 9 of the Act is required to restrain respondent No.1 from supplying petroleum products to respondent No.2 in the name of M/s Jai Hind Filling Station showing him as a sole proprietor, rather the petroleum products are required to be supplied in the name of partnership firm consisting of both the partners i.e. petitioner and respondent No..2. He submitted that till the time, arbitrator is appointed in terms of Clause 62(a) of Dealership Agreement dated 26.4.2013, this court may either direct respondent No.1 to make supply of petroleum products in the name of partnership concern M/s Jai Hind Filling Station consisting of both the partners or may appoint a Receiver to take control of aforesaid M/s Jai Hind Filling Station to maintain true accounts.

11. While refuting aforesaid submissions made on behalf of the petitioner, Mr. Shrawan Dogra, learned Senior Advocate duly assisted by Mr. Ajay

Sipahiya, Advocate vehemently argued that the present petition is not maintainable and as such, same deserves to be dismissed at the threshold. Learned senior counsel further argued that since the dispute arisen inter se petitioner and respondent No. 2 is with regard to partnership of M/s Jai Hind Filling Station and, in those proceedings, learned Arbitrator has already framed issues with regard to sole proprietorship, as is being claimed by respondent No.2 vis-à-vis partnership as is being claimed by the petitioner, instant petition filed under S. 9 of the Act is not maintainable. Interim relief as has been sought in the instant petition can only be granted by learned Arbitrator under S.17 of the Arbitration and Conciliation Act, if approached by the petitioner. Mr. Dogra, learned senior counsel representing respondent No.2 further argued that otherwise also, present petition is not maintainable in view of the fact that prior to filing of the petition at hand, petitioner also approached learned District Judge Solan by filing petition under S. 9 of the Act, seeking therein similar reliefs as have been claimed in the instant petition but same stands rejected vide order dated 19.7.2014 passed by learned Additional District judge-I Solan (Annexure R2-12). While fairly admitting the factum with regard to Dealership Agreement dated 26.4.2013 entered inter se petitioner and respondent No.2, Mr. Dogra stated that Clause 62(a) of the Dealership Agreement, which is sought to be invoked by the petitioner for raising fresh dispute, cannot be invoked by the petitioner against respondent No.2 because in terms of Clause 62(a) of the Dealership Agreement, dispute if any inter se dealer and IOCL can be referred for arbitration, whereas in the present case, dispute sought to be adjudicated is inter se petitioner and respondent No.2.

12. Before ascertaining correctness and genuineness of the rival submissions of learned counsel for the parties, it would be apt to take note of S.9 of the Arbitration and Conciliation Act, which is reproduced herein below:

"9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

13. Bare perusal of aforesaid provision suggests that a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, can pray for interim measure of protection in respect of any of the matters as detailed in S.9(i) and 9(ii)(a) to (e), reproduced herein above. Bare perusal of S.9 suggests that the said provision relates to interim relief. It entitles a party to seek interim relief at three stages (1) before commencement of arbitral proceedings,

(2) during the course of arbitral proceedings and (3) after conclusion of arbitration proceedings. A considerable time may elapse in invoking the arbitration clause and during this time if an urgent relief is sought by a party and there is hardly any time to wait, S.9 provides that before arbitral proceedings, an individual is also entitled to move the court, meaning thereby entire purpose of S.9 is to provide relief to the parties, when arbitral tribunal is not in existence. Though arbitration is supposed to be undertaken by learned Arbitrator but rights of parties should not be frustrated, hence, for the period when arbitral tribunal may not be in existence, parties may approach court for interim relief. Similarly at any time after arbitral award and before its enforcement as per S. 36, one has a right to go to the court. After passing of award, arbitral tribunal becomes *functus officio* however, before its enforcement, right after passing award and before, concerned parties are required to wait for 90 days for setting aside award but due to some urgency, one may require urgent relief and in that case, such party may approach the Court under S.9. Sub-sections (i) and (ii) of S. 9 were added by 2015 amendment providing bar for approaching court after arbitral proceeding have started. Function of arbitral tribunal ends once it renders award and period of existence of arbitral tribunal is from the time of its constitution till the time it has passed an award. S. 9(3) of Arbitration and Conciliation Act incorporated after 2015 amendment provides that if there is Arbitral Tribunal in existence, one cannot approach court under S. 9. Through 2015 Amendment Act power of court to grant interim relief after constitution of arbitral tribunal has been curtailed. S 9(3) of Act states that an application under S. 9(1) shall not be entertained by court unless remedy under Section 17 is inefficacious. Hon'ble Apex Court in a number of cases observed that word ‘entertained’ mentioned under S.9 means consideration of issues raised by applicant. Hon'ble Apex Court held that a court entertains a matter when it takes up issues for

consideration and may continue till pronouncement of judgment. Section 9(3) would not be applicable once S. 9(1) has been invoked.

14. Prior to 2015 amendment Act, even when arbitral tribunal was in existence, there was no bar for making an application under S. 9. Prior to 2015 amendment power of a court under S. 9 was much wider than power of arbitral tribunal under S.17. Post 2015 amendment, this provision has been rectified in the Act to a large extent. Now when an arbitral tribunal is constituted, court would refrain from entertaining application under S.9 of the Act and leave it to the arbitral tribunal to decide the issue under S. 17, which fact becomes apparently clear from the reading of newly added S. 9(2) and (3) in the amendment Act, 2015..

15. At this junction, it would be apt to take note of para 6 of application (page 245)

> "6. That after entering into Partnership Deed the petitioner, respondent No.1 and Respondent No.2 had also entered into a Tripartite Dealership Agreement vide which the dispute if any between the parties to the agreement shall be referred to the sole arbitration of Director (Marketing) and in the present case the dispute is interse between the partners as well as the Respondent No.2 because the respondent No. 2 have illegally and in connivance with respondent No.1 has supplied the petroleum products to the respondent No.1 as sole Proprietor that too after coming into force of the Partnership Deed and Dealership Agreement as such, the present dispute arisen between the partners and the Respondent No.2 is liable to be referred to the Arbitration of the Director (Marketing) of the Indian Oil Corporation Ltd. And even if this Hon'ble Court comes to the conclusion that the dispute is interse between the partners then some independent person may be appointed as arbitrator to settle, adjudicate the dispute between the petitioner and Respondent no.1. The copy of the Dealership Agreement is annexed with this petition as **Annexure P-9.**"

16. If the averments contained in para 6 are read in their entirety, petitioner specifically submitted before this Court while making prayer for

appointment of an arbitrator that though as per tripartite Dealership Agreement, dispute inter se parties is required to be referred to sole arbitration of Director (Marketing), but if this court comes to the conclusion that dispute is inter se partners, some independent person may be appointed as arbitrator to adjudicate the dispute inter se petitioner and respondent No.1. In this para, petitioner claimed that respondent No.1 has supplied petroleum products to respondent No.2 and as such, present dispute between partners and respondent No.1 is liable to be referred to Director (Marketing), Indian Oil Corporation Limited. But if this court comes to conclusion that dispute is inter se partners, some independent person may be appointed as an arbitrator to adjudicate the dispute.

17. Having taken note of the aforesaid submission made by learned counsel for the petitioner in Arb. Case No. 59 of 2014, this court vide order dated 31.10.2014 passed in the aforesaid case, appointed Mr. G.D. Verma, learned Senior Advocate as an arbitrator, who further as per direction of this Court entered upon reference and on the basis of pleadings of parties, framed following issues:

> "1. Whether the claimant and respondents are partners in business concern M/s Jai Hind Filling Station. If so, since when and in what effect? OPC
> 2. If issue No.1 is decided in affirmative, what is the contribution towards the partnership concern, M/s Jai Hind Filling Station Assets by the claimant and respondent? OPP
> 3. Whether the respondent is the Sole proprietor of M/s Jai Hind Filling Station, if so, to what effect? OPR
> 4. Whether writing dated 25.4.2013 and another writing which has been placed on record by the claimant on 14.3.2016 has been executed by the respondent, if so, to what effect? OPC
> 5. Whether Partnership concern M/s Jai Hind Filling Station stand determined as per notice dated 17.7.2014 issued by the respondent, if so, to what effect? OPR

6. Whether the claimant is entitled for claim raised in the Claim Petition or any other part thereof. If so, to what extent? OPC

7. Whether the claimant is entitled to be declared as absolute owner of land measuring 2116 square meters in Khasra Numbers 58, 59 situated in Mauja Kumharda, as per writing dated 25.4.2013, if so what effect? OPC

8. Whether claimant failed to pay a sum of Rs. 2.45 Lakcs to business concern M/s Jai Hind Filling Station as claimed by respondent, if so, to what effect? OPR

9. Whether the claimant applied for licence from Labour Department by misusing the Partnership Deed? OPR

10. Whether after the execution of Partnership Deed, the partnership firm remained in abeyance and was never acted upon? OPR"

18. Careful perusal of the issues framed by learned Arbitrator reveals that at first instance, issue with regard to partnership of M/s Jai Hind Filling Station is required to be decided by learned Arbitrator. Another important issue which is to be decided by learned Arbitrator is whether Jai Hind Filling Station is sole proprietorship concern of respondent No.2. Since very question with regard to partnership inter se petitioner and respondent No.2 in M/s Jai Hind Filling Station and termination of partnership concern as per notice dated 17.7.2014, is pending adjudication before learned Arbitrator, it is not understood, how dispute, if any with regard to claim of the petitioner that he is dealer alongwith respondent No.2 in M/s Jai Hind Filling Station can be considered and decided in the present proceedings. Though, if the order passed on 31.10.2014 by this Court appointing the arbitrator, is perused, it suggests that the petitioner sought appointment of arbitrator in terms of Clause 17 of the partnership deed dated 25.4.2013 but if annexure R-2/14, application filed by petitioner is read in its entirety, especially para 6, it specifically talks about Tripartite Dealership Agreement vide which dispute, if any is to be referred to sole arbitration of Director (Marketing). In the aforesaid application, petitioner has stated specifically that in the present case, dispute

is inter se her and respondent No.1 as respondent No.1 has supplied petroleum products to respondent No.2 as sole proprietor illegally that too after coming into force Dealership Agreement and Partnership Deed and as such, matter is required to be referred to Director (Marketing), Indian Oil Corporation Limited but this court may appoint an independent arbitrator to adjudicate the dispute. In this background, this court on 31.10.2014 appointed Mr. G.D. Verma, learned Senior Advocate, as an arbitrator who has already commenced the proceedings.

19. Since the arbitration proceedings have already commenced with the framing of issues on the basis of pleadings adduced on record by respective parties, present application under S. 9 of the Act is not maintainable. Though learned senior counsel for the petitioner placed heavy reliance upon Clause 62(a) of Dealership Agreement, Annexure P-2 but perusal of the same nowhere makes the petitioner entitled to invoke arbitration proceedings.

20. Clause 62(a) of Dealership Agreement reads as under:

> "62(a) Any dispute or difference of any nature whosoever, any claim, cross-claim, counter claim or set-off or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of Director (Marketing)of Corporation who may either himself act as the Arbitrator or nominate some other officer of the Corporation to act as the Arbitrator. The Dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator or an officer of the Corporation. "

21. In terms of aforesaid clause, dispute or difference of any nature, inter se parties arising out of or in relation thereto shall be referred to the sole arbitration of Director (Marketing)of Indian Oil Corporation Limited who may act himself as an arbitrator or nominate an officer of the Corporation to act as arbitrator. However, last lines are very relevant, wherein specific words 'Dealer' has been used. It has been stated in the said clause that dealer shall not be

entitled to raise any objection on such ground that arbitrator is an officer of the Corporation. In terms of Dealership Agreement both, petitioner and respondent No.2 being partners of Jai Hind Filling Station are termed as 'dealers'. (Annexure R-2/5). Dealership Agreement clearly reveals that the Indian Oil Corporation Limited is one party whereas respondent No.2 Mohinder Nath Sofat and Veena Gupta partners of Jai Hind Filling Station Dharampur are the second party, meaning thereby though it is a Tripartite Dealership Agreement but it is an agreement inter se IOCL and dealership which comprises of petitioner and respondent No.2. Hence to invoke arbitration clause in terms of S. 62(a) of Dealership Agreement, dispute must be inter se dealership firm and the IOCL but definitely not inter se partners in dealership firm and IOCL or inter se partners of the dealership firm.

22. Here, in the instant case, dispute has arisen petitioner and respondent No.2 on question of their being partners of M/s Jai Hind Filling Station which is pending adjudication before arbitrator appointed by this Court. Now, dispute sought to be raised by invoking clause 62(a) of Dealership Agreement by the petitioner is that IOCL cannot supply the petroleum products in the name of respondent No.2 rather, same are required to be supplied in the name of partnership concern, which as per respondent No.2 stands determined in terms of notice dated 17.7.2014, which issue is already pending before learned Arbitrator appointed by this Court.

23. It is not in dispute that at the first instance, LoI with regard to establishment of petrol pump of IBP Company, which was subsequently taken over by IOCL, was issued in favour of respondent No.2, who allegedly after six years of establishment of retail outlet entered into Partnership Deed with the petitioner but as has been taken note here in above, on account of certain dispute, respondent No.2 first filed a civil suit but the same was withdrawn and similarly, the petitioner approached this Court by way of petition under S.

11(6) of the Act, for appointment of arbitrator to adjudicate dispute inter se parties arising out of Partnership Deed.

24. Though prima facie this court is of the view that in terms of Clause 62(a) of Dealership Agreement, petitioner claiming himself to be one of partners of Jai Hind Filling Station cannot invoke jurisdiction of this Court to adjudicate the dispute regarding supply of petroleum products directly in the name of respondent no.2 of dealership concerned, but even otherwise such dispute cannot be decided till the time, dispute with regard to partnership or determination thereof is decided by learned Arbitrator appointed by this Court

25. Earlier petition filed under S. 9 of Act, by petitioner before learned Additional District Judge-I, Solan, came to be dismissed vide order dated 19.7.2014 (Annexure R-2/12) on the ground of pecuniary jurisdiction. Before learned court below petitioner claimed that she spent huge amount of Rs. 34.00 Lakh towards partnership assets, but to attract jurisdiction of court, she assessed the proportionate value of the partnership assets falling to her share at Rs. 30,00,000/-, whereas, as per respondent therein, market value of assets was Rs.5.00 Crore. Learned court below after having taken note of the fact that petitioner is not assertive of invoking the jurisdiction of a particular court having pecuniary jurisdiction, dismissed the petition. Learned Additional District Judge-II, Solan also noticed that power to appoint receiver is discretionary power and receiver cannot be appointed unless the party prima facie proves that he/she has excellent chance of succeeding. Though the petitioner laid challenge to aforesaid order by way of Arb. Appeal No. 7 of 2014 (Annexure R-2/16) but this court having taken note of the fact that respondent No.2 is running the petrol pump directed respondent No.2 to maintain the records and produce the same before the court, duly verified by a Chartered Accountant after every three months. It is not in dispute that pursuant to said order, respondent No.2 is not only maintaining records but reports of Chartered accountant after three months are being furnished.

26. No doubt, CWP No. 5417 of 2014 having been filed by respondent No.2 seeking direction to respondent No.1 to continue making supply of petroleum products in its name has been dismissed on 29.11.2021, but that does no mean that issue with regard to partnership inter se petitioner and respondent No.2 stands decided, rather, the same is to be decided by learned Arbitrator in the proceedings pending before him.

27. Similarly, there is no direction in the judgment dated 29.11.2021, passed by this Court in CWP No. 5417 of 2014 to respondent No.1 to not supply petroleum products in the name of respondent No.2 rather, this court having taken note of pendency of dispute before learned Arbitrator, made following observations para 17 and 18 (page 89 and 90)

> "17. Now coming to reliefs No. 1 and 2 prayed for by the petitioner. If one peruses the reply, which has been filed to the writ petition by Indian Oil Corporation, i.e. respondent No. 1, a perusal thereof clearly demonstrates that it stands mentioned therein that said respondent is supplying petrol and petroleum products to the petrol pump in issue. De hors this fact, whether or not the Petrol Pump in issue is to be continued the supply of the petrol and petroleum products is a matter intra the petitioner, respondent No. 2 and respondent No. 1-Corporation, subject to the agreements entered into between them and as the entire issue is pending before the learned Arbitrator, therefore, these two reliefs can also not be gone into by this Court in the peculiar facts of the case for the reason that in the garb of these two reliefs, the petitioner cannot be permitted to run the Petrol Pump claiming that he is the sole proprietor thereof especially in view of the fact that the status of the Petrol Pump is also subject matter of the arbitration proceedings. Therefore, on these counts also, this writ petition is held to be not maintainable.
>
> 18. In fact, in the peculiar facts of this case, which, as has been argued by learned Senior Counsel appearing for respondent No. 2, involves seriously disputed questions of law, this Court in exercise of its writ jurisdiction cannot venture into and adjudicate the issues which the petitioner wants this Court to do. This is well left to either a Civil Court to do the needful where the parties can lead evidence in support of their respective contentions or the learned Arbitrator who, as mentioned hereinabove, is already seized of the entire matter. Accordingly, this writ petition is held to be not maintainable and is thus dismissed.

Interim order, if any, stands vacated. Pending miscellaneous application(s), if any, also stand disposed of accordingly."

28. In the aforesaid judgment, writ court has held that whether or not the Petrol Pump in issue is to be continued the supply of the petrol and petroleum products is a matter intra the petitioner, respondent No. 2 and respondent No. 1-Corporation, subject to the agreements entered into between them and as the entire issue is pending before the learned Arbitrator, therefore, these two reliefs can also not be gone into by this Court in the peculiar facts of the case for the reason that in the garb of these two reliefs, the petitioner cannot be permitted to run the Petrol Pump claiming that he is the sole proprietor thereof especially in view of the fact that the status of the Petrol Pump is also subject matter of the arbitration proceedings. Though writ petition filed by respondent No.2 was not held maintainable but at no point of time, direction ever came to be issued by writ court to respondent No.1 not to supply the petroleum products to respondent No.2, rather writ court stated categorically that same is to be guided by agreements inter se parties and this issue is pending before learned Arbitrator.

29. Respondent No.1 in its short reply has stated categorically that retail outlet M/s Jai Hind Filling Station Kumarhatti is high selling one with sales more than 400 KL situate on Chandigarh Shimla Highway at Dharampur and any action resulting in closure of retail outlet shall be detrimental to image of corporation and shall cause loss of sale to corporation and to public. After disposal of Arbitration Case No. 59 of **2014**, petitioner filed Arb. Appeal No. 7 of 2014, wherein this court after finding that retail outlet was being run by respondent No.2 directed respondent No.2 to maintain record and get it duly verified from a Chartered Accountant. Aforesaid order was passed 7 years back and till date, no complaint ever came to be made by petitioner that records are not being maintained by respondent No.2 in terms of order dated 26.11.2014 in Arb. Appeal No. 7 of 2014. Since, the petitioner did not make

any application for modification of order nor pointed out discrepancy if any on the part of respondent No.2 in maintaining record coupled with the fact that the dispute inter se parties is already pending adjudication before learned Arbitrator, there appears to be no justification for this Court to intervene at this stage, to grant interim relief, while exercising power under S.9 of the Act.

30. In such like situation, party can approach arbitral tribunal under application under S. 17 of the Act, praying therein for interim measures. However, order if any on S. 9 would only operate during operation of arbitral tribunal and its being functional.

31. In this regard reliance is placed upon judgment of High Court of Delhi in **Hero Wind Energy Private Ltd.** V. **Inox Renewables Limited and Another**, reported in 2020 SCC Online Del 720 (para 27 to 32)

> "27. Per Section 7 of the Arbitration Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The identical arbitration clause in all the agreements between the parties to the present proceedings, as set out hereinabove, provides for "any dispute, controversy, disagreement or disputed claim arising out of, in connection with or under this Agreement or the breach, termination, interpretation or invalidity thereof or in relation to any matter contained in or relating to this Agreement raised by any Party" to be "referred to arbitration". The parties thus agreed to submit to arbitration, all disputes which may arise. Supreme Court, in Dolphin Drilling Ltd. Vs. Oil & Natural Gas Corporation Ltd. (2010) 3 SCC 267 held that the words "all disputes" in arbitration clause can only mean "all disputes that may be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other"; it cannot be held that once the arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that might arise in future. We may add, that depending on nature of the agreement or obligations to be performed thereunder, it is not necessary that all disputes between parties arise at one point of time. This Court in National Highways Authority of India Vs. ITD Cementation India Ltd. 197 (2013) DLT 650 held that in large scale projects, it is not unheard that different facets of the project constitute subject matter of separate references and in the context of large scale

works contracts, there cannot be any rigid application of the principles of Order II Rule 2 of the CPC unless it is demonstrated that prejudice has been caused to either party as a result of such non-adherence. We may further add that even if commencement of arbitration with respect to disputes which have arisen, can await culmination of full performance of the agreement, to commence arbitration at one time only, also with respect to other dispute which may arise, the claim earliest arising may by then become barred by time. Order II Rule 2 of the CPC also envisages successive causes of action.

28. Section 11(2) of the Act grants freedom to the parties to agree on a procedure for appointing the arbitrator. The arbitration clause in all the agreements provides for "An arbitration tribunal to be formed..... which shall consist of 3 (three) arbitrators. Each party shall have the right to appoint 1 (one) arbitrator each. The appointed arbitrators shall appoint the 3rd (third) neutral arbitrator who will preside over the arbitration tribunal." Hero and Inox, under the freedom conferred on them vide Section 11(2) of the Act, agreed on a procedure of appointing the arbitrators, with Hero on the one hand and Inox Group of Companies on the other hand appointing one arbitrator each and the two appointed arbitrators appointing the third arbitrator.

29. Section 21 of the Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. There is no agreement to the contrary in the arbitration clause in the present case. It is on record that Hero, vide communication dated 28th February, 2018 invoked arbitration, of disputes which had then arisen between the parties and pursuant whereto the Arbitral Tribunal was constituted. 30. The use in Section 21 of the Act, while defining the date of "commencement of arbitral proceedings", of the words "arbitral proceedings in respect of a particular dispute", is clearly indicative of the Act envisaging a separate Arbitral Tribunal with respect to successive disputes which may arise between the same parties out of the same agreement or set of agreements. All these provisions show that there can be multiple claims and multiple references at multiple stages. This Court in Messrs Krishna Construction Company Vs. Engineer Member, D.D.A. 2005 (122) DLT 54, relying upon Purser & Co. Vs. Jackson (1977) Q.B. 166 held that in arbitration proceeding, it is the terms of reference of the arbitration which determine the issue which the Arbitrator has to decide; accordingly, if a particular issue is included in the terms of reference, parties would be estopped by the

doctrine of res judicata from raising that issue in subsequent arbitration proceedings even though the Arbitrator had made no award in relation to that issue. The senior counsels for the appellant are also correct in contending that this becomes further evident from Section 29A read with Section 23 of the Arbitration Act prescribing a period of six months, from the date the Arbitrator or all the Arbitrators have received notice of appointment, for completion of pleadings and period of 12 months therefrom for making the arbitral award.

31. That brings us to Section 9 of the Act. Sub-Section (1) thereof entitles a party to apply to Court for interim measures "before or during arbitral proceedings....." The reference to arbitral proceedings, as aforesaid, has to be to the arbitral proceedings for adjudication of a "particular dispute". The particular dispute which has now arisen between Hero and Inox is of right of Hero to use shared infrastructure and which dispute has arisen, as aforesaid, after termination of the O&M Agreement and failure to mutually agree on O&M charges for shared services. The arbitral proceedings with respect thereto will commence on the date when request for this dispute to be referred to arbitration is made by either party on other. There is no request by either of the parties to the other for arbitration of the disputes which have arisen from termination by Hero of the O&M Agreement and failure of the parties to arrive at a mutually acceptable rate payable by Hero for O&M charges for shared infrastructure for shared services. So the arbitral proceedings with respect to this dispute have not commenced.

32. In our opinion, the words 'Arbitral Tribunal' in Section 9(3) of the Act have to take colour from all the said provisions and thus have to be interpreted as Arbitral Tribunal constituted to adjudicate the disputes which have arisen and been referred to arbitration and with respect whereto Arbitrators have been appointed and notified of their appointment. Much prior to the incorporation of Sub-Section (3) in Section 9, Supreme Court in Firm Ashok Traders Vs. Gurumukh Das Saluja (2004) 3 SCC 155 held, that under the 1996 Arbitration Act, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures; the need for Section 9 of the Act, inspite of Section 17 having been enacted, is that Section 17 of the Act would operate only during the existence of the Arbitral Tribunal and its being functional; during that period, the power conferred on the Arbitral Tribunal under Section 17 of the Act and the power conferred on the Court under Section 9 of the Court may overlap to some extent but so far as the period pre and

> post the arbitral proceedings is concerned, the party requiring an interim measure shall have to approach only the Court. Seen in this light, the Arbitral Tribunal constituted with reference to the disputes which had earlier arisen, even though from the same agreement, cannot be the Arbitral Tribunal within the meaning of Section 9(3) of the Act even if were to be of the same composition. Section 9(3) of the Act does away with the jurisdiction of the Court with respect to interim measures also, once the Arbitral Tribunal is constituted. However, if a separate Arbitral Tribunal even if of same composition is to be constituted for disputes arising out of successive causes of action, Arbitral Tribunal constituted for adjudication of disputes arisen from a earlier cause of action cannot be the Arbitral Tribunal constituted for the disputes arising from a subsequent cause of action and qua which interim measures are sought."

32. Bare perusal of law taken into consideration reveals that all disputes that may be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other"; it cannot be held that once the arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that might arise in future.

33. Since in the case at hand, dispute if any in terms of Dealership Agreement was already in existence at the time of filing of the application by petitioner for appointment of an Arbitrator in terms of Clause 17 of the Partnership Deed and such fact was duly mentioned in the application by the petitioner as has been take note herein above, it is not open for the petitioner to claim at this stage that since independent dispute has arisen on account of refusal on the part of respondent No.1 to not make supply of petroleum products in the name of dealership firm M/s Jai Hind Filling Station, it is entitled to invoke separate arbitration proceedings under Clause 62(a) of the Dealership Agreement, dated 26.4.2013, especially when Tripartite Dealership Agreement dated 26.4.2013 was also made basis alongwith Partnership Deed dated 25.4.2013 by the petitioner while seeking appointment of an Arbitrator in terms of Clause 17 of the Partnership Deed, which prayer of hers was duly accepted and learned Arbitrator was appointed.

34. Consequently, in view of detailed discussion made herein above and law taken note of, this court finds no merit in the present petition and the same is dismissed. Interim directions dated 23.6.2022 and 15.7.2022 are vacated. Liberty is reserved to the petitioner to make prayer for interim relief by way of filing application under S. 17 of the Act before learned Arbitrator, who would consider the same in accordance with law, within a period of two weeks, from the date of its filing.

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

Between:-

KEDIYA RAM GANDHAR SON OF SH. MOGI RAM,
VILLAGE KANTI MASHWA, SUB TEHSIL KAMRAOO,
DISTRICT SIRMOUR, H.P.

PETITIONER

(BY MR. ASHOK K. TYAGI, ADVOCATE)

AND

PARAMJEET VERMA SON OF SH. PREM PAL VERMA, RESIDENT OF H. NO. 181,WARD NO. 8, NEAR BUS STAND PAONTA SHAIB,
DISTRICT SIRMOUR, H.P.

RESPONDENT

(BY MR. JEEVAN KUMAR, ADVOCATE)

CR. REVISION
NO. 58 OF 2019
DECIDED ON: 08.08.2022

Code of Criminal Procedure, 1973- Section 397 - **Negotiable Instruments Act, 1881** - Section 138 - Insufficiency of funds – Accused was convicted and sentenced by Trial Court – Appeal Filed - Dismissed by the Additional Sessions Judge – Upheld conviction under Section 138 of Negotiable Instruments Act, 1881- Petition filed in High Court - **Held** - Accused ordered to deposit compensation- Partially complied - Given two weeks to deposit remaining amount - Failed to comply - Accused failed to provide a probable defense against the presumption under Sections 118 and 139 of the Act - conviction upheld-Petition dismissed. (Para 7,8,18)

Cases referred:

M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);
Rohitbhai Jivanlal Patel v. State of Gujarat, (2019) 18 SCC 106;

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

O R D E R

Instant criminal revision petition filed under S. 397 CrPC, lays challenge to judgment dated 8.1.2019 passed by learned Additional Sessions Judge, Sirmaur at Nahan, Himachal Pradesh camp at Paonta Sahib, District Sirmaur, Himachal Pradesh, in Cr. Appeal No.75-N/10 of 2017, affirming judgment of conviction and order of sentence dated 11.9.2017, passed by learned Judicial Magistrate First Class, Court No.2, Paonta Sahib, District Sirmaur, Himachal Pradesh in Cr. Case No. 109/3 of 2012, whereby learned trial Court, while holding petitioner-accused (hereinafter, 'accused') guilty of having committed offence punishable under S.138 of the Negotiable Instruments Act (hereinafter, 'Act') convicted and sentenced him to under rigorous imprisonment for one year and pay a compensation to the tune of Rs. 1.00 Lakh to the respondent-complainant (hereinafter, 'complainant').

2. Precisely, the facts of the case, as emerge from the record, are that the complainant instituted proceedings under S.138 of the Act in the court of learned Judicial Magistrate First Class, Court No.2, Paonta Sahib, alleging therein that on 29.3.2012, he lent a sum of Rs. 50,000/- to the accused on his request, who with a view to discharge his liability, issued cheque bearing No. 024027 dated 2.4.2012, for a sum of Rs. 50,000/-, drawn on State Bank of India, Branch Rajban. However, the fact remains that the aforesaid cheque on its presentation was dishonoured on account of insufficient funds in the account of the accused. Since despite receipt of legal notice, accused failed to make the payment of cheque amount within the stipulated time, complainant instituted proceedings under S. 138 of the Act in the competent court of law, which, after hearing the parties and appreciating the evidence led on record, held accused guilty of having committed offence punishable under S. 138 of the Act, and accordingly convicted and sentenced as per description given above.

3. Being aggrieved and dissatisfied with judgment of conviction and order of sentence passed by learned trial Court, accused preferred an appeal before

learned Additional Sessions Judge Sirmaur camp at Paonta Sahib, which was dismissed vide judgment dated 8.1.2019, as consequence of which, judgment of conviction and order of sentence passed by learned trial Court, came to he upheld.. In the aforesaid background, accused has approached this court in the instant proceedings, praying therein for his acquittal, after setting aside judgments of conviction and order of sentence.

4. Vide order dated 4.2.2019, this court suspended substantive sentence imposed by learned trial Court upon the accused subject to petitioner's depositing entire amount of compensation and furnishing personal bonds in the sum of Rs.20,000/- within six weeks. However, aforesaid order never came to be complied with. Only a sum of Rs. 50,000/- came to be deposited on behalf of the accused.

5. On 18.7.2022, this court granted last opportunity of two weeks to the petitioner to make payment of the balance amount, but the fact remains neither he came present in the court nor deposited the balance amount. Learned counsel for the petitioner states that since despite repeated opportunities, petitioner is not coming forward to deposit remaining amount, this court may dispose of the present petition on merit.

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

7. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the judgments of conviction and order of sentence impugned in the petition at hand, this court finds no force in the submission of learned counsel for the accused that the learned courts below have failed to appreciate the evidence in its right perspective, as a consequence of which findings contrary to record have come to the fore. Material available on record reveals that neither issuance of cheque nor signatures thereupon have been denied by the accused, rather he set up a case that the cheque was issued as a security because the complainant helped

him in getting the loan sanctioned. However, no probable defence ever came to be led on record by the accused to prove aforesaid defence taken by him. Needless to say, there is a presumption in favour of holder of cheque that the same was issued with a view to discharge lawful liability. No doubt aforesaid presumption is rebuttable but for that purpose, person taking such defence is required to raise probable defence either by leading positive evidence in this behalf or by referring to documents led on record by complainant. In the case at hand, save and except one defence set up by accused that he issued security cheque, no cogent and convincing evidence ever came to be led on record by him. Accused set up a case that he had agreed to pay Rs. 1,000/- to the complainant for his having rendered assistance to secure loan from the Bank and had issued one signed blank cheque, which was to be filled up and used by the complainant, in case, sum of Rs. 1,000/- agreed to be paid by him was not paid. Accused set up a case that though Rs. 1,000/- was paid to complainant, but yet he misused the cheque.

8. Aforesaid defence set up by the accused is highly improbable especially when no evidence ever came to be led on record with regard to application, if any made by accused to the bank concerned for advancement of loan and thereafter sanction order if any issued.

9. Once there is no denial of issuance of cheque and signatures thereupon, presumption as available under Ss.118 and 139 comes into play. Section 118 and 139 of the Act clearly provide that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability. True, it is that to rebut aforesaid presumption accused can always raise probable defence either by leading some positive evidence or by referring to the material, if any adduced on record by the complainant.

10. Reliance in this regard is placed upon judgment rendered by Hon'ble Apex Court in **Rohitbhai Jivanlal Patel** v. **State of Gujarat**, (2019) 18 SCC 106, wherein, it has been held as under:

> "18. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.
>
> 19. In order to discharge his burden, the accused put forward the defence that in fact, he had had the monetary transaction with the said Shri Jagdishbhai and not with the complainant. In view of such a plea of the accused-appellant, the question for consideration is as to whether the accused-appellant has shown a reasonable probability of existence of any transaction with Shri Jagdishbhai? In this regard, significant it is to notice that apart from making certain suggestions in the cross-examination, the accused- appellant has not adduced any documentary evidence to satisfy even primarily that there had been some monetary transaction of himself with Shri Jagdishbhai. Of course, one of the allegations of the appellant is that the said stamp paper was given to Shri Jagdishbhai and another factor relied upon is that Shri Jagdishbhai had signed on the stamp paper in question and not the complainant.
>
> 19.1 We have examined the statement of Shri Jagdishbhai as also the said writing on stamp papers and are unable to find any substance in the suggestions made on behalf of the accused-appellant.

19.2 The said witness Shri Jagdishbhai, while pointing out his acquaintance and friendship with the appellant as also with the respondent, asserted in his examination-in-chief, inter alia, as under:
"Accused when he comes to our shop where the complainant in the matter Shashimohan also be present that in both the complainant and accused being our friends, were made acquaintance with each other. The accused had necessity of money in his business, in my presence, had demanded Rs.22,50,000/- (Rupees twenty two lacs fifty thousandly) on temporary basis. And thereafter, the complainant from his family members by taking in piecemeal had given to the accused in my presence. Thereafter, on demanding the money by the complainant, the accused had given seven (7) cheques to the complainant in our presence but such cheques being washed out in rainy water and on informing me by the complainant I had informed to the accused. Thereafter, Rohitbhai had given other seven (7) cheques to the complainant in my presence and the deed was executed on Rs. 100/- stamp paper in there is my signature."

19.3 This witness was cross-examined on various aspects as regards the particulars in the writing on the stamp paper and the date and time of the transactions. In regard to the defence as put in the cross-examination, the witness stated as under:

> "I have got shop in National Plaza but in rain no water logging has taken place. It is not true that there had been no financial dealings between me and the accused today. It is not true that I had given rupees ten lacs to the accused Rohitbhai on temporary basis. It is not true that for the amount given to the accused, I had taken seven blank duly cheques also blank stamp paper without signature. It is not true that there was quarrel between me and the accused in the matter of payment of interest. It is not true that even after the payment of Rs. ten lacs and the huge amount of the interest in the matter of interest quarrel was made. It is not true that due to the reason of quarrel with the accused, in the cheques of the accused lying with me by making obstinate writing has filed the false complaint through Shashimohan Goyanka. It is not true that no financial dealings have taken place between the complainant and the accused.

> therefore I also the complainant both at the time of evidence the accused at what place, on what date at what time, the amount taken has not been able to make clearly. (sic) It is not true that the blank stamp paper duly signed were lying in which obstinate writing has been made therefore the same has not been registered through sub registrar. It is not true that the dealings have been made between me and accused therefore there is my signature and the signature of the accused and the complainant has not signed. It is not true that any types of dealings between the accused and the complainant having not been done in my presence therefore in my statement no clarification has been given. It is not true that the accused in my presence as mentioned in the complaint any cheque has not been given. It is not true that I in collusion with the complainant to usurp the false amount the false complaint has been filed through Shashimohan Goyanka. It is not true that in support of the complaint of Shashimohan Goyanka is giving false statement."

19.4 The statement of Shri Jagdishbhai does not make out any case in favour of the accused-appellant. It is difficult to say that by merely putting the suggestion about the alleged dealing to Shri Jagdishbhai, the accused- appellant has been able to discharge his burden of bringing on record such material which could tilt the preponderance of probabilities in his favour.

19.5 The acknowledgement on the stamp paper as executed by the appellant on 21.03.2007 had been marked with different exhibit numbers in these 7 cases. In Complaint Case No. 46499 of 2008, the same is marked as Ex. 54 and reads as under :

> "Today the executor I Rohit Patel Ranchhodray Masala is a partner. Due to the financial difficulties having been arised, I have taken Rs.22,500,000/- (Rupees twenty two thousand fifty thousand only- sic) from my group which are to be paid to Shashimohan Goyanka.

With reference to that today I have given seven (7) cheques of Corporation Bank, Alkapuri Branch bearing No. 763346 to 762252 amounting to Rs. 22,50,000/- (Rupees twenty two lacs fifty thousand

only) Dates : (1) 01/4/08, (2) 01/05/08 (3) 01/07/08, (4) 01/08/08 (5) 01/10/08 (6) 01/11/08 (7) 01/12/08 the account of which is 40007. Earliest these cheques were given but due to rainy water logging the said cheques having been washed out (7) cheques have again been given which is acceptable to me."

19.6 The fact of the matter remains that the appellant could not deny his signatures on the said writing but attempted to suggest that his signatures were available on the blank stamp paper with Shri Jagdishbhai. This suggestion is too remote and too uncertain to be accepted. No cogent reason is available for the appellant signing a blank stamp paper. It is also indisputable that the cheques as mentioned therein with all the relevant particulars like cheque numbers, name of Bank and account number are of the same cheques which form the subject matter of these complaint cases. The said document bears the date 21.03.2007 and the cheques were post- dated, starting from 01.04.2008 and ending at 01.12.2008. There appears absolutely no reason to discard this writing from consideration.

19.7 One of the factors highlighted on behalf of the appellant is that the said writing does not bear the signature of the complainant but and instead, it bears the signatures of said Shri Jagdishbhai. We find nothing unusual or objectionable if the said writing does not bear the signatures of the complainant. The said writing is not in the nature of any bi partite agreement to be signed by the parties thereto. It had been a writing in the nature of acknowledgement by the accused-appellant about existence of a debt; about his liability to repay the same to the complainant; about his having issued seven post-dated cheques; about the particulars of such cheques; and about the fact that the cheques given earlier had washed away in the rain water logging. Obviously, this writing, to be worth its evidentially value, had to bear the signatures of the accused, which it does. It is not unusual to have a witness to such a document so as to add to its authenticity; and, in the given status and relationship of the parties, Shri Jagdishbhai would have been the best witness for the purpose. His signatures on this document, therefore, occur as being the witness thereto. This document cannot be ruled out of consideration and existing this writing, the preponderance of probabilities lean heavily against the accused-appellant.

11. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR(Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the Negotiable Instruments Act, regarding commission of the offence comes into play. It would be profitable to reproduce relevant paras No.23 to 25 of the judgment herein:-

2. "23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

3. 24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If

however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

4. 25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy."

12. Complainant with a view to prove his case, deposed as CW-4 and tendered his affidavit in evidence, Ext. CW-4/A. He successfully proved cheque Ext. CW-2/B, Return Memo, Mark-A, legal notice, Ext. CW-4/B, which bears his signatures in red circle 'A' and 'B', postal receipt mark-A, acknowledge mark B and receipt Mark C. In his, cross-examination this witness deposed that he is an Accountant and he came in contact of accused in the year 2011 in connection with PMRY loan. He further deposed that the accused charged Rs.1,000/- for his loan case as he was agent of Bank. He stated that the loan was rejected in the year 2011, as a consequence of which his relations with the accused became strained. He denied that on account of strained relations, he had threatened to implicate the accused in false case.

Complainant admitted that he has no money lending licence. He stated that he withdrew Rs.25,000/- from ATM and remaining amount of Rs.25,000/- was in cash with him. Complainant stated that the receipt Mark C is dated 29.3.2012. C. He further deposed that it was handwriting of accused and writing 'A' and 'B' are of different pen. This witness denied that he obtained signatures of the accused on blank papers or that the signatures on Mark C are not of the accused. He also denied that the notice was not properly served upon the accused. He specifically denied that he obtained blank cheque in lieu of Rs.1000/-, while preparing his PMRY loan. He denied that he filled cheque himself. He further denied that the accused did not borrow Rs.50,000/- from him.

13. Close scrutiny of the evidence led on record by respective parties, suggests that the accused has admitted the factum with regard to issuance of cheque Exhibit CW-2/B but claimed that it was issued as a security cheque to the complainant to keep promise of providing PMRY loan and it was not issued towards any legally enforceable liability. However, such claim of the accused is totally contrary to the record available on record, especially the receipt Ext. CW-5/A, wherein he admitted factum with regard to borrowing of Rs.50,000 from the complainant. Ext. CW-5/A bears signatures of the accused which resemble the signatures of the accused on Ext. CW-2/B.

14. CW-5 Shakeel Ahmad categorically proved the factum with regard to execution of receipt Ext. CW-5/A, by depositing that the accused borrowed Rs. 50,000/- from the complainant and in lieu thereof, the accused issued cheque, Ext CW-2/B.

15. Contention of learned counsel for the accused that the cheque was a security cheque, stands falsified from the statement of complainant, wherein he stated that the loan was rejected in 2011, whereas, cheque was issued in 2012 and Ext. CW-5/A is in the handwriting of the accused, as such, it can be safely concluded that accused borrowed Rs. 50,000 from complainant

otherwise there was no occasion to sign receipt Ext. CW-5/A and to issue cheque Ext. CW-2/B.

16. Since there is no denial on behalf of accused with regard to issuance of cheque and signatures thereupon, plea taken by him with regard to issuance of blank security cheque is of no relevance. Burden is always on the drawer of the cheque to establish that the date, amount and the payee's name are written by somebody else, without the knowledge and consent of the drawer. There is presumption in favour of the holder of the cheque that the cheque was issued in discharge of legally enforceable liability/debt.

17. Having scanned the entire material available on record, this court finds that the complainant proved on record that he lent Rs. 50,000/- to the accused, who with a view to discharge his liability, issued cheque, Ext. CW-2/B but the same was dishonoured on its presentation, as such, complainant had no option but to institute proceedings under S. 138 of Act. If the evidence, be it ocular or documentary adduced on record by complainant is perused, it can be safely concluded that the complainant has proved all the basic ingredients as required to be proved to bring the case within the ambit of S. 138 of the Act.

18. Consequently in view of this above, this court finds no merit in the case and same is dismissed. Judgments of conviction and order of sentence passed by learned Courts below are upheld. Accused is directed to surrender forthwith to undergo sentence, if not already served. Sum of Rs. 50,000/- lying deposited in Registry of this Court is ordered to be released in favour of complainant if not already released, by remitting the same in his savings bank account, details whereof shall be furnished by learned counsel for the respondent within one week..

19. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Between:-

STATE OF HIMACHAL PRADESH

PETITIONER

(BY MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL)

AND

1. SH. SHIV LAL SHARMA S/O LATE SH. CHANDER MANI SHARMA, EX. PRESIDENT H.P. STATE CO-OPERATIVE BANK, THE MALL, SHIMLA (DELETED)
2. SH. R.L. SHARMA S/O SH. PHOLO RAM SHARMA (RETD. G.M.) H.P. STAET CO-OPERATIVE BANK SHIMLA R/O LADYANI P.S. BHARARI, TEH. GHUMARWIN, DISTT. BILASPUR, H.P.
3. SMT. JYOTI KHANNA W/O SH. ARBIDN KHANNA R/O 5/11 ROOP NAGAR NEW DELHI PARTNER OF M/S DEEPAK VENEET & COMPANY C-69, NSM AZADPUR DELHI.
4. SMT. ANITA KHANNA W/O SH. BHARAT BHUSHAN KHANNA R/O 5/11 ROOP NAGAR, NEW DELHI PARTNER OF M/S DEEPAK VENEET & COMPANY, C-69, NSM AZADPUR, DELHI.
5. SH. DEEPAK KHANNA S/O SH. BHARAT BHUSHAN KHANNA R/O 5/11 ROOP NAGAR, NEW DELHI PARTNER FO M/S DEEPAK VENEET & COMPANY, C-69 NSM AZADPUR DELHI.
6. SH. JAWALA DASS S/O SH. UMA SARAN R/O HOUSE NO. 7 CHINAR APARTMENT SEC-9 ROHANI DELHI PARTENER RATTAN MEHTA FRUIT AGENCY D-424 NSM AZADPUR DELHI.
7. SH. KEWAL KOCHHAR S/O SH. JAI RAM SHAH R/O A-329 NEW SABJI MANDI, AZADPUR OWNER HARI CHAND JAI RAM SHARMA FIRM DELHI
8. SH. GURJEET SINGH S/O SH. BHAG SINGH R/O D-424 NEW SABJI MANDI, AZADPUR DELHI, PARTENER RATTAN MEHTA FRUIT AGENCY D-424 NSM AZADPUR DELHI. (DEAD)
9. SH. SURESH KUMAR GAGAL S/O SH. BASANT LAL R/O A.G. HIM KUNJ SEC-14 ROHINI NEW DELHI PARNER M/S SUPER APPLE GROVER ASSOCITION N.S.M. AZADPUR DELHI
10. SH. GANGESH KUMAR S/O SH. JAI KUMAR R/O S.D. 43 PRITAMPURA DELHI PARTENER OF M/S SUPER APPLE GROVER ASSOCIATION N.S.M. AZADPUR DELHI
11. SH. ANIL KUMAR S/O SH. HARI CHAND R/O U.U. 9 PRITAMPURA NEW DELHI PARTNER OF M/S SUPER APPLE GROVER ASSSOCIATION N.S.M. AZADPUR DELHI

12. KAMAL MOHINI ANAND W/O SH. MADAN LAL ANAND HOUSE NO. 34/44 PANJABI BAG WEST DELHI
13. SH. RAM LAL DHAL S/O SH. KESAR DASS DHAL R/O B-1/22 NEW MOTI NAGAR PS MOTI NAGAR DELHI PROP. M/S SIPRA UNLOADING CORECT ACCOUNT NSM AZADPUR DELHI
14. KISHORE KUMAR S/O LATE SH. THAKUR DASS R/O ES-88A SHILLIMAR BAG, DELHI C/O JASHAN SONS'S C-125, NEW SABJI MANDI, AZADPUR DELHI (DEAD)
15. SH. SATISH KUMAR MALHOTRA S/O SH. SITA RAM MALHOTRA R/O D-13, A/18 MODEL TOWN NEW DELHI-9 PROP. M/S SATISH KUAMR MALHOTRA B-84 NSM AZADPUR DELHI
16. KANWAR PREM SINGH S/O SH. KESHAV RAM R/O SAI TEHSIL THEOG, DISTT. SHIMLA PROP. M/S KANWAR PREM SINGH R/O D-37 LORD KRISHANA FOOD ADARSH NAGAR DELHI.
17. SH. DEEPAK ARORA S/O SH. HARI CHAND R/O U.U. 9 PRITAMPURA DELHI PARTENER OF M/S SUPER APPLE GROVER ASSOCAITON N.S.M AZADPUR DELHI.
18. PARMIL KUMAR SHARMA S/O LATE SH. CHANDERMANI SHARMA YOUNER BROTHER OF SH. SHIV LAL SHARMA ACCUSED NO.1 R/O VILLAGE KUTHER P.O. CHAIL CHOWK P.S. GOHAR DISTT. MANDI, H.P.
19. DAVINDER KUMAR DOGRA S/O SH. BALAK RAM DOGRA, ACCOUNTANT, HP STATE CO-OPERATIVE BANK LTD. BRANCH DELHI.
20. HARISH KUMAR S/O SH. KANHIYA LAL R/O D-14-A-19 MODEL TOWN, DELHI BROTHER OF ACCUSED NO.5
21. SHIV KUMAR S/O SH. KANHYA LAL, RPOP. M/S KUMAR WATCH CO. C-45, NSM AZADPUR DELHI R/O C-206 GALI NO. 8, MAJLISH PARK, ADRASH NAGAR DELHI.
22. MANJU LOHANA W/O SH. JAI KUMAR PARNTER M/S JASHAN SON'S R/O D-14 A/19 MODEL TOWN DELHI-9
23. HARISH KUMAR S/O SH. KANHYA LAL R/O D-14 A/19 MODEL TOWN, DELHI
24. GIRDHAR LOHANA S/O SH. KANHYA LAL, PARTNER M/S JASHAN SON'S COMMISSION AGENT C-45, NSM AZADPUR, DELHI
25. JAI KISHAN S/O SH. KANHYA LAL R/O A-26 BADHWA NIWAS-3, DELHI, S.S. ROAD ADRASH NAGAR DELHI-33, PROP. M/S JASHAN SON'S COMMISSION AGENT C-45 NSM AZADPUR, DELHI.
26. MADAN LAL ANAND S/O BELE RAM ANAND, R/O HOUSE NO. 34/44 PUNJABI BAG, WEST DELHI, B-218, NSM AZADPUR, DELHI, PROP. M/S MADAN LAL AJAY KUMAR.
27. GULSHAN KUMAR ANAND S/O SH. MADAN LAL ANAND R/O HOUSE NO. 34/44 PUNJABI BAG, DELHI, PROP. M/S GULSHAN KUMAR & BROS. B-837 NSM AZADPUR DELHI

28. SH. SANJAY ANAND S/O SH. MADAN LAL ANAND R/O HOUSE NO. 34/44 PUNJABI BAG, DELHI, PARTNER FIRM MADAN LAL & SONS'S ACCUSED NO. 15. (DIED)
29. SMT. RAJNI ANAND W/O SH. GULSHAN KUMAR ANAD R/O HOUSE NO. 34/44 PUNJABI BAG, DELHI-26 & B-218 NSM, NEW DELHI D/O IN LAW OF ACCUSED NO. 15
30. ANUP SINGH S/O CHANEN SINGH CAST RANGARIA SIKH VILLAGE SATAUR, TEHSIL SADAR HOSHIARPUR, DISTRICT HOSHIARPUR, PUNJAB, PRESENTLY H.N. 1213 SECTOR 21-B, CHANDIGARH.
31. SH. ANIL KAPOOR S/O SH. HARISH CHAND KAPOOR R/O FLAT NO. 72 SITAL APPARTMENT ROHINI SADAN NO. 14, PROP. M/S SHRI RAM PACKAGE C-45 NSM, AZADPUR DELHI AGENT OF ACCUSED JAI KRISHAN NO. 5
32. HIRA LAL S/O SH. KANHYA LAL, PATNER M/S JASHAN SON'S COMMISSION AGENTS C-45, NSM AZADPUR NEW DELHI, BROTHER ACCUSED NO.5, R/O D-14-A/19 MODAL TOWAN DELHI

ACCUSED/RESPONDENTS

(MR. V.S. CHAUHAN, SENIOR ADVOCATE
WITH MR. AJAY SINGH KASHYAP, ADVOCATE
FOR R-1.

MR. J.S. BHOGAL, SENIOR ADVOCATE WITH
MR. T.S. BHOGAL AND MS. SRISHTI VERMA, ADVOCATES
FOR R-3.

MR. B.S. CHAUHAN, SENIOR ADVOCATE WITH
MR. MUNISH DATWALIA, ADVOCATE
FOR R-4, 12, 21, 24, 26, 27 AND 29.

MS. AVNI KOCHHAR, ADVOCATE,
FOR R-5, 8 AND 14.

MR. NARINDER SHARMA, ADVOCATE
FOR R-15, 17, 20 AND 25.

MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MR. MANMOHAN KATOCH, ADVOCATE
FOR R-19.

CR. REVISION

NO. 117 OF 2011
DECIDED ON: 11.07.2022

Code of Criminal Procedure, 1973- Sections 181(4) , 397, 401- **Prevention of Corruption Act, 1988** - Sections 4(2), 13 – **Indian Penal Code, 1860** - S.120B, 109, 409, 420, 467, 409, 471A, 467, 201 read with S.120B and 109 - Territorial jurisdiction issue - Irregularities in loans, overdrafts, and CC limits sanctioned by the Himachal Pradesh State Cooperative Bank Limited, Azadpur New Sabji Mandi, Delhi - Fraudulent activities in loan disbursements - **Held**- Offence has been allegedly committed by the respondents at Delhi, where loans/CC Limits and overdraft limits were availed on the basis of forged documents and the amount so received by the respondents was to be accounted for at Delhi Branch of the Bank - Decision of lower courts were affirmed regarding the returning of challan for filing in Delhi - No evidence suggests jurisdiction in Shimla – Petition Dismissed. (Para 20)

Cases referred:

CBI v. Braj Bhushan Prasad, (2001) 9 SCC 432;

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

O R D E R

Being aggrieved and dissatisfied with order dated 9.2.2011 passed by learned Special Judge (Forests), Shimla, Himachal Pradesh in Case No. 4-5/7 of 98, titled Stte v. Shiv Lal and others, whereby challan having been filed by petitioner-State against respondents-accused under S.120B, 109, 409, 420, 467, 409, 471A, 467, 201 read with S.120B and 109 IPC and S. 13 of Prevention of Corruption Act, came to be returned on account of territorial jurisdiction, petitioner State has approached this court in the instant proceedings filed under Ss.397 and 401 IPC, praying therein to set aside impugned order dated 9.2.2011

2. Precisely, the facts of the case, as emerge from the record, are that Himachal Pradesh State Cooperative Bank Limited, Azadpur New Sabji Mandi, Delhi sanctioned loans, overdrafts and CC Limits to various persons and firms. Since certain irregularities were found to have been committed by bank

officials, while disbursing loans, overdrafts and CC Limits, to various firms, Himachal Pradesh State Co-operative Bank Limited Shimla, lodged an FIR at Police Station Enforcement, South Zone, Shimla. Police after having conducted investigation, presented Challan in the court of learned Special Judge (Forests) Shimla against the respondents-accused (hereinafter, 'accused') under the aforesaid provisions. During the pendency of the trial before learned court below at Shimla, one of the accused namely Parmil filed an application praying therein to return the Challan for presenting in the competent court of law at Delhi. Learned Special Judge (Forests), Shimla vide order dated 9.2.2011 allowed the aforesaid application and returned the Challan to the petitioner-State for being presented to the competent court of law, in accordance with law. In the aforesaid background, petitioner-State has approached this Court in the instant proceedings, praying therein to set aside the aforesaid order and direct learned Special Judge (Forests) to proceed with the case.

3. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the impugned order, this court finds that there is no dispute inter se parties that the Himachal Pradesh State Cooperative Bank Limited opened its branch at New Sabji Mandi, Azadpur, New Delhi. It is also not in dispute that the said branch sanctioned loans/ overdrafts/ CC Limits to various firms and persons, which were found to have been sanctioned in violation of the rules. After having found certain illegalities and irregularities allegedly committed by the bank officials, Head Office of the Bank at Shimla lodged FIR No. 53 of 1994 against the accused named in the FIR, who are respondents herein, alleging therein that they, in connivance with bank officials, obtained loans, CC Limits and facility of overdraft on the basis of forged documents. Police, after completion of investigation presented challan in the court of learned Special Judge (Forests), Shimla, Himachal Pradesh, which vide order dated 9.2.2011, returned the

Challan to the State for being presented to the competent court of law at Delhi.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General vehemently argued that since the head office of the Himachal Pradesh State Co-operative Bank Limited is situate at Shimla and necessary permission with regard to sanctioning of loans, overdrafts and CC Limits was given by the officers sitting in Head Office at Shimla, FIR in question rightly came to be lodged at Shimla. He further argued that since there is overwhelming evidence on record suggestive of the fact that loan amount and CC limits sanctioned from Branch at Delhi were issued with prior approval of authorities sitting at Shimla and as such, court at Shimla has jurisdiction to try the offences alleged to have been committed by the respondents. He further argued that weekly and monthly statements of transactions of Azadpur Branch used to be sent to the head office of the Bank at Shimla. He submitted that since part of cause of action has arisen at Shimla, court at Shimla has jurisdiction to try the case. While inviting attention of this court to provisions of S. 3 and 4 of the Prevention of Corruption Act, Mr. Bhatnagar, submitted that the present case can be tried at a place, where conspiracy was hatched. Lastly he invited attention of this Court to judgment dated 14.7.2008 passed by Co-ordinate Bench in Cr. Revision No.1 of 2007 alongwith 2 and 3 of 2007 titled State of HP v. Amar Dutt and another to demonstrate that in similar facts and circumstances, court at Shimla was held to have jurisdiction and competence to try the criminal case lodged against the accused named in the FIR in that case.

5. Mr. J.S. Bhogal, Mr. B.S. Chauhan and Mr. V.S. Chauhan, learned Senior Advocates duly assisted by Mr. Ajay Kochhar and other advocates, appearing for the respondents, while supporting the impugned order passed by learned court below submitted that since no cogent and convincing evidence ever came to be placed on record that the officials sitting in head

office at Shimla hatched criminal conspiracy and the loans/CC Limit and overdraft were issued at their instructions, no offence, if any, punishable under aforesaid provisions can be said to have been committed by the respondents within the territorial jurisdiction of the courts at Shimla. While making this court peruse provisions of S. 181(4) CrPC, learned counsel for the respondents vehemently argued that a person can be tried for alleged commission of offence in the court within whose jurisdiction, he /she allegedly committed the main offence. Learned counsel for the respondents argued that since there is no dispute that the loans/CC Limit and overdrafts were issued by the officials of Himachal Pradesh State Co-operative Bank Limited Branch situate at Delhi, fraud if any committed by the officials and other accused named in the FIR, while granting loans/ CC Limit and overdrafts at Delhi cannot be tried at Shimla and no illegality can be said to have been committed by learned Special Judge (Forests), Shimla, while returning the Challan to be presented in the competent court of law..

6. Before ascertaining the genuineness and correctness of the rival submissions having been made by learned counsel for the parties vis-à-vis reasoning assigned in the order impugned in the instant proceedings, this court deems it fit to take note of S. 181(4) CrPC and Sections 4 (2) of the Prevention of Corruption Act.

7. Bare perusal of S. 181 (4) CrPC clearly reveals that any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

8. In the case at hand, it is not in dispute that the loans, CC Limits and overdraft facilities were issued in favour of respondents/accused by the officials of Himachal Pradesh State Co-operative Bank Limited at Delhi and

amount advanced in terms of aforesaid facilities was to be returned to branch at Delhi and not at Shimla. It is not the case of the prosecution that the orders granting loans and issuing CC Limits were passed by authorities at Head Office Shimla, rather prayer to advance loan and issue CC Limit was allegedly made by accused to the Branch Manager, Himachal Pradesh State Co-operative Bank Limited, Azadpur New Delhi. Since subsequently loans, Cc limits and overdraft facilities were alleged to have been found issued in violation of rules and on the strength of forged documents, case if any, under aforesaid provisions could be filed before competent court of law at Delhi, under whose jurisdiction, branch of Himachal Pradesh State Co-operative Bank Limited Azadpur fell.

9. S. 4(2) of Prevention of Corruption Act clearly speaks that every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

10. Since in the case at hand, alleged offence has been committed within the jurisdiction of court at Delhi, it is not understood how case at Shimla could be registered against the accused named in the FIR.

11. Otherwise also, S.4(2)of Prevention of Corruption Act cannot override the provision of jurisdiction provided under the Code because, amongst four sections of aforesaid provision of the Prevention of Corruption Act only first and the last are tagged with non-obstante words, “notwithstanding anything contained in the Code of Criminal Procedure” and in case sub-section 2 is freed from non-obstante words, it would show that provisions of Code can as well be read with that sub-section.

12. Otherwise also provisions of Ss.178 to 180 CrPC, prescribe different courts having domain over different local area having concurrent jurisdiction to enquire into or try the offence and trial is permissible in any one of them.

13. Reading of S.4(2) of Prevention of Corruption Act shows that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences, meaning thereby that if the Prevention of Corruption Act has stipulated any place for trial of the offence under that Act, the provisions of the Code would stand displaced to that extent in regard to the place of trial. Moreover, when offence under S.3(1) of Prevention of Corruption Act is committed, the sole determinative factor for trial of the place is the place, where the offence was committed.

14. Reliance placed by learned Additional Advocate General on judgment dated 14.7.2008 passed by Co-ordinate Bench in Cr. Revision No. 1 of 2007 titled **State** v. **Amardutt and another** is wholly misplaced because bare perusal of judgment supra clearly reveals that normally the offence of criminal breach of trust should be tried by the court of area where it was committed. However, when it is not clear where the offence was committed, then court having jurisdiction over area, where accounting would be done, would also have the jurisdiction.

15. However, in the case at hand it is clear that offence was committed in the jurisdiction of court at Delhi and there is no material on record to suggest that accounting qua the loan disbursed in favour of accused named in FIR by Himachal Pradesh State Co-operative Bank Limited Azadpur is/was accountable at Shimla and hence, it cannot be said that some part of offence was committed at Shimla.

16. A Co-ordinate Bench of this court in case supra, having taken note of the fact that application for return of Challan on the ground of territorial jurisdiction was filed at fag end of trial rejected the prayer of applicant for return of Challan to be presented in the competent Court of law. In that case, attention of court was invited to S. 462(2) CrPC, which provides that no finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area.

17. Since in that case, trial had commenced and 26 prosecution witnesses stood examined, Co-ordinate Bench of this court did not accept prayer of applicant in that case for return of Challan to be filed in competent court of law.

18. Since in the case at hand, trial is yet to commence, provisions contained under S. 462 CrPC cannot be made applicable as has been prayed for by learned Additional Advocate General. In the instant case, charges are yet to be framed and as such, no prejudice if any would be caused to either of parties, in case, Challan as has been ordered to be returned is allowed to be presented to competent court of law at Delhi.

19. Otherwise also, Hon'ble Apex Court in **CBI** v. **Braj Bhushan Prasad**, (2001) 9 SCC 432 has held as under:

> "38. In this context it is useful to refer to Section 181 of the Code which falls within Chapter XIII, comprising of provisions regarding jurisdiction of the criminal courts in inquiries and trials. Section 181 pertains to place of trial in case of certain offences. Sub-section (4) thereof deals with the jurisdiction of the courts if the offence committed is either criminal misappropriation or criminal breach of trust. At least four different courts have been envisaged by the sub-section having jurisdiction for trial of the said offence and any one of which can be chosen. They are: (1) the court within whose local jurisdiction the offence was committed; (2) the court within whose local jurisdiction any

> part of the property which is the subject of the offence was received; (3) the court within whose local jurisdiction any part of the property which is the subject of the offence was retained; and (4) the court within whose local jurisdiction any part of the property which is subject of the offence was required to be returned or accounted for, by the accused."

20. In the case at hand, offence has been allegedly committed by the respondents at Delhi, where loans/CC Limits and overdraft limits were availed on the basis of forged documents and the amount so received by the respondents was to be accounted for at Delhi Branch of the Bank, as such, court at Delhi has the territorial jurisdiction to entertain the complaint and not the court at Shimla. Therefore, there is no illegality committed by the learned Court below, while returning the Challan to the petitioner for filing the same before competent Court of law at Delhi.

21. Consequently in view of above, this court finds no merit in the present petition and same is dismissed alongwith all pending applications.

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

Between:-

1. BHARTI SHARMA W/O LATE SHRI SURRENDER KUMAR,
AGE 48 YEARS

2. POOJA SHARMA, 19 YEARS
D/O LATE SHRI SURRENDER KUMAR,
BOTH RESIDENTS OF VPO MAWA KAHOLAN,
TEHSIL GHANARI, DISTRICT UNA, H.P.,

PETITIONERS/PLAINTIFFS

(BY MR. AJAY SHARMA, SENIOR ADVOCATE WITH
MR. ATHARV SHARMA, ADVOCATE)

AND

1. NARESH KUMAR S/O SHRI TIRATH RAM,

2. RAHUL SHARMA S/O SHRI VIJAY KUMAR
SON OF JASWANT RAI, BOTH RESIDENTS OF VPO MAWA KAHOLAN,
TEHSIL GHANARI, DISTRICT UNA, H.P.

RESPONDENTS/DEFENDANTS

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

CIVIL REVISION
NO. 143 OF 2022
DECIDED ON: 21.10.2022

Code of Civil Procedure, 1908 – Sections 115, 151- **Indian Evidence Act, 1872** – Section 65-Proving of Will through secondary evidence as the original was lost or misplaced **– Held -** Need for proper evidence to establish the loss of the original document before admitting secondary evidence - Petition allowed- Lower court's order was quashed and set aside – Case remanded back to the lower court for reconsideration in the light of the observations made in the petition. (Para 11, 15)

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

O R D E R

Instant civil revision petition filed under S.115 CPC lays challenge to order dated 4.8.2022 passed by learned senior sub judge, Court No. 1, Amb, District Una, Himachal Pradesh in Civil Suit No. 118-112-I-XVI(Annexure P-3), whereby an application having been fled by the respondents/defendants (hereinafter, 'defendants') under S. 65 of the Indian Evidence Act read with S.151 CPC, seeking therein permission to prove Will dated 29.5.2014, by leading secondary evidence, came to be allowed.

2. Precisely, the facts of the case as emerge from the record are that the petitioners/plaintiffs (hereinafter, 'plaintiffs') filed a suit for declaration that they are owner-in-possession qua share of deceased Surender Kumar in the property described in the plaint. Aforesaid plea came to be made on the basis that the suit property is joint Hindu family coparcenery ancestral property and alleged Will executed by late Surender Kumar is bad in law. Aforesaid suit filed by the plaintiffs came to be opposed on behalf of the defendants on the ground that they are owner-in-possession of the suit land on the basis of Will dated 29.5.2014, executed by late Surender Kumar in their favour. Defendants specifically denied the allegation that the Will sought to be relied upon by them is the result of coercion and fraud. During pendency of the suit and before conclusion of the evidence, defendant No. 2 filed an application under S. 65 of the Indian Evidence Act, seeking permission to lead secondary evidence with regard to registered Will dated 29.5.2014 (Annexure P-1). In the aforesaid application, defendants averred that though the plaintiffs have filed suit for declaration, claiming themselves to be owner of the suit property on the basis that the suit land is joint Hindu family coparcenery property under Mitakshara Hindu Law but the person, who is owner of joint Hindu family coparcenery ancestral property has already partitioned the suit land between the predecessor-in-interest of late Surender Kuamr, who bequeathed his share in favour of the defendants. Defendants also claimed in the application that they are exclusive

owner-in-possession of the property of late Surender Kumar on the basis of Will dated 27.5.2014, registered on 29.5.2014 vide *Wasika* No. 211. Defendants stated in the application that the main controversy in the matter is with regard to execution of Will dated 29.5.2014 by the deceased Surender Kumar, photocopy of certified copy whereof is already filed. It is stated by the defendants that as per law of evidence, its original is required. Defendants stated in the application that the original of the same was given by them to the Patwari Halka for entering mutation but now their counsel has informed that he has misplaced the original Will, as such, they be permitted to prove the execution of Will, photocopy whereof is already on record, by leading secondary evidence.

3. Aforesaid prayer made on behalf of the defendants came to be resisted by the plaintiffs, who in their reply denied the factum with regard to execution of Will, if any, by late Surender Kumar. They specifically denied the averment made on behalf of the defendants, that they had handed over the original of the Will to their counsel, but he lost the same.

4. Learned Court below, on the basis of pleadings adduced on record by respective parties, vide impugned order dated 4.8.2022, allowed the application, subject to payment of cost of Rs. 15,000/-. While accepting the prayer made on behalf of the defendants, court below observed in the order that merely granting prayer to lead secondary evidence regarding document does not mean that it is taken to be proved, rather, the same is required to be proved in accordance with law and no prejudice shall be caused to the opposite party, if application is allowed, as the plaintiffs would get chance to cross-examine the witness, who shall be produced to prove said Will. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings, praying therein to set aside order dated 4.8.2022.

5. Having heard learned counsel appearing for the parties and perused the material available on record vis-à-vis reasoning assigned in the impugned order, this court finds that in nutshell, grouse of the plaintiffs is that once the averment with regard to loss of original Will by the counsel of the defendants was specifically denied by way of reply to the application filed by the plaintiffs, learned Court below instead of deciding the application, merely on the

basis of averments contained in the application, ought to have framed issues, so that parties could lead evidence.

6. Mr. Ajay Sharma, learned senior counsel duly assisted by Mr. Atharv Sharma, Advocate, appearing for the plaintiffs, while making this court peruse the provisions of Ss.64 and 65 of the Indian Evidence Act, submitted that though secondary evidence is admissible but till the time, it is proved in accordance with law that the document intended to be proved by leading secondary evidence was lost/mis-placed, prayer made in the application for leading secondary evidence cannot be accepted. In support of his contentions, Mr. Sharma, learned senior counsel relied upon following judgments:

(a) Kalyan Singh v. Chhoti, AIR 1990 SC 396
(b) Suresh Kumar v. Harbans Lal, 2018 (Supp) Shim. LC 582
(c) Sh. Amar Nath v. Shri Bhagat Chand, 2019 (2) Shim. LC 972).

7. Mr. Y.P. Sood, learned counsel appearing for the defendants, while supporting the impugned order granting permission to lead secondary evidence, contended that there is no illegality in the order impugned in the instant proceedings, especially when it is not in dispute that the photocopy of certified copy of Will, which is now sought to be proved by way of secondary evidence, stood annexed with the written statement. He further submitted that otherwise also, execution of Will is not in dispute rather, the entire case of the plaintiffs is that the mutation entered on the basis of Will executed by Surender Kumar is null and void, as such, plaintiffs cannot be permitted to claim that the Will sought to be relied upon by the defendants was never executed. He submitted that since the plaintiffs have termed the Will relied upon by the defendants to be result of fraud, onus is upon the party relying upon the Will to prove the same. He stated that since the Will is being sought to be relied upon by the defendants and they have placed on record photocopy of the certified copy of Will executed by Surender Kumar, they have been rightly permitted by learned Court below to prove the aforesaid document by way of secondary evidence. He stated that once the existence of the document sought to be proved by way of secondary evidence stands duly established, learned

Court below rightly accepted the prayer of the defendants. It is submitted by Mr. Sood, that otherwise also, no prejudice, if any, is going to be caused to the plaintiffs in case defendants are permitted to prove the Will by way of secondary evidence, because, the plaintiffs would get opportunity to cross-examine the witness to be examined by the defendants to prove the execution of Will.

8. Pleadings adduced on record, especially, reply to the application filed by the plaintiffs under S. 65 of the Indian Evidence Act, reveals that the plaintiffs specifically denied the averment made in the application filed by the defendants that the original Will was handed over by them to their counsel for getting mutation entered but he has misplaced the same. No rejoinder came to be filed by the defendants to the aforesaid plea set up by the plaintiffs. Bare perusal of the provisions of Ss. 64 and 65 of the Indian Evidence Act, clearly reveals that the document sought to be relied upon, if lost or misplaced, can be proved by way of secondary evidence, however, before accepting the averment with regard to loss of document sought to be relied upon, it is required to be established on record that said document was in existence and the same has been lost/misplaced. Mere assertion made in the application with regard to loss /misplacement of the document cannot be sufficient rather in that regard, some cogent and convincing evidence is required to be led on record. Apart from above, person seeking to lead secondary evidence is also required to prove that the document sought to be relied upon was in existence but the same was misplaced/lost. At this stage, it would be apt to take note of Ss. 64 and 65 of the Indian Evidence Act.

> 64. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.
>
> 65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases—
>
> (a) When the original is shown or appears to be in the possession or power—
>
> of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or
>
> of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

9. In the instant case, when plaintiffs specifically denied the claim of the defendants that the document sought to be proved by way of secondary evidence was lost/misplaced by their counsel, learned Court below ought to have framed issue(s) so that parties could lead evidence and establish their claim. Reliance in this regard is placed upon **Suresh Kumar** supra, wherein, it has been held as under:

> ""7. At this moment, this Court finds that the documents whether exists or not; destroyed or not; or are in the possession of same person or not; or can be produced before the learned Court below or whether the secondary evidence is to be allowed or not, in view of the non-production of the document is not available, which is pending adjudication. So, the learned Court below is within its right to frame issues in this regard. This Court finds that there is no illegality in the impugned order dated 11.1.2018, passed by the learned Court below, which cannot be said to be without any basis."

10. So far averment that the photocopy of certified copy of the Will is already on record, there is no specific averment in the application that the photocopy of the Will on record has been prepared from the original. It is also not pleaded that who prepared the Will and who compared the same. Provisions contained under S. 65 of the Indian Evidence Act, reproduced above, clearly provide that the secondary evidence can be led, when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest; when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; when the original is of such a nature as not to be easily movable. Secondary evidence of contents of documents is admissible, however, certified copy of Will is not admissible per se in evidence, but same can be proved by way of leading secondary evidence.

11. Though, the defendants who have filed photocopy of the certified copy of Will sought to be relied upon by them alongwith written statement, are entitled to lead secondary evidence to prove the Will but for that purpose, they are required to prove by leading cogent and convincing evidence that the Will sought to be proved by way of secondary evidence was in existence but the same has been lost or misplaced by their counsel, as has been claimed in the application. Mere assertion /averment with regard to misplacement /loss of document may not be sufficient to lead secondary evidence rather, onus to prove misplacement /loss to have benefit of S.65(c) of the Indian Evidence Act is on the party seeking to prove the document by way of secondary evidence. It is required to be proved that the document sought to be relied upon was misplaced/lost, for any reason not arising from his own conduct/neglect.

12. Since in the case at hand, plaintiffs specifically denied the averments contained in the application that the defendants had handed over original copy of Will to their counsel for getting mutation entered and he lost the same, court below before considering prayer made

on behalf of the defendants for secondary evidence ought to have framed issues and allowed the parties to lead evidence and thereafter, the learned Court below ought to have proceeded to decide the application. Reliance in this regard is placed upon **Amar Nath** supra, wherein, it has been held as under:

> "3. I have heard learned counsel for the parties and gone through the record.
> 4. Relying upon the judgments rendered by the Hon'ble Supreme Court in cases of J. Yashoda Vs. K. Shobha Rani, (2007) 5 Supreme Court Cases, 730, M. Chandra Vs. M. Thangamuthu, (2010) 9 Supreme Court Cases 712, H. Siddiqui Vs. A. Ramalingam (2011) 4 Supreme Court Cases 240 & U. Sree Vs. U. Srinivas, (2013) 2 Supreme Court Cases 114, it can be concluded that secondary evidence in respect of an ordinary document can be allowed in case following requirements inter-alia amongst others are met :-
> i) For leading secondary evidence, non production of the document in question has to be properly accounted for by giving cogent reasons inspiring confidence.
> ii) The party should be genuinely unable to produce the original of the document and it should satisfy the Court that it has done whatever was required at its end. It cannot for any other reason, not arising from its own default or neglect produce it.
> iii) Party has proved before the Court that document was not in his possession and control, further that he has done, what could be done to procure the production of it.
> iv) The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.
> 5. The record of the case clearly indicates that in the written statement, even the date of the agreement is not mentioned. The written statement was filed on 18.06.2012. The matter was fixed for defendant's witnesses w.e.f. 22.11.2014. The application for leading secondary evidence was moved on 10.07.2017, five years after the filing of written statement. The reason for delay advanced by the petitioner/defendant that he came to know about the existence of only photocopy of the agreement in the court file, at the time of examination of defendant's witnesses, does not inspire confidence. From 22.11.2014, the matter was fixed for defendant's witnesses. The record of learned Court below demonstrates that statements of DW No.1, DW No.2,DW No.3 had already been recorded on 20.12.2016. There is no reason forthcoming in the application, which sufficiently and cogently explains the delay in moving the application.

> 6. The requirements laid down under Sections 63 and 65 of the Indian Evidence Act for permission to lead secondary evidence are not met in the instant case. There is no averment made in the application that the photocopy of the agreement on the record is made from the original, when it was made and who compared it. The loss of the original agreement has not been accounted for in accordance with the provisions of Section 65 of the Indian Evidence Act. The application is bereft of the particulars, which are required for discharging the proof, required under Section 65 of the Indian Evidence Act.
>
> 7. Merely, a vague averment made in the application that the document has not been traced, is not sufficient to allow the application for leading secondary evidence. Therefore, no illegality can be found in the order passed by the learned Trial Court."

13. Hon'ble Apex Court in **Kalyan Singh** supra, has held that ordinarily copy of sale deed is not secondary evidence but certified copy of sale deed may be produced as secondary evidence in the absence of the original. Hon'ble Apex Court held as under:

> "25. The High Court said, and in our opinion very rightly, that Ex. 3 could not be regarded as secondary evidence. Section 63 of the Evidence Act mentions five kinds of sec-ondary evidences. Clause (1), (2) and (3) refer to copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in clause (1) is presumed under Section 79; but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as secondary evidence in the absence of the original. But in the present case Ex. 3 is not a certified copy. It is just an ordinary copy. There is also no evidence regarding contents of the original sale deed. Ex. 3 cannot, therefore, be considered as secondary evidence. The appellate Court has a right and duty to exclude such evidence."

14. In the case at hand, as has been averred in the application that the photocopy of certified copy was annexed with the written statement, but it is just an ordinary copy as such, learned Court below, before allowing prayer made on behalf of the defendants, was required to frame issue(s) in this regard.

15. Consequently, in view of above, this court finds merit in the present petition and the same is allowed. Order dated 4.8.2022 (Annexure P-3) passed by learned Senior Sub Judge, Court No. 1, Amb, District Una, Himachal Pradesh in Civil Suit No . 118-112-I-XVI is quashed

and set aside. Matter is remanded back to learned Senior Sub Judge, Court No. 1, Amb, District Una, Himachal Pradesh, to decide the application afresh, in light of the observations made in the instant order, within a period of four weeks. Learned counsel appearing for the parties undertake to cause presence of their parties before learned Court below on **7.11.2022**, enabling it to do the needful in terms of this order within the time stipulated above.

16. Petition stands disposed of alongwith all pending applications. Record of learned Court below, if received be sent back forthwith.

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

Between:-

NAGENDER PAL SHARMA
SON OF SH. THAKAR DASS,
RESIDENT OF VILLAGE BHARARI,
POST OFFICE CHAMBI, TEHSIL SUNDERNAGAR
DISTRICT MANDI (H.P.)

... PETITIONER

(BY MS. SUMAN THAKUR, ADVOCATE)

AND

SMT. VIDYA SHARMA,
WIFE OF SH. NAGENDER PAL SHARMA,
RESIDENT OF BHAGWAHAN MOHALLA,
H. NO. 81/8, MANDI (H.P.)

.. RESPONDENT

(BY MR. DEVENDER K. SHARMA,
ADVOCATE)

CR. REVISION
NO. 223 OF 2021
DECIDED ON:20.06.2022

Code of Criminal Procedure, 1973- Sections 397, 125 – Maintenance – Mis-treatment and Second marriage by petitioner- During the pendency of the Criminal Revision Petition, the parties reached a compromise- Petitioner sought to set aside the compromise, alleging coercion- **Held**- Petition not maintainable as the petitioner willingly entered into a compromise - Failure to fulfill the terms of the compromise led to the revival of the maintenance order - Upheld Maintenance order, but modified the amount. (Para 6, 8, 12)

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

O R D E R

By way of instant criminal revision petition filed under S.397 CrPC, challenge has been laid to order dated 10.3.2021 passed by learned Sessions Judge, Mandi, District Mandi, Himachal Pradesh in Cr. Revision No. 14/2017 (Annexure P-6), whereby criminal revision petition having been filed by the petitioner came to be disposed of as compromised, whereby the petitioner herein agreed to pay Rs. 10.00 Lakh to the respondent as permanent alimony and respondent also agreed to file a divorce petition in the competent Court of law within a period of three months, the petitioner herein agreed to pay Rs. 5.00 Lakh on the date of filing of divorce petition and remaining Rs. 5.00 Lakh at the time of passing of final order. Most importantly, petitioner stated before learned Court below that in case he fails to pay the aforesaid amount to the respondent, ex parte order dated 24.12.2017, passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi, regarding monthly maintenance allowance shall come to force.

22. Precisely, the facts of the case as emerge from the record are that the respondent filed a petition under S.125 CrPC, (Annexure P-3) in the court of learned Additional Chief Judicial Magistrate, Court No.1, Mandi, Himachal Pradesh praying therein for maintenance. In the aforesaid petition, respondent claimed that she is legally wedded wife of the petitioner and their marriage was solemnized on 24.1.1978 as per Hindu rites and ceremonies at Village and Post Office Rajgarh, Tehsil Balh, District Mandi, She alleged that the petitioner after having contracted second marriage with one Pushp Lata ousted her from the matrimonial house and is not providing any maintenance to the respondent, as such, she was compelled to do a job to maintain herself and her minor children. She alleged that she has turned old and suffering from arthritis and is unable to walk as such, has resigned from her job in

April, 2016 and since then she has no source of income to maintain herself. Respondent claimed that the petitioner is a retired employee of BBMB and getting Rs. 20,000/- from pension and apart from this, he is having sufficient landed property, from which his monthly income is more than Rs. 30,000/-. In the aforesaid proceedings, respondent claimed monthly maintenance to the tune of Rs. 10,000/-. In the aforesaid proceedings, petitioner despite having received notice failed to put in appearance and as such, he was proceeded ex parte vide order dated 24.12.2016 (Annexure P-4). Learned trial Court allowed the petition under S.125 CrPC having been filed by the respondent and directed the petitioner to pay sum of Rs. 10,000/- per month from the date of institution of petition i.e. 12.4.2010.

23. Being aggrieved and dissatisfied with the aforesaid order granting maintenance passed by learned trial Court, petitioner preferred a Cr. Revision under S.397 CrPC in the court of learned Sessions Judge, Mandi, Himachal Pradesh, which subsequently came to be disposed of vide order dated 10.3.2021 (Annexure P-6), on the basis of compromise arrived inter se parties. Perusal of order dated 10.3.2021 reveals that the petitioner herein agreed to pay Rs. 10.00 Lakh to the respondent as permanent alimony and also agreed to file a joint petition under S.13B of the Hindu Marriage Act, with the petitioner seeking therein divorce by way of mutual consent. In those proceedings, petitioner agreed to pay a sum of Rs. 5.00 lakh to the respondent, on the day of filing of the divorce petition and remaining amount at the time of passing of final order. He also undertook before learned Sessions Judge that in case he fails to pay the aforesaid amount, order dated 24.12.2016 passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi awarding Rs. 10,000/- as maintenance shall automatically revive.

24. Interestingly, after passing of aforesaid order dated 10.3.2021, petitioner has approached this court in the instant proceedings, praying therein to set aside order dated 10.3.2021, on the ground that he was

compelled /pressurized to enter into compromise as stands recorded in order dated 10.3.2021. It has been averred in the petition that the petitioner, who is senior citizen and is not keeping good health entered into compromise out of fear that in case maintenance in terms of order dated 24.12.2016 is not paid, he would be dispossessed of his property. Apart from above, order impugned in the instant proceedings, has been laid challenge on the ground that the respondent herein left the matrimonial house in 1992 without any rhyme and reason and as such, he is not liable to pay any compensation. It has been further stated in the petition that he is getting Rs.21,000/- per month as pension and out of aforesaid sum he is compelled to pay maintenance to two wives i.e. respondent and another lady namely Pushp Lata.

25. Learned Counsel appearing for the petitioner vehemently argued that the learned Court below while awarding maintenance to the tune of Rs. 10,000/- failed to take note of the fact that monthly income of the petitioner is Rs. 21,000/- and with the same, he is required to support two families, one of respondent and another of Pushp Lata. While referring to judgment passed by Hon'ble Apex Court in **Rajnesh** v. **Neha,** (2021)2 SCC 324, learned Counsel appearing for the petitioner argued that the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance and dependent family members, whom he is obliged to maintain under law, liabilities, if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid.

26. Having heard Learned Counsel appearing for the parties and perused the material available on record vis-à-vis reasoning assigned by learned Sessions Judge, while passing impugned order dated 10.3.2021 (Annexure P-6), this court finds present petition to be not maintainable. Bare perusal of aforesaid order clearly reveals that though the petitioner herein laid challenge to order dated 24.12.2016 passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi whereby he was directed to pay Rs.

10,000/- as monthly maintenance to respondent but during the pendency of the criminal revision petition, he himself entered into compromise with the respondent, whereby he agreed to pay Rs. 10.00 Lakh to the respondent as permanent alimony. Sum of Rs. 5.00 Lakh was to be paid at the time of filing of the divorce petition and remaining Rs. 5.00 Lakh at the time of passing of final order. It stands duly recorded in the impugned order that the petitioner specifically undertook before learned court below that in case he fails to pay aforesaid amount, ex parte order dated 24.12.2016 passed by learned trial Court shall revive.

27. In the case at hand, interestingly, the petitioner after having given aforesaid statement before learned Sessions Judge, failed to file divorce petition under S.13B of the Hindu Marriage Act alongwith respondent and he never paid any amount agreed to be paid as such, ex parte order dated 24.12.2016 passed by learned trial Court rightly came to be revived.

28. Though, in the case at hand, petitioner has claimed that he was compelled /pressurized to enter into compromise but such plea is not substantiated by any material rather, order dated 10.3.2021 clearly reveals that during the pendency of the criminal revision filed by the petitioner, parties of their own volition entered into compromise, whereby petitioner agreed to file petition under S.13 B of the Hindu Marriage Act in the competent Court of law, seeking therein divorce by way of mutual consent. It has been stated by the petitioner in the petition that since he was under threat of execution of order dated 24.12.2016 passed by learned trial Court, he entered into compromise. Aforesaid admission of the petitioner itself establishes the factum with regard to compromise entered into by the petitioner of his own will and volition with the respondent. On account of violation of aforesaid undertaking given by the petitioner in criminal revision petition filed by him, order dated 24.12.2016 passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi has revived and as such,

petitioner cannot escape liability to pay the maintenance to the respondent, who is his legally wedded wife.

29. Otherwise also, there is no dispute that the respondent is legally wedded wife of the petitioner and he during subsistence of marriage with the respondent, contracted second marriage with Pushp Lata. Factum with regard to maltreatment and cruelty meted to the respondent stands duly established on record with the admission made by petitioner that he has contracted second marriage with Pushp Lata, who is also claiming maintenance from him. Since the petitioner contracted second marriage, it cannot be accepted that the respondent of her own volition left the matrimonial house, rather, under compelling circumstances, she was forced to leave the matrimonial house.

30. Though, this court finds no illegality and infirmity in the order dated 24.12.2016 passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi, awarding monthly maintenance to the tune of Rs. 10,000/- to the respondent, but having taken note of the fact that monthly income of the petitioner is Rs. 21,000/-, amount of maintenance awarded by learned trial Court appears to be on higher side.

31. Hon'ble Apex Court in **Rajnesh** supra, has categorically held that the financial situation and liabilities of the non-applicant and higher obligations of respondent are required to be taken into consideration, while awarding maintenance. No doubt, the onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. Since in the case at hand, there is no dispute that the monthly income of the petitioner is Rs. 21,000/- and he has two families to support, by no stretch of imagination, order granting maintenance to the tune of Rs. 10,000/- can be held to be justifiable. Hon'ble Apex Court in **Rajnesh** supra, has held as under:

"80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.

81. A careful and just balance must be drawn between all relevant factors.The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home.36 The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

82. Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.

83. Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and / or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

Where wife is earning some income

90. The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have provided guidance on this issue in the following judgments.

90.1 In Shailja & Anr. v Khobbanna, this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home. Sustenance does not mean, and cannot be allowed to mean mere survival.

90.2 In Sunita Kachwaha & Ors. v Anil Kachwaha 42 the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

90.3 The Bombay High Court in Sanjay Damodar Kale v Kalyani Sanjay Kale while relying upon the judgment in Sunita Kachwaha (supra), held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance.

90.4 An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family, as held by the Delhi High Court in Chander Prakash Bodhraj v Shila Rani Chander v. Shila Rani. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the court.

90.5 This Court in Shamima Farooqui v Shahid Khan45 cited the judgment in Chander Prakash (supra) with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife."

32. In view of the detailed discussion made herein above, the petition is disposed of by upholding the order dated 10.3.2021 passed by learned Sessions Judge, Mandi, however, order dated 24.12.2016 passed by learned Additional Chief Judicial Magistrate, Court No.1, Mandi, Himachal Pradesh

(Annexure P-4) in CR.M.A. No. 116-IV/2016 is modified to the extent that instead of Rs. 10,000/- the petitioner shall be liable to pay monthly maintenance to the respondent at the rate of Rs. 7,000/- per month from the date of institution of the petition under S.125 CrPC.

33. The petition stands disposed of in afore terms. Pending applications, if any, stand disposed of.

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

Between:-

BALAK RAM ALIAS BALKU,
S/O SH. SHUKRU
AGE 64 YEARS
RESIDENT OF VILLAGE AND P.O. MOHAL,
TEHSIL AND DISTRICT KULLU, H.P.

APPELLANT

(BY MR. SANJAY BHARDWAJ, ADVOCATE)
AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA, A
DDITIONAL ADVOCATES GENERAL WITH
MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL &
MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

2. CR. APPEAL NO. 231 OF 2022

Between:-

RAJU
S/O SH. PREM CHAND
AGE 43 YEARS
RESIDENT OF VILLAGE SHURAD, P.O. KHOKHAN,
TEHSIL BHUNTAR, DISTRICT KULLU, H.P.

APPELLANT

(BY MR. SANJAY BHARDWAJ, ADVOCATE)
AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA, A
DDITIONAL ADVOCATES GENERAL WITH
MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL &
MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

3. CR. APPEAL NO. 240 OF 2022

Between:-

PREM CHAND
S/O LATE SH. DEVU
AGED 75 YEARS,
RESIDENT OF VILLAGE AND P.O. BANDROL,
TEHSIL AND DISTRICT KULLU, H.P.

APPELLANT

(BY MR. SANJAY BHARDWAJ, ADVOCATE)
AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA, A
DDITIONAL ADVOCATES GENERAL WITH
MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL &
MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

CR. APPEAL
NOS. 230, 231 AND 240 OF 2022
DECIDED ON: 14.9.2022

Code of Criminal Procedure, 1973- Section 449 (ii) – Section 446 (iii) - Court's power to remit penalty – Accused failed to appear, forfeiting surety bonds – Penalty imposed on Appellant– **Held -** Sureties are responsible for the accused's appearance - Court exercised discretion to modify the penalties based on appellants' financial status - Penalties reduced to Rs. 1 Lakh each. (Para 17, 18)

Cases referred:

Jameela Khader v. State of Kerala, 2004 Crl. L.J. 3389;

These appeals coming on for orders this day, the court delivered the following:

J U D G M E N T

Since all these appeals arise out of connected proceedings before learned Court below, as such, same were heard together at the request of Learned Counsel appearing for the appellant and are being disposed of vide this common judgment.

2. By way of instant criminal appeals filed under S.449 (ii) CrPC, challenge has been laid to orders dated 28.5.2022 passed by learned Special Judge-II, Kullu in CrMP's Nos. 327 of 2022, State v. Prem Chand, 328 of 2022, State v. Balak Ram and 329 of 2022 titled State v. Raju, wherein learned Court below ordered forfeiture of the surety bonds furnished by the appellants and imposed penalty of Rs. 5.00 Lakh each, upon all the appellants, in the proceedings under S.446 CrPC in Session Trial No. 39 of 2018, titled State v. Prakash Suvedi.

3. Precisely, the facts of the case, as emerge from the record, are that in Session Trial No. 39 of 2018 titled state v. Prakash Suvedi, which is pending before learned Special Judge, Kullu, present appellants stood surety for the accused namely Prakash Suvedi and furnished surety bonds of Rs. 5.00 Lakh each. Since the accused failed to appear before learned court below, it

cancelled the bail bonds of accused and forfeited the same to the State of Himachal Pradesh and initiated proceedings under S. 446 CrPC were initiated against appellants in terms of order dated 31.3.2022.

4. Since the appellants surety despite having been afforded opportunity to cause presence of the accused before learned Court below, failed to procure the presence of the accused and as such, learned Special Judge-II Kullu vide order dated 28.5.2022, imposed penalty of Rs.5.00 Lakh each upon all the three sureties, who are appellants herein. Vide aforesaid order, learned Special Judge also issued direction for issuance of warrant to realize the amount of penalty through Collector, Kullu. In the aforesaid background, appellants have approached this court in the instant proceedings, praying therein to set aside the impugned order or reduce the amount of penalty imposed by learned court below while exercising power under S.446(iii) CrPC.

5. Learned counsel for the appellants contended that though the appellants had given surety in favour of accused, while he was being enlarged on bail in the case registered against him under the Narcotic Drugs and Psychotropic Substances Act, but since despite best efforts put in by them, whereabouts of the accused could not be ascertained, appellants-sureties cannot be saddled with such huge liability of Rs.5.00 Lakh each. He further submitted that since three persons stood as surety against accused, learned court below ought not have imposed penalty of Rs.5.00 Lakh against all, especially when contraband allegedly recovered from the conscious possession of accused was only 1.600 kg. Learned counsel for the appellants further submitted that the appellants belong to poor families and it is beyond their limit to deposit Rs.5.00 Lakh each, in terms of order dated 28.5.2022 issued by learned court below. He submits that the appellants have their families to support and in case they are compelled to pay the amount of penalty, they may have to sell their lands/properties, as a consequence of which their families would be on the road. While inviting attention of this court to

S.446(3) , Learned Counsel appearing for the appellants contended that this court can always remit any portion of the penalty.

6. Mr. Narinder Guleria, learned Additional Advocate General, while opposing aforesaid prayer made on behalf of the appellant(s) contended that since the appellants failed to cause presence of the accused as undertaken by them, while furnishing surety bonds, no illegality can be said to have been committed by learned court below while imposing penalty of Rs. 5.00 Lakh.

7. Having heard learned counsel for the parties and perused material available on record, this court though finds no illegality in the impugned orders dated 28.5.2022, because in the event of non-appearance of the accused in trial, it is the duty of the appellants to cause his presence. In case surety of the accused fails to cause his presence, surety amount mentioned in the surety bonds is liable to be recovered from them. Since in the case at hand, appellants furnished surety in the sum of Rs. 5.00 Lakh at the time of enlargement of accused on bail, and they failed to cause his presence during trial, learned court below had no option but to initiate proceedings under S. 446 CrPC against the sureties /appellants. Once the surety fails to render proper explanation on record qua non-appearance of accused or he/she fails to ensure appearance of the accused during trial, court is well within its jurisdiction to impose penalty in proceedings under S.446 CrPC.

8. Question, which now remains to be considered is, 'whether this court can reduce the amount of penalty imposed by learned court below or not?

9. Before finding answer to the same, S. 446(iii) CrPC, may be taken note of, which reads as under:

> "446. Procedure when bond has been forfeited.
>
> (1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is

proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

10. S. 446 CrPC, clearly empowers a court to, at its discretion, remit any portion of penalty in peculiar facts and circumstances of the case.

11. In the case at hand, record reveals that all the appellants stood sureties in the sum of Rs.5.00 Lakh each, for the same accused, while he was enlarged on bail. Interestingly, learned court below has directed all the appellants to deposit sums of Rs.5.00 Lakh each, on account of penalty. Penalty imposed by learned court below appears to be on higher side, especially when it emerges from the record that the appellants made all out efforts to cause presence of the accused but since the whereabouts of the accused were not known to them, it may be too harsh to burden the appellants with penalty of Rs.5.00 Lakh each.

12. Careful perusal of S.446 (i) CrPC reveals that it is in two part, first part deals with the forfeiture of bond and second party with payment of penalty. After having forfeited bonds furnished by an accused or a surety, court can either impose penalty of entire surety amount or it may be decided by the court after hearing the surety. In the case at hand, it has been averred on behalf of the appellants/sureties, that he is not in a position to pay entire amount of surety bond i.e. Rs. 5.00 Lakh and in the event of his being compelled to do so, he may have to sell his property as a consequence of which the entire family of surety would be ruined.

13. Otherwise also, while passing order with regard to imposition of penalty, for not causing appearance of the accused, crucial issue is to find out whether the accused had failed to appear for genuine and justifiable reason and also whether the sureties were at fault in not securing attendance of the accused. All the attending circumstances are to be taken into consideration by court, while imposing the penalty consequent upon forfeiture.

14. Since in the case at hand, appellants made sincere efforts to cause presence of the accused in the trial, and on account of order of imposition of penalty by learned court below, serious prejudice may be caused to accused and their families, learned court below while imposing penalty, ought to have been little considerate/lenient. Reliance is placed upon judgment passed by

Kerala High Court in **Jameela Khader** v. **State of Kerala**, 2004 Crl. L.J. 3389, wherein, it has been held as under:

> "7. As mentioned earlier, the petitioners were directed to show cause why penalty should not be imposed on them for their failure to produce the accused before the Court on the date fixed for hearing. Su-section (2) of Section 446 provides that if the sureties do not show sufficient cause and they do not pay the penalty imposed on them, the Court may proceed to recover the same as though it is a fine imposed by the Court under the Code. If recovery becomes impossible, the sureties are liable to suffer imprisonment in civil jail for a term which may extend to six months.
>
> 8. There is no dispute that sub-Section (3) of Section 446 empowers the Court to use its discretion to remit any portion of the penalty and enforce payment of only part of the penalty. Clause 3 of Section 446 reads as hereunder:¬
>
> "3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in party only."
>
> It is true that the above provision does not specify at what state the Court can remit the penalty. But the preceding clause make it clear that the Court can impose penalty only after recording proof of forfeiture and after issuing show cause notice.
>
> 9. The short question are:
>
> (1) Can the Court which forfeits the bond of the surety remit or order part payment of the penalty after imposing such penalty?
>
> (2) Can the Criminal Court reopen or review its earlier order of imposition of penalty to invoke the power of discretion as provided under Sub-Section (3) of Section 446?."

10. On a perusal of the provisions in Section 446, it is evident that a bond which has been executed either for appearance of accused or production of property shall be forfeited the moment it is proved that a condition in the bond has been violated. For instance, if the accused fails to appear on the day on which he has been directed to appear, the Magistrate is empowered to forfeit the bond of the accused as well as that of the sureties forthwith. Of course, the Court must be satisfied that the condition in the bond has been violated. Thus it can be seen

that the power vested with the Court to forfeit the bond is unfettered. However, clause (1) of Section 446 provides that the Court shall record the grounds of proof of forfeiture. Thereafter the Court may call upon any person bound by such bond to pay the penalty or to show cause why it should not be paid. Thus clause (1) of Section 446 clearly indicates that the forfeiture of a bond for breach of any of the conditions is almost an inevitable or automatic consequence. It is then for the surety to explain the reasons for the breach. Clause (2) of Section 446 stipulates that if sufficient cause is not shown and the penalty is not paid the Court may proceed to recover it. The proviso to clause (2) deals with the consequences of failure to pay the penalty. The person who is bound as surety is liable to suffer imprisonment in civil jail if he fails to pay the penalty imposed.

11. A reading of the above two clauses of Section 446 clearly shows that forfeiture of the bond and payment of penalty would follow as a natural consequence for breach of any of the conditions of the bond. The quantum of penalty may be the entire amount covered under the bond or it may be as decided by the Court after hearing the surety. It is provided in clause (1) that "the Court may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid" (emphasis supplied). Nevertheless, the Court can exonerate the surety from payment of penalty, if it is satisfied that there are valid reasons for the failure to produce the accused or the property. The Court can exercise its discretion in the matter after hearing the surety. The court can remit any portion of the penalty and direct the surety to pay only a portion thereof."

12. But incidentally, it may be noticed that by the subsequent introduction of Section 446-A in the Code, the situation is slightly different. If the bond is executed for appearance of an accused and the bond is cancelled due to his failure to appear, then the court can forfeit the bond. His release can be ordered "upon the execution of a fresh personal bond.....with one or more of such sureties". No penalty is envisaged under Section 446-A. More importantly the provisions contained in Section 446-A are "without prejudice to the provisions of Section 446".

13. However, the question that has arisen in this case is at what stage the court can use its discretion to remit a portion of the penalty if the bond is cancelled under Section 446. Evidently the court which forfeits the bond has to necessarily consider all facts and circumstances before imposing the penalty. There may be situations where the accused might have been prevented from appearance in Court due to valid reasons beyond his control. Instances may be numerous and variegated depending on factual situations which cannot be enumerated. But the crucial issue is to find out whether the accused had failed to appear before the Court for genuine and justifiable reasons and also whether the sureties were at fault in failing to procure the attendance of the accused. All the attendant circumstances have to be considered by the Court while imposing the penalty consequent on the forfeiture. Question of remission of penalty or enforcement of payment only in part is also to be considered at that stage. In my view, the discretion has to be exercised at the time when the penalty is imposed and not at any later stage. In that view of the matter, the order impugned cannot be faulted.
14. But learned counsel for the petitioners submits that the Court can exercise the power of discretion at any stage. He places reliance on a few reported decisions in support of his contention.
15. In Balraj S. Kapoor v. State of Bombay, AIR 1954 Bombay 365, it was held that the Court can remit a portion of the penalty invoking its discretionary power under Section 514(5) of 1898 Code (Section 446(3) of the 1973 Code) even at a subsequent stage.
16. In Sualal Mushilal v. State, AIR 1954 M.P. 231, it was held that the power to remit a portion of the penalty in exercise of its power under Clause (5) of Section 514 of the 1898 Code (corresponding to Section 446(3) of 1973 Code) could be exercised so long as the payment of any portion of the penalty remains unenforced. Though the circumstances which justify remission of a portion of the penalty have to be considered by the Court before it proceeds to consider the answer of the surety to the show cause notice, still the Court could remit any portion of the penalty if such

circumstances occur subsequent to the order of recovery so long as the amount was not totally recovered.

17. In Moola Ram v. State of Rajasthan, 1982 Crl.L.J. 2333, the High Court of Rajasthan held as follows:

> "Even after passing the final order forfeiting the bond for appearance in Court and for recovery of the whole amount of penalty under the bond, the Court under Section 446(3) can remit any portion of the penalty so long as the amount is not totally recovered. There is nothing in Section 446(3) to show that an order remitting any portion of the penalty and enforcing payment of part thereof can be passed by the Court only at the time it passed the final order directing forfeiture of the bond and realisation of the amount thereof as penalty."

In the above decision the learned Single Judge had followed Balraj Kapoor's case and Sualal Mushilal's case mentioned supra.

18. Sri. Mohammed Anzar, learned counsel for the petitioners submits that judicial precedents mentioned above are unanimous in the view that the court which imposes the penalty after forfeiture of the bond can remit the penalty or direct that only a portion thereof be paid. This can be done even at a subsequent stage. But I find it difficult to agree with the above proposition.

19. In **Balraj Kapoor's** case (supra), the learned Judge of the Bombay High Court had observed that:

> "..... it seems to me that the better View is that the Court is called upon to require the surety to pay the amount of the penalty or to remit a portion of the penalty as soon as the bond is forfeited. It is at that stage that the Court is called upon to consider the question as to whether the entire amount of the penalty should be ordered to be paid or only a portion of the amount should be ordered to be paid.....

The question whether the discretion is to be exercised at a subsequent stage or at the stage when the Court calls upon the surety to pay the amount of the penalty is, I think, not free from difficulty. It is, I think, possible to take the view that the Court may, in its discretion, remit a portion of the penalty and enforce payment in part only even at a subsequent stage. But I would prefer to say that the Court can insist upon the payment of

the entire amount of the penalty or may make an order remitting a portion of the penalty as soon as the bond is forfeited and the Court is called upon to apply its mind to the matter....."

20. I am inclined to agree with the above observation in the judgment, though it was ultimately held by the learned Judge that the Court can remit the penalty even at a subsequent stage.

21. There is yet another reason to take the above view. A criminal Court does not have the power to review or re-open its own order. In this case the order that was passed imposing a penalty of Rs. 5,000/- each had become final. Therefore, the Court could not have reopened or reviewed its own earlier order as requested by the petitioners.

22. However, the discretion vested in the Court by virtue of Clause (3) of Section 446 can be exercised by the appellate or revisional court if the order is challenged as provided under the Code. The appellate or revisional Court, as the case may be, can always consider, even at a later stage, whether there are circumstances warranting remission of penalty.

23. It is contended by the learned Public Prosecutor that in the case on hand, the petitioners had a remedy to challenge the impugned order before the Sessions Court by filing an appeal. It is contended that this petition under Section 482 of the Code cannot be entertained since the petitioners had not resorted to the remedy available to them. It is true that an appeal is provided under Section 449 of the Code which enables the aggrieved party to file an appeal against "all orders passed under Section 446". If the impugned order is passed by a Magistrate, an appeal shall lie to the Sessions Court. In the case of an order made by a Court of Sessions, an appeal lies before the High Court. Therefore there is force in the contention of the learned Public Prosecutor that the petitioners are not without any remedy as provided under the Code.

24. But in the peculiar facts and circumstances of this case, I am not inclined to direct the petitioners to approach the Appellate Court. This Court can always consider the question whether an order passed by the inferior court is just or legal. If there

is any illegality or irregularity, this Court can always interfere in order to meet the ends of justice.

15. Co-ordinate Bench of this court in similar facts and circumstances also remitted portion of penalty imposed by learned court below in Cr. Appeal No. 221 of 2021 titled **Ram Singh** v. **State of Himachal Pradesh**, decided on 18.11.2021, observing as under:

16. Prima facie, this Court does not find any infirmity with the order passed by learned Court below as admittedly when the appellants stood surety for the accused and thereafter accused did not appear in the Court of law to face the trial, but natural, the appellants have to face the consequences. However, during the course of arguments this fact has gone un-rebutted that the appellants are poor persons and the amount of penalty imposed upon the appellants is huge.

17. Consequently in view of detailed discussion made herein above and the law taken into consideration, this court, is of the view that the discretion vests in this court, under S.446 (iii) CrPC, to remit the penalty. Since in the instant cases, appellants/sureties are not the men of sufficient means, quantum of penalty imposed by learned court below while forfeiting sureties exercising power under S.446 CrPC, deserves to be modified.

18. Accordingly, all the appeals are allowed. Order dated 28.5.2022 passed by learned Special Judge-II, Kullu in CrMP's Nos. 327 of 2022, State v. Prem Chand, 328 of 2022, State v. Balak Ram and 329 of 2022 titled State v. Raju, are modified to the extent that the appellants/sureties shall pay penalty of Rs.1.00 Lakh each only, which shall be deposited within two months with the learned trial Court, from the date of passing of this order.

All the appeals stand accordingly disposed of, alongwith all pending applications.

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

Between:-

1. SHRI VIKAS DHIMAN S/O SH. RAM PAL DHIMAN, R/O HOUSE NO. 270B-3, SHIV SHAKTI COLONY, PINJORE, DISTRICT PANCHKULA, HARYANA;

2. SHRI RAM PAL DHIMAN S/O SHRI SHAKTI CHAND R/O HOUSE NO. 270B-3, SHIV SHAKTI COLONY, PINJORE, DISTRICT PANCHKULA, HARYANA;

3. SMT. TRIPTA DHIMAN, W/O SH. RAM PAL DHIMAN, R/O HOUSE NO. 270B-3, SHIV SHAKTI COLONY, PINJORE, DISTRICT PANCHKULA, HARYANA;

... PETITIONERS

(BY MR. GAUTAM SOOD & MR. ROHIT, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY HOME, SECRETARIAT, CHOTTA SHIMLA;

2. STATE OF HIMACHAL PRADESH THROUGH SUPERINTENDENT OF POLICE, SOLAN, HP;

3. SMT. AAKSHI DEVGAN, D/L SH. B.M DEVGAN, R/O E.W.S.H.NO.2, SECTOR 6, PARWANOO, DISTRICT SOLAN, HP.

RESPONDENT

(MR. SUDHIR BHATNAGAR
ADDITIONAL ADVOCATE GENERAL
FOR R-1 AND 2)

MR. JYOTIRMAY BHATT, ADVOCATE FOR R-3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CR.PC
NO. 479 OF 2019

DECIDED ON: 15.10.2022

Code of Criminal Procedure, 1973- Section 482 - **Indian Penal Code, 1860 -** Sections 498A, 506 , 34 - Quashing of FIR - Harassment for less dowry and physical abuse – **Held** - Found no substantial evidence connecting the petitioners to the alleged offences - Court allowed the petition and quashed the FIR - Petitioners acquitted of the charge.(Para 39,40)

Cases referred:

Asmathunnisa v. State of A.P. (2011) 11 SCC 259;
Jai Prakash Singh v State of Bihar, (2012) 4 SCC 379;
Kishan Singh v. Gurpal Singh, (2010) 8 SCC 775;
Kishan Singh, Jai Prakash Singh & Manoj Kumar Sharma and others Vs. State of Chhattisgarh & another, (2016) 9 SCC 1;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajesh Sharma v. State of U.P., AIR 2017 SC 3869;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;
Shakson Belthissor v. State of Kerala and Anr, 2009 (14) SCC 466;
Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;
State of Karnataka v. L. Muniswamy & Others (1977) 2 SCC 699;
Varala Bharath Kumar and Anr v. State of Telangana and Anr, 2017 AIR (SC) 4434;
Wasim v. State (NCT of Delhi) (2019) 7 SCC 435;

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

O R D E R

By way of instant petition filed under Section 482 of Cr.PC, prayer has been made on behalf of the petitioners for quashing of FIR No. 25 of 2019 dated 2.2.2019, registered at Police Station Parwanoo, District Solan, H.P. under Sections 498A, 506 read with Section 34 of IPC as well as consequent proceedings, if any, pending in the competent Court of law.

2. For having a bird's eye view of the matter, facts, shorn of unnecessary details but relevant for the adjudication of the case are that the

marriage inter se respondent No.3 Smt. Anita Dhiman and petitioner No.1, Vikas Dhiman, was solemnized on 27.10.2017 as per Hindu rites and rituals at Gurudwara, Kalka, Panchkula (HR). After three months of the marriage, respondent No.3 went to her parental house and thereafter refused to come back to the house of the petitioners. Pleadings as well as other material available on record reveals that though the petitioners made an attempt to bring respondent No.3 back to their house but the parents of respondent No.2 insisted that petitioner No.1 and respondent No.3 should live separately and as such petitioner No.1 hired a separate room at Pinjore. Though articles and other luggage of petitioner and respondent No.3 were shifted to the rented accommodation at Pinjore but the fact remains that the respondent No.3 never joined the company of petitioner No.1. Since the petitioners were informed by the family of respondent No.3 that respondent No.3 has attempted to commit suicide at her parental house, petitioners filed on-line complaint at Police Station, Panchkula (HR) as well as on CM Helpline Portal, Annexure P-3 alleging therein that the marriage of the petitioner No.1 with respondent No.3 was solemnized on 27.10.2017, but after three months of marriage, respondent No.3 left the matrimonial house and never returned. It is also alleged in the complaint that though as per suggestion made by the parents of respondent No.3, separate accommodation was hired by him at Pinjore but yet respondent No.3 refused to join his company. Petitioners alleged that they have apprehension that they would be falsely implicated in some criminal case i.e. abetment of suicide by respondent No.3 and as such criminal action, in accordance with law be taken against the respondents. Pursuant to aforesaid complaint, Women Cell Panchkula investigated the matter and recorded statement of respondent No.3, wherein she categorically deposed that she does not wish to live with her husband, of her own volition, without there being pressure of any kind upon her. In the aforesaid background, complaint having been filed by petitioner No.1 came to be disposed of in the year, 2018.

3. Exactly after four months of disposal of aforesaid complaint filed at the behest of the petitioners, respondent No.3 filed a complaint with the Superintendent of Police Solan, alleging therein that after some time of her marriage, her in-laws as well as husband started harassing her, pressurizing her to get the marriage of her younger sister solemnized with her brother-in-law. She alleged that on account of constant pressure, she became upset and started residing at her matrimonial house. She alleged that nobody from her in-laws ever came to take her to her matrimonial house. She also alleged that on the askance of relatives, a separate room was taken by her husband at Pinjore and their articles/luggage was also kept in that room but since her husband never came to take her, they could not reside in the aforesaid accommodation. On the basis of aforesaid complaint by respondent No.3, matter came to be investigated by SHO Police Station Parwanoo, but the Police, after having found the matter to be a family dispute, reported the matter to CDPO, Dharampur, District Solan for further action, vide communication dated 29.11.2018 (Annexure P-4). Most importantly, it stands recorded in the aforesaid communication that respondent No.3 stated to the police that she does not wish to reside with her husband and there is no pressure of any kind upon her. Approximately after three months of issuance of aforesaid communication dated 29.11.2018, respondent No.3 instituted FIR at Police Station Parwanoo, dated 2.2.2019 alleging therein that her marriage was solemnized with the petitioner on 27.10.2017 as per Hindu customs and rites at Pinjore. She alleged that though her parents had given ornaments of gold and diamond alongwith furniture and other gifts but yet her husband and in-laws kept on harassing her for bringing less dowry. She alleged that she was also pressurized by her in-laws to get the marriage of her brother-in-law solemnized with her sister. She also alleged that sum of Rs. 14,00,000/- was demanded by her mother-in-law enabling her husband to purchase a house. She also alleged that she was given beatings by her husband and other family

members. She alleged that on account of constant mental harassment, she also attempted to commit suicide.

4. Though, after completion of investigation, police has presented challan in the competent court of law but before the same could be taken to its logical end, petitioners herein have approached this Court by way of instant proceedings filed under Section 482 Cr.P.C for quashing of FIR as well as consequent proceedings pending in the competent Court of law. Primarily quashing of FIR has been sought by petitioners on three following grounds.

> I) FIR sought to be quashed, discloses no offence under Section 498 A, 506 read with section 34 of IPC.
> ii) FIR sought to be quashed has been filed with a view to take revenge and harass the petitioners.
> iii) Evidence collected on record by prosecution nowhere connects the petitioners with the commission of offence punishable under Section 498A, 506 read with section 34 of IPC.

5. Aforesaid prayer made in the instant petition for quashing of FIR has been opposed by respondents on the ground that there is overwhelming evidence available on record suggestive of the fact that the petitioners had been constantly harassing respondent No.3 on account of bringing less dowry and she was also given beatings.

6. Sh. Sudhir Bhatnagar, learned Additional Advocate General and Mr. Jyotirmay Bhatt, learned counsel representing respondent No.3 vehemently argued that bare perusal of FIR itself discloses offences punishable under Sections 498A and 506/34 of IPC and as such prayer made on behalf of the petitioners for quashing of FIR, deserves outright rejection. Above named counsel representing respondents also argued that the grounds raised for quashing of FIR are not sufficient to accept the prayer on behalf of the petitioners for quashing of FIR, especially when it stands duly established on record that respondent No.3 was compelled to leave her matrimonial house

after three months of her marriage and since then she has not been permitted by the petitioners to enter her matrimonial house.

7. To the contrary, Mr. Gautam Sood, learned counsel for the petitioners, while making this Court peruse the contents of FIR, contended that since there is no allegations of "cruelty" qua demand of dowry, no case much less case under Section 498A is made out against the petitioners, as such FIR deserves to be quashed and set aside on this ground alone. He further argued that there is inordinate delay in lodging the FIR, because allegedly respondent No.3 was ousted from her matrimonial house after three months of her marriage in the year, 2017 but the FIR sought to be quashed, came to be instituted in the month of February, 2019. He submitted that save and except one complaint lodged by respondent No.3 with Superintendent of Police, Solan, wherein there is no mention of demand dowry by the petitioners, there is no other complaint made by the respondent No. 3 either to the Police or any other authority. He submitted that statements of respondent No.3 recorded by SHO police station Parwanno and women Cell Panchkula clearly reveal that she did not wish to live with the petitioners and as such left the matrimonial house. He further submitted that even on the asking of the parents of respondent No.3, petitioner No.1 hired a separate accommodation at Pinjore, but yet respondent No.3 failed to join his company there. While making this Court peruse the documents annexed with the petition, learned counsel for the petitioners argued that since complaint came to be lodged by the petitioners on account of threat of suicide advanced by respondent No.3 at Women Cell Panchkula, respondent No.3 in retaliation made unfounded allegations against the petitioners, which have culminated into the FIR sought to be quashed.

8. Lastly Mr. Sood submitted that if the evidentiary value of material collected on record by prosecution is taken into consideration vis-à-vis the offences alleged to have been committed by the petitioners, case of prosecution

is bound to fail and as such no useful purpose would be served by permitting the prosecution to go ahead with the trial rather such prosecution would cause great prejudice to the petitioners.

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

10. Before considering the prayer made in the petition at hand, this Court deems it necessary to discuss and elaborate the scope of S.482 CrPC.

11. Hon'ble Apex Court in judgment titled **State of Haryana and others** vs. **Bhajan Lal and others**, 1992 Supp (1) SCC 335 has laid down several principles, which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. Before pronouncement of aforesaid judgment rendered by the Hon'ble Apex Court, a three-Judge Bench of Hon'ble Court in State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699, held that the High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. Relevant para is being reproduced herein below:-

> "7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the

provision which seeks to save the 58 inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

12. Hon'ble Apex Court in **Bhajan Lal** (supra), has elaborately considered the scope and ambit of Section 482 Cr.P.C.

13. Subsequently, Hon'ble Apex Court in **Vineet Kumar and Ors.** v. **State of U.P. and Anr.,** while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 Cr.PC, as enumerated in **Bhajan Lal** (supra), i.e. where a criminal proceeding is manifestly attended with malafides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings.

14. Hon'ble Apex Court in **Prashant Bharti** v. **State (NCT of Delhi),** (2013) 9 SCC 293, while drawing strength from its earlier judgment titled as **Rajiv Thapar and Ors** v. **Madan Lal Kapoor**, (2013) 3 SCC 330, has reiterated that High Court has inherent power under Section 482 Cr.PC., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. While invoking its inherent jurisdiction under Section 482 of the Cr.P.C., the High Court has to be fully satisfied that the material produced

by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrules the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)
>
> 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material

produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false. 30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially

when, it is clear that the same would not conclude in the conviction of the accused."

15. Hon'ble Apex Court in **Asmathunnisa** v. **State of A.P.** (2011) 11 SCC 259, has held as under:

"12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under section 482 of the Code of Criminal Procedure. Inherent power under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified 9 by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

13. The law has been crystallized more than half a century ago in the case of R.P. Kapur v. State of Punjab AIR 1960 SC 866 wherein this Court has summarized some categories of cases where inherent power can and should be exercised to quash the proceedings. This Court summarized the following three broad categories where the High Court would be justified in exercise of its powers under section 482:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

16. In **Smt. Nagawwa** v. Ve**eranna Shivalingappa Konjalgi and Others** (1976) 3 SCC 736, according to the court, the process against the accused can be quashed or set aside :

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not

disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no 10 prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused; (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like".

17. This court in **State of Karnataka** v. **L. Muniswamy & Others** (1977) 2 SCC 699, observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice requires that the proceedings ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the Legislature. This case has been followed in a large number of subsequent cases of this court and other courts."

18. Hon'ble Apex Court in **Asmathunnisa** (supra) has categorically held that where discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like, High Court would be justified in exercise of its powers under S. 482 CrPC.

19. From the bare perusal of aforesaid exposition of law, it is quite apparent that exercising its inherent power under Section 482 Cr.PC., High Court can proceed to quash the proceedings, if it comes to the conclusion that allowing the proceedings to continue would be an abuse of process of the law.

20. It is not in dispute that within a period of three months from the date of marriage, which was solemnized on 27.10.2017, respondent No.3 left her matrimonial house and since then she had been living in her parental house. It is also not in dispute that prior to lodging of FIR sought to be quashed in the instant proceedings, wherein respondent No.3 levelled allegations of demand of dowry, cruelty and mental harassment against the petitioners, she had filed one complaint to SP Solan alleging therein that she is being constantly harassed, tortured and pressurized by petitioners to get the marriage of her younger sister solemnized with her brother-in-law. In the initial complaint as detailed herein-above, no allegation, if any with regard to demand of dowry by petitioners ever came to be made, rather, when matter was investigated by SHO PS Parwanoo, respondent No.3 nowhere stated in her statement anything with regard to demand of dowry and she categorically stated that she does not wish to live with the petitioners. Respondents No. 1 and 2, in their reply to the petition have categorically stated that respondent No.3 had lodged complaint on 15.11.2018 against the petitioners alleging therein mental harassment by her husband and mother-in-law. During inquiry, complainant/respondent No.3 and her husband were asked to join the investigation, however, respondent No.3 refused to live with the petitioners and as such police after having found the nature of the dispute to be of domestic violence, referred the matter to CDPO, Block Dharampur, on 29.11.2018 as is evident from Annexure P-4 and thereafter no complaint, if any, ever came to be lodged at the behest of respondent No.3 against the petitioners with regard to demand of dowry and cruelty, if any, meted to her at the hands of the petitioners. Since the family members of the respondent No.3

informed petitioners that respondent No.3 attempted to commit suicide, they immediately reported the matter to Women Cell Panchkula stating therein that though the petitioner No. 1 is ready and willing to take respondent No.3 back and despite his having hired separate accommodation, respondent No.3 is not willing to join his company. Petitioners also alleged before the Women Cell Panchkula that there is apprehension of their being falsely implicated in a criminal case. Women Cell Panchkula, taking cognizance of aforesaid complaint, called both the parties and persuaded them to reconcile the matter, as is evident from report dated 13.07.2018, Annexure P-3, but even at that stage, respondent No.3 refused to join the company of petitioner No.1. Most importantly, Women Cell, Panchkula recorded in its report that during investigation, no cognizable offence was found to have been committed by the petitioners. Besides above Women Cell Panchkula counseled both the parties to get the matter settled in the competent court of law. Once no offence was found to have been committed by the petitioners, Women Cell Panchkula and SHO Parwanoo, advised both the parties to get their marriage annulled in the competent court of law. Respondent No.3 in the month of February 2019 lodged FIR sought to be quashed in the instant proceedings, making therein allegations of demand of dowry, which in fact, were never made in earlier complaints/proceedings, as have been taken note herein above. In the FIR sought to be quashed though respondent No.3 admitted that she remained at her matrimonial house for three months but claimed that she was constantly tortured and mental harassed by the petitioners for bringing less dowry. Besides this, she also levelled allegations that she was being constantly pressurized by the petitioners to get the marriage of her younger sister solemnized with her brother-in-law.

21. Mr. Gautam Sood, learned counsel for the petitioners, while making this Court peruse the record, vehemently argued that FIR sought to be quashed in the instant proceedings, is an afterthought and the same has been

filed with a view to harass the petitioners, who have been already suffering the ordeal of trial for more than three years without there being any fault of them. He stated that if respondent No.3 was constantly harassed and tortured for bringing less dowry, it is not understood, what prevented her to make such allegations at the first instance i.e. in the year 2017, when she herself left the matrimonial house.

22. Having scanned the material available on record as well as the facts and circumstances of the case, as have taken note herein above, this Court finds substantial force in the aforesaid submission of Mr. Sood, learned counsel representing the petitioners, It is an admitted case of the parties that respondent No.3 remained in the matrimonial house for three months only and thereafter she started living at her parental house. She had left the matrimonial house on 27.01.2018 but the FIR sought to be quashed in the instant proceedings, containing therein allegations of demand of dowry and criminal intimidation, came to be lodged in February 2019 i.e. after one year of the alleged incident. There is no material worth credence, available on record, which may suggest that prior to lodging of the FIR sought to be quashed in the instant proceedings, respondent No.3 ever levelled allegations with regard to demand of dowry, rather in her initial complaint given to the SP Solan, she alleged that she is being constantly harassed, tortured and pressurized by her in-laws i.e. the petitioners for getting marriage of her sister solemnized with her brother-in-law. If the complaint submitted to the SP Solan as well as report submitted by SHO Parwanoo pursuant to inquiry conducted by him, are perused in their entirety, they clearly reveal that the dispute inter se petitioners and respondent No.3 was never with regard to demand of dowry, rather on account of some trivial issues respondent No. 3 had left the matrimonial house and had started living with her parents. Record further reveals that on the askance of parents of respondent No.3, petitioner No.1 hired rented accommodation in Pinjore but yet respondent No.3 failed to join

the company of the petitioner. In a statement given to police, respondent No.3 categorically stated that she does not wish to join the company of the petitioners, but even at that stage, she nowhere stated that she is being harassed and tortured by the petitioners for bringing less dowry. Apart from above, there appears to be merit in the contention of Mr. Sood, that FIR is an afterthought because, admittedly, the same came to be lodged after lodging of complaint made by the petitioners in Women Cell Panchkula (Haryana), wherein they expressed their apprehension with regard to their being involved falsely in criminal case by respondent No.3,

23. Mere levelling of allegation of demand of dowry, if any, by petitioners is not sufficient to conclude their guilt, rather prosecution in that regard is/was under obligation to adduce on record cogent and convincing evidence, which in the case at hand is totally missing, rather statement of respondent No.3, at whose instance FIR was lodged nowhere proves allegations of demand of dowry. Statement given by respondent No.3 to SHO police station Parwanoo and Women Cell Panchkula clearly reveal that respondent No.3 never wanted to stay with her husband in his house and as such petitioner No. 1 was compelled by respondent No.3 to hire separate accommodation. Though petitioner No.1 hired rented accommodation and stacked all articles required for a household but yet respondent No.3 refused to join his company. Even if the allegations with regard to demand of dowry levelled by respondent No.3 are presumed to be correct, it is not understood that what prevented respondent No.3 from lodging FIR in the year 2017, when allegedly she was thrown out of her house on account of bringing less dowry. Similarly there is no explanation that why respondent No.3 kept silent for more than two years with regard to cruelty meted to her on account of bringing less dowry. Complaint lodged by respondent No. 3 to the police nowhere alleges demand of dowry or beatings if any given by petitioner No.1 and other family members i.e. petitioners No. 2 and 3. If the allegations contained in the FIR are read in their

entirety, no offence under Sections 498 A and 506 read with section 34 of IPC can be stated to have been committed by the petitioners, rather contents of FIR as well as other material placed on record clearly reveal that FIR sought to be quashed in the instant proceedings has been purposely and intentionally lodged by respondent No.3 to wreak vengeance upon petitioners, who otherwise have repeatedly made efforts to bring respondent No.3 back to the matrimonial house.

24. Leaving everything aside, when it stands clearly established on record that respondent No.3 had been living separately for more than three years, before lodging of FIR and in between, she never levelled allegations with regard to demand of dowry against the petitioners, allegations levelled with regard to demand of dowry can be presumed to have been made falsely with a view to harass the petitioners. Though in the case at hand, dispute is between petitioner No.1 and respondent No.3 but unfortunately entire family of petitioner No.1 has been implicated, parents of petitioner No.1, who are aged persons. No specific allegation, if any, with regard to cruelty meted by petitioners No. 2 to 4 upon the respondent no.3, for bringing less dowry has been specifically levelled but yet they are compelled to face criminal proceedings instituted at the behest of respondent No.3.

25. There is another aspect of the matter. Though Shri Jyotirmay Bhatt learned counsel representing respondent No.3 vehemently argued that material available on record clearly reveals that respondent No.3 was subjected to cruelty at the hands of the petitioners for bringing less dowry and as such they have been rightly booked under Sections 498A, but 'cruelty' as defined under Section 498A of IPC is required to be established before instituting proceedings, if any, under Section 498A IPC. At this stage it would be apt to take note of Section 498A IPC:

> "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with

imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purposes of this section, "cruelty means"--

(a) anywilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

26. For the purpose of Section 498-A, "cruelty" has been specifically defined under the aforesaid provision of law. Though Mr. Jyotirmay Bhatt, learned counsel for the complainant vehemently argued that case of the complainant strictly falls within the definition of "cruelty" as defined under the explanation (a) and (b) of Section 498-A, but having taken note of the allegations contained in the FIR as well as other material available on record, this court finds it difficult to agree with the aforesaid submission of Mr. Bhatt. There is no material suggestive of the willful conduct, if any, of the petitioners to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health. Similarly, there is no allegation that at any point of time, demand, if any, ever came to be made by the petitioners of dowry or maltreatment on account of bringing less dowry.

27. “Cruelty” has been specifically defined under S.498A IPC. Mr. Bhatt, learned counsel representing respondent No.3 argued that the said case strictly comes under the definition of “cruelty” as provided under Section 498A, explanation (b) but this Court is not persuaded to agree with the aforesaid submission of learned counsel for respondent No.3. There is no material available on record, suggestive of willful conduct, if any, of the petitioners to drive the complainant to commit suicide or to cause grave injury to her limb or health. Similarly there is no cogent and convincing evidence, if

any of demand of dowry or maltreatment by petitioners on account of less dowry.

28. At this stage, Learned counsel appearing for the respondent No.3 submitted that the material available on record clearly reveals that at one point of time respondent No.3 attempted to commit suicide and as such provisions of Section 498A are attracted. However, this Court is not impressed with the aforesaid submission of learned counsel for respondent No.3 for two reasons viz. (i) save and except statement of petitioner No.1 given to Women Cell Panchkula that there is likelihood of their being involved in false criminal case, there is no material suggestive of the fact that matter, if any,, with regard to attempt of suicide made, if any, by respondent No.3 ever came to be reported to police (ii) attempt to commit suicide, if any, never took place in the matrimonial house rather attempt if any of this nature was made at parental house, that too after expiry of five months from the date of departure of respondent No.3 from her matrimonial house.

29. As per explanation B of S.498A IPC, harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or on account of failure by her or any person related to her to meet such demand, is termed as “cruelty”.

30. In the instant case, there is no whisper in the FIR that the petitioners ever maltreated the complainant for bringing less dowry, rather her precise allegations from day one she was constantly being pressurized by her the petitioner to get her younger sister married to her brother-in-law, which action would not come within the ambit of “cruelty”, as defined above.

31. Reliance is placed on judgment rendered by the Hon'ble Apex Court in **Shakson Belthissor** v. **State of Kerala and Anr**, 2009 (14) SCC 466, wherein it has been held that there is no allegation of harassment on account of dowry, no offence of cruelty either under Explanation (a) or Explanation (b)

of Section 498A IPC is made out. Relevant paras of the aforesaid judgment reads as under:

> "26. It was fairly agreed at bar that the aforesaid FIR was filed by Respondent No. 2 with the intention of making out a prima facie case of offence under Section 498A of the Indian Penal Code. The charge sheet, which was filed by the police was under Section 498A of the Indian Penal Code. As to whether or not in the FIR filed and in the charge sheet a case of Section 498A IPC is made out or not is an issue, which is required to be answered in this appeal.
>
> 27.Section 498A of the IPC reads as follows:
>
> "498A. Husband or relative of husband of a woman subjecting her to cruelty.
>
> Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> Explanation-For the purpose of this section, "cruelty" means-
>
> (a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman; or
>
> (b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her meet such demand".
>
> In the light of the aforesaid language used in the Section, the provision would be applicable only to such a case where the husband or the relative of the husband of a woman subjects the said woman to cruelty. When the ingredients of the aforesaid Section are present in a particular case, in that event the person concerned against whom the offence is alleged would be tried in accordance with law in a trial instituted against him and if found guilty the accused would be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> 28. The said section contains an explanation, which defines "cruelty" as understood under Section 498A IPC. In order to understand the meaning of the expression `cruelty' as envisaged under Section 498A, there must be such a conduct on the part of the husband or relatives of the husband of woman which is of such a nature as to cause the woman to

commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman.

29. When we examine the facts of the present case particularly the FIR and the charge sheet we find that there is no such allegation either in the FIR or in the charge sheet making out a prima facie case as narrated under explanation

(a). There is no allegation that there is any such conduct on the part of the appellant which could be said to be amounting to cruelty of such a nature as is likely to cause the Respondent No. 2 to commit suicide or to cause any injury to her life. The ingredient to constitute an offence under explanation (a) of Section 498A IPC are not at all mentioned either in FIR or in charge sheet and in absence thereof, no case is made out. Therefore, explanation (a) as found in Section 498A IPC is clearly not attracted in the present case.

30. We, therefore, now proceed to examine as to whether the case would fall under explanation (b) of Section 498A of IPC constituting cruelty of the nature as mentioned in explanation

(b). In order to constitute cruelty under the said provision there has to be harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or a case is to be made out to the effect that there is a failure by her or any person related to her to meet such demand. When the allegation made in the FIR and charge sheet is examined in the present case in the light of the aforesaid provision, we find that no prima facie case even under the aforesaid provision is made out to attract a case of cruelty."

32. It would also be apt to take note of judgment of Hon'ble Apex Court in **Wasim** v. **State (NCT of Delhi)** (2019) 7 SCC 435, wherein it has been held as under:

"10. The conviction of the Appellant by the Trial Court under Section 498-A was not for demand of dowry. The conviction under Section 498-A was on account of mental cruelty by the Appellant in having an extra marital relation and the threats held out by him to the deceased that he would leave her and marry Poonam. 10. The High Court acquitted the Appellant under Section 306 IPC by reaching a conclusion on the basis of evidence that the charge of abetment of suicide on part of the Appellant was not proved. Without any discussion of the evidence pertaining to demand of dowry and without dealing with the findings recorded by the Trial Court

regarding the demand of dowry, the High Court held that the offence under Section 498-A was made out

11. Cruelty is dealt with in the Explanation to Section 498-A as follows:

498-A. Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purpose of this section, "cruelty" means--

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

12. Conviction under Section 498-A IPC is for subjecting a woman to cruelty. Cruelty is explained as any willful conduct which is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. Harassment of a woman by unlawful demand of dowry also partakes the character of 'Cruelty'. It is clear from a plain reading of Section 498-A that conviction for an offence under Section 498-A IPC can be for willful conduct which is likely to drive a woman to commit suicide OR for dowry demand. Having held that there is no evidence of dowry demand, the Trial Court convicted the Appellant under Section 498-A IPC for his willful conduct which drove the deceased to commit suicide. The Appellant was also convicted under Section 306 IPC as the Trial Court found him to have abetted the suicide by the deceased.

14. The High Court ought not to have convicted the Appellant under Section 498-A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry. The High Court did not refer to such findings of the Trial Court and record reasons for its disapproval."

33. Reliance is also placed on judgment passed by the Hon'ble Apex Court in **Varala Bharath Kumar and Anr** v. **State of Telangana and Anr,** 2017 AIR (SC) 4434, wherein it has been held as under:

"7. It is by now well settled that the extraordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Where allegations made in the First Information Report/the complaint or the outcome of investigation as found in the Charge Sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out the case against the accused; where the allegations do not disclose the ingredients of the offence alleged; where the uncontroverted allegations made in the First Information Report or complaint and the material collected in support of the same do not disclose the commission of offence alleged and make out a case against the accused; where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the power under Article 226 of the Constitution of India or under Section 482 of Code of Criminal Procedure may be exercised.

While exercising power under Section 482 or under Article 226 in such matters, the court does not function as a Court of Appeal or Revision. Inherent jurisdiction under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The court must be careful and see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage.

8. We are conscious of the fact that, Section 498A was added to the Code with a view to punish the husband or any of his relatives, who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. Keeping the afore- mentioned object in mind, we have dealt with the matter. We do not find any allegation of subjecting the complainant to cruelty within the meaning of Section 498A of IPC. The records at hand could not disclose any willful conduct which is of such a

nature as is likely to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the complainant. So also, there is nothing on record to show that there was a demand of dowry by the appellants or any of their relatives, either prior to the marriage, during the marriage or after the marriage. The record also does not disclose anywhere that the husband of the complainant acted, with a view to coerce her or any person related to her to meet any unlawful demand of any property or valuable security.

34. Having scanned entire material available on record as well as law taken into consideration, this Court has no hesitation to conclude that by way of FIR sought to be quashed, respondent No.3 alongwith her other family members, has attempted to unnecessarily harass the petitioners for wreaking vengeance, that too on account of her strained relations with them.

35. Recently Hon'ble Apex Court in case titled as **Rajesh Sharma** v. **State of U.P.**, AIR 2017 SC 3869, has categorically held that provisions contained under S.498 are being misused by one party to harass other party and such complaints lead to uncalled for harassment not only to the accused but also the complainant. To remedy the situation, Hon'ble Apex Court held that involvement of civil society in the aid of administration of justice can be one of the steps, apart from the investigating officers and the concerned trial courts being sensitized. It is also necessary to facilitate closure of proceedings where a genuine settlement has been reached instead of parties being required to move High Court only for that purpose. It has been further held that Section 498A was inserted in the statute with the object of punishing the accused for the commission of cruelty by husband or his relatives against a wife particularly when such cruelty has potential to result in suicide or murder of a woman as mentioned in the Statement of Objects and Reasons of the Act 46 of 1983. Hon'ble Apex Court has observed that it is matter of serious concern that the cases instituted under S.498 for harassment of married women and many of such complaints are not bona fide. Hon'ble Apex Court has held in **Rajesh Sharma** supra, as under:

"14. Section 498A was inserted in the statute with the laudable object of punishing cruelty at the hands of husband or his relatives against a wife particularly when such cruelty had potential to result in suicide or murder of a woman as mentioned in the Statement of Objects and Reasons of the Act 46 of 1983. The expression 'cruelty' in Section 498A covers conduct which may drive the women to commit suicide or cause grave injury (mental or physical) or danger to life or harassment with a view to coerce her to meet unlawful demand. It is a matter of serious concern that large number of cases continue to be filed under Section 498A alleging harassment of married women. We have already referred to some of the statistics from the Crime Records Bureau. This Court had earlier noticed the fact that most of such complaints are filed in the heat of the moment over trivial issues. Many of such complaints are not bona fide. At the time of filing of the complaint, implications and consequences are not visualized. At times such complaints lead to uncalled for harassment not only to the accused but also to the complainant. Uncalled for arrest may ruin the chances of settlement. This Court had earlier observed that a serious review of the provision was warranted 9. The matter also appears to have been considered by the Law Commission, the Malimath Committee, the Committee on Petitions in the Rajya Sabha, the Home Ministry, which have been referred to in the earlier part of the Judgment. The abuse of the 8 Explanation to Section 498A 9 Preeti Gupta (supra) provision was also noted in the judgments of this Court referred to earlier. Some High Courts have issued directions to check such abuse. In Arnesh Kumar (supra) this Court gave directions to safeguard uncalled for arrests. Recommendation has also been made by the Law Commission to make the offence compoundable."

36. So far delay in lodging FIR is concerned, Hon'ble Apex Court in **Kishan Singh** v. **Gurpal Singh**, (2010) 8 SCC 775, has discussed effect of delay in lodging FIR and held as under:

"22. In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an after thought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal

proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (vide : Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., AIR 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors., (2008) 12 SCC 531)."

37. Hon'ble Apex Court in **Jai Prakash Singh** v **State of Bihar**, (2012) 4 SCC 379, has held as under:

12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: Thulia Kali v. The State of Tamil Nadu, AIR 1973 SC 501; State of Punjab v. Surja Ram, AIR 1995 SC 2413; Girish Yadav & Ors. v. State of M.P., (1996) 8 SCC 186; and Takdir Samsuddin Sheikh v. State of Gujarat & Anr., AIR 2012 SC 37)."

38. Relying upon the judgments of **Kishan Singh**, **Jai Prakash Singh** and **Manoj Kumar Sharma and others** Vs. **State of Chhattisgarh and another**, (2016) 9 SCC 1, this Court in **Ravi Kapoor @ Jeetendra** v **State of Himachal Pradesh and another**, Cr.MMO No. 87 of 2018 has held that delay in lodging FIR often results in embellishment, which is a creature of an afterthought and on account of delay, FIR not only gets bereft of advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. It further held that extraordinary delay in lodging FIR raises grave doubt about the truthfulness of allegations made therein.

39. Apart from above, in the case at hand, there is no material to demonstrate that prior approval of ACP and DCP was taken by the police officials before lodging of FIR sought to be quashed rather, in the case at hand police despite being fully aware of the background of the case, merely on the basis of allegations levelled by respondent No.3, proceeded to lodge the FIR in question. Even if for the sake of argument, allegations levelled in the FIR sought to be quashed are presumed to be correct, evidence collected on record is not sufficient to connect the accused with offences alleged to have been committed by them and as such no fruitful purpose would be served in permitting court below to continue with the proceedings initiated on the basis of FIR lodged by respondent No.3

40. Consequently, in view of detailed discussed made herein above and law taken note herein above, this court finds sufficient grounds to exercise its inherent power under S. 482 CrPC. Accordingly, the present petition is allowed. FIR No. 25 of 2019 dated 2.2.2019, registered at Police Station Parwanoo, District Solan, H.P. under Sections 498A, 506 read with Section 34 of IPC as well as consequent proceedings, if any, pending in the competent Court of law are quashed and set aside. All the petitioners are acquitted of the charges framed against them in the aforesaid FIR.

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

BETWEEN:-

1. DEV RAJ
S/O SHRI BASHI RAM,
R/O WARD NO. 7, KATHUA,
TEHSIL AND DISTRICT KATHUA, JAMMU & KASHMIR,
AGED ABOUT 51 YEARS

2. SARBJEET SINGH
SON FO LATE SH. HARJINDER SINGH,
VILLAGE AND POST OFFICE BALBEHRA,
TEHSIL AND DISTRICT PATIALA,
PUNJAB,
AGED ABOUT 29 YEARS

PETITIONERS

(BY MR. RAJIV RAI AND MR. ALOK RANJAN, ADVOCATES)

AND

1. BIR SINGH MALHOTRA
SON OF SH. GURUMUKHA SINGH
RESIDENT OF VILLAGE KARIAN,
POST OFFICE HARDASPUR
TEHSIL AND DISTRICT CHAMBA,
HIMACHAL PRADESH

RESPONDENT/COMPLAINANT

2. RISHI RANA
SONOF SH. JAI SINGH
RESIDENT OF VILLAGE AND POST OFFICE BHULLANA
TEHSIL BAIJNATH, DISTRICT KANGRA, H.P.

RESPONDENT/ACCUSED

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC NO. 509 OF 2019
DECIDED ON: 15.6.2022

Code of Criminal Procedure, 1973- Sections 482, 319 - **Negotiable Instruments Act, 1881** - Section 138 – Petition to Quash an order allowing the application under Section 319 CrPC to array petitioners as accused -**Held**- Requirement of clear particulars about the accused's role in the company's affairs - Court emphasizes specific averments for vicarious liability - No

evidence of their involvement in the transaction Petition allowed – Order quashed and set aside. (Para 16, 17, 18)

Cases referred:

Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd., (2018)14 SCC 202;

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

O R D E R

By way of instant petition filed under S.482 CrPC, prayer has been made on behalf of petitioners/accused for quashing and setting aside order dated 3.3.2018, whereby application under Section 319 CrPC filed by the respondent No.2/complainant (hereinafter, 'complainant') praying therein to array the petitioners as an accused in case No. 67 of 2016, having been filed by him under S.138 of the Negotiable Instruments Act pending adjudication before Chief Judicial Magistrate, Chamba, Tehsil and District Chamba, came to be allowed.

2. Precisely the facts, as emerge from the record are that the complainant instituted a complaint under S.138 of the Act in the court of learned Chief Judicial Magistrate, Chamba, District Chamba, against respondent No.2/accused-Rishi Rana (hereinafter, 'accused'), alleging therein that the above named accused approached him in the month of March, 2016, seeking loan of Rs. 5.00 Lakh for his domestic use. Complainant, who had cordial relations with the accused, advanced Rs. 5.00 Lakh in the month of March, 2016 with the understanding that the same shall be returned by the accused within a period of one month. Since the accused failed to make payment in the month of April, 2016, he issued cheque bearing No. 063983 dated 25.4.2016 to the complainant for a sum of Rs. 5.00 Lakh drawn at Punjab National Bank Sultanpur, Chamba, against saving bank account No. 7893002100000314. However, the fact remains that the said cheque on its presentation was dishonoured on account of insufficient funds. Since despite

issuance of legal notice, accused Rishi Rana failed to make the payment, complainant instituted proceedings under S.138 of the Act in the court of learned Chief Judicial Magistrate, Chamba.

3. After recording of evidence in the case, complainant preferred an application under S.319 CrPC, (Annexure P-4), praying therein to array petitioners herein as an accused on the ground that the cheque in question was also signed by them. In the aforesaid application, complainant averred that during the course of cross-examination, it transpired that the cheque in question is issued from a current account, which is in the name of the firm and the same has been signed by the persons sought to be arrayed as an accused, in addition to Rishi Rana. Apart from above, complainant also averred that inadvertently notice under S.138 of the Act was only issued to Rishi Rana being the authorized signatory but since the petitioners also signed the cheque, they are required to be arrayed as an accused.

4. Learned court below vide order dated 3.3.2018, (Annexure P-5) allowed the application and issued notice returnable for 5.8.2018 to the petitioners herein. In the aforesaid background, petitioners have approached this court in the instant proceedings, praying therein to set aside order dated 3.3.2018 as well as complaint instituted under S.138 of the Act.

5. Pursuant to notice issued in the instant proceedings, respondent No.1 has filed reply, wherein it is averred that S. 319 CrPC provides that in the course of any inquiry or trial of an a offence it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed. Learned counsel for the respondent No.1 argued that once there is no dispute that the cheque in question has been signed by petitioners and the cheque has been issued by the firm, no illegality can be said to have been committed by learned court below, while arraying petitioners herein as an accused in

case filed under S.138 of the Act. Above named counsel while placing reliance upon an order dated 3.9.2019 passed by Hon'ble Apex Court in **Kishore Sharma** v. **Sachin Dubey**, Cr. Appeal No. 1326 of 2019, argued that otherwise the issue sought to be decided in the instant proceedings being triable one, cannot be decided in the instant proceedings. He argued that the factum with regard to issuance of legal notice and consequence thereof cannot be looked into in these proceedings, rather the same being triable issue is required to be tried by learned trial Court.

6. Mr. Rajiv Rai and Mr. Alok Ranjan, Advocates representing the petitioners, while inviting attention of this court to complaint under S. 138 of the Act as well as application under S.319 CrPC, vehemently argued that at no point of time, allegation if any ,ever came to be leveled against the petitioners that the loan of Rs. 5.00 Lakh was advanced to them, rather, there is a precise allegation in the complaint that respondent /complainant lent Rs. 5.00 Lakh in the month of March, 2016 to respondent No.2 /accused Rishi Rana for his domestic use and as such, there is no liability, if any, of theirs. He further argued that it is not the case of the complainant that the money was lent to the firm and as such, petitioners herein being partners in the firm, issued notice and as such, petitioners cannot be held liable for action if any, of one of the partners i.e. respondent No.2 Rishi Rana, who had raised personal loan. Above named counsel further argued that since at no point of time, legal notice, if any, ever came to be issued against the petitioners before initiation of proceedings under S.138 of the Act, complaint, if any, qua them otherwise is not maintainable.

7. To substantiate aforesaid submission learned counsel for the petitioners invited attention of this Court on a judgment of Hon'ble Apex Court in **Ashoke Mal Bafna** v. **Upper India Steel Mfg. & Engg. Co. Ltd.**, (2018)14 SCC 202, wherein, it has been held that before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine

the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof.

8. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned by learned court below, while passing the order impugned in the instant proceedings, this court finds force in the submission of learned counsel for the petitioners that, at no point of time, allegation, if any, with regard to advancement of loan to the petitioners ever came to be leveled rather, the complainant specifically stated in the complaint that in March, 2016, he on the request of accused Rishi Rana advanced him loan to the tune of Rs. 5.00 Lakh for his domestic use. There is not even a whisper in the complaint that the loan to the tune of Rs. 5.00 Lakh was advanced to some firm or other partners of accused Rishi Rana. It is only after conclusion of evidence, that the complainant filed an application under S. 319 CrPC praying therein to array the petitioners as an accused on the ground that they have also signed cheque alongwith accused Rishi Rana. It has been further averred in the reply that inadvertently before instituting complaint under S.138, no notice could be issued to the petitioners.

9. Once there is no allegation in the complaint that Rs. 5.00 Lakh was advanced to the firm or to other partners of the accused Rishi Rana, complaint against the petitioners is otherwise not maintainable. Mere fact that they have also signed the cheque in question, is not sufficient to conclude complicity of the petitioners in the case, especially when there is no allegation in the complaint that the complainant had advanced loan to the tune of Rs. 5.00 Lakh to the firm or the persons sought to be arrayed as accused.

10. True it is that in the case at hand, cheque in question has been signed by petitioners alongwith respondent/accused Rishi Rana, but once there is no liability if any of these persons towards complainant, they

otherwise cannot be held liable for issuance of cheque, which ultimately came to be dishonoured on account of insufficient funds.

11. Hon'ble Apex Court in Ashok Malbafna supra has held that before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary. It is necessary for Courts to ensure strict compliance of the statutory requirements as well as settled principles of law before making a person vicariously liable. To fasten vicarious liability under S.141 of the Act on a person, law is well settled that the complainant should specifically show as to how and in what manner, accused was responsible.

12. Hon'ble Apex Court in **Dilip Hariramani** v. **Bank of Baroda**, Cr. Appeal No. 767 of 2022, decided on 9.5.2022, has held as under:

> "10. We would also refer to the summarisation of law on Section 141 by this Court in National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another,10 to the following effect: 10 (2010) 3 SCC 330: The case dealt with challenge to a summoning order. Withal, interference by the courts at the stage of summoning order is restricted/limited.
>
> "39. From the above discussion, the following principles emerge:
>
> (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in

charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

xx xx xx

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

11. In the present case, we have reproduced the contents of the complaint and the deposition of PW-1. It is an admitted case of the respondent Bank that the appellant had not issued any of the three cheques, which had been dishonoured, in his personal capacity or otherwise as a partner. In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, an expression interpreted by this Court in Girdhari Lal Gupta v. D.H. Mehta and Another11 to mean 'a person in overall control of the day-to-day business of the company or the firm', the conviction of the appellant has to be set aside. 12 The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Indian Contract Act, 1872 is a civil liability. The appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the day- to-day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of 11 (1971) 3 SCC 189 12 State of Karnataka v. Pratap Chand and Others, (1981) 2 SCC 335. the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company."

13. Interestingly in the case at hand, there is no allegation worth the name in the complaint against the petitioners, that they had taken loan from complainant and they with a view to discharge their liability issued cheque which subsequently came to be dishonoured on account of insufficient funds.

14. Otherwise also it is well settled by now that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. Hon'ble Apex Court has held in **Ashoke Mal Bafna** supra, as under:.

> "10. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action [See : Pooja Ravinder Devidasani v. State of Maharashtra (2014) 16 SCC 1 : AIR 2015 SC 675].
>
> 11. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.
>
> 12. Turning to the case on hand, admittedly the cheques dated 28-12-2004 were issued while the appellant was Director of the Company with validity for a period of six months but during that period they were not presented for realization at the bank. The appellant has resigned as Director w.e.f 2-1-2006 and the fact of his resignation has been furnished by Form 32 to the Registrar of Companies on 24-03-2006 in conformity with the rules. Thereafter, the appellant had played no role in the activities of the default Company. This fact remains substantiated with the Statement filed by the default Company on 20-02-2006 with the Registrar of Companies that in an advertisement of the Company seeking deposits (Annexure P3), only the names of three Directors of the Company were shown as involved in the working of the Company and the name of appellant was not therein. Indisputably,

therefore, the cheques bounced on 24-08-2006 due to insufficient funds were neither issued by the appellant nor the appellant was involved in the day to day affairs of the Company.

13. Before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and then to proceed further with proper application of mind to the legal principles on the issue. Impliedly, it is necessary for Courts to ensure strict compliance of the statutory requirements as well as settled principles of law before making a person vicariously liable.

14. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of Court. Looking at the facts of the present case in the light of settled principles of law, we are of the view that this is a fit case for quashing the complaint. The High Court ought to have allowed the criminal miscellaneous application of the appellant because of the absence of clear particulars about role of the appellant at the relevant time in the day to day affairs of the Company."

15. No doubt under S.319 CrPC, court enjoys vast power to order impleadment of those persons as accused against whom, some evidence appears during trial or enquiry that he has also committed offence alongwith other accused but in the case at hand, there is /was no material available before court below to arrive at a conclusion that persons sought to be arrayed as accused i.e. petitioners herein had committed offence punishable under S.138 of the Act.

16. No doubt, Hon'ble Apex Court in **Kishore Sharma**, supra has held that the question with regard to issuance of notice prior to initiation of proceedings under S.138 of the Act, being triable is to be decided by the trial court and on the basis of same, complaint cannot be ordered to be quashed, but in the case at hand, for the reasons discussed herein above, prayer made on behalf of the petitioners for quashment of complaint qua them, deserves to be allowed in light of judgment rendered by Hon'ble Apex Court in **Ashoke Mal Bafna** supra.

17. Consequently in view of above, present petition is allowed. Order dated 3.3.2018 passed by learned Chief Judicial Magistrate, Chamba, Himachal Pradesh in Case No. 67/2016 is quashed and set aside.

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

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

Between:-

1. SH. R.P. SOOD S/O LATE SH. PYARE LAL, R/O SOOD NIWAS, P.O-UPPER DARI, TEHSIL-DHARAMSHALA, DISTT-KANGRA, H.P.
2. RANJIT SINGH RANA S/O SH. HIRA SINGH, VILL-NANGAL, P.O-BEHIN, TEHSIL-DEHRA, DISTT-KANGRA, H.P
3. SH. SUBHASH CHAND SHARMA, S/O SH. ROSHAN LAL, VP.P & TEHSIL-JAISINGPUR, DISTT.-KANGRA, H.P.
4. SH. VINOD KUMAR S/O LATE SH. JANT RAM, VILL & P.O-LUDRET, TEHSIL-DEHRA, DISTT-KANGRA, H.P.
5. SH SHAMSHER SINGH RANA, S/O LATE SH. UDHAM SINGH RANA, VILL & P.O-DURGELA, TEHSIL-SHAHPUR, DISTT-KANGRA,H.P.
6. SH BALDEV CHAND VERMA, PRAGYA KUNJ, TANDA-GHUGGAR, PALAMPUR, DISTT.-KANGRA, H.P.
7. SH HUKAM CHAND S/O SH. PREM CHAND, VILL-& P.O-CHAMUKHA HAR DOGRI, TEHSIL-DEHRA, DISTT-KANGRA, H.P.
8. SMT. KRISHLA DEVI, W/O SH PURAN SINGH JARIAL, VILL-PANIHAR, P.O-CHHATRI, TEHSIL-SHAHPUR, DISTT-KANGRA, H.P
9. SH. KANT KUMAR SAINI, S/O LATE SH LALU RAM SAINI, H. NO. 374/5, SAIN MUHALLA, MANDI, H.P.
10. SH PARVEEN KUMAR, S/O SH NOLU RAM,VPO-SERATHANA, TEHSIL & DISTT. KANGRA, H.P.
11. SH BIR SINGH, S/O SH MANGAT RAM, VILL-SHADLA, PO-KATINDI, TEHSIL-SADAR, DISTT.-MANDI, H.P.
12. SH SARABJEET KUMAR, S/O SH TRIYASH VERMA, VILL-ANSOLI, P.O-MATAUR, TEHSIL & DISTT-KANGRA H.P.
13. SH INDER SINGH S/O SH KHINU RAM, VILL-BHYARTA, P.O-CHUNAHAN, TEHSIL-SADAR, DISTT-MANDI, HP.
14. SH SURESH KUMAR SHARMA, S/O SH. SHAM LAL, VILL-&P.O., MAROOH, TEH. & DISTT-KANGRA, H.P.
15. SH JOGINDER CHAND S/O LATE SH KARTAR CHAND, VILL-AGOJAR, P.O-ANDRETTA, TEHSIL-PALAMPUR, DISTT-KANGRA, H.P.
16. SH JOG RAJ, S/O SH SUNKU RAM, VILL-LALHA, P.O-HANGLOW, TEHSIL-PALAMPUR, DISTT-KANGRA, H.P.
17. SH JOGINDER SINGH BHATIA, S/O SH LAXMAN BHATIA, VILL & P.O-TANDA KHOLI, TEHSIL & DISTT-KANGRA, H.P.
18. SH SUNIL KUMAR DHIMAN S/O SH BIHARI LAL, VILL & P.O- - RAJIANA, 53 MILES, DISTT-KANGRA, H.P
19. SH. RAMESH SINGH, S/O SH. GANDHARV SINGH, VILL-HARSAR, DEHRAI, P.O-JAWALI, TEHSIL-NURPUR, DISTT-KANGRA, H.P

20. SH K B THAPA S/O LATE SH. D.B. THAPA, VILL-SIDHPUR, TEHSIL-DHARAMSHALA, DISTT-KANGRA, H.P.
21. SH MOHINDER LAL PLAH, S/O SH CHET RAM, VILL-PAREL, P.O-SULTANUR, CHAMBA, H.P.
22. SH. PRABHAT KUMAR PURI S/O SH GANGA NATH PURI, R/O MOHALLA SAPRI, P.O & DISTT-CHAMBA, H.P.
23. SH. RAMESH CHAND BHANDARI S/O LATE SH DEVI DYAL BHANDARI, MOHALLA & P.O-SULTANPUR, TEHSIL-CHAMBA, DISTT-CHAMBA, H.P
24. SH ARUN KUMAR ANAND , S/O SH KISHAN CHAND, MOHALLA HATNALA, TEHSIL-CHAMBA, DISTT-CHAMBA, H.P.
25. SH TILAK RAJ SHARMA, S/O SUKH DEV SHARMA, VILL-BHADRAN, P.O-SALOL, TEHSIL & DISTT-CHAMBA, H.P.
26. SH. GIRDHARI LAL S/O SH KRISHAN CHAND, VILL-DEVIGHAT, P.O-BATT, TEH. CHAMBA, DISTT-CHAMBA, H.P.
27. SH PRAKASH CHAND BHANDARI S/O SH DEVI DYAL BHANDARI, VILL-NANU, P.O-SAROL, DISTT-CHAMBA, H.P.
28. SH BIHARI LAL, S/O SH SONU RAM, VILL-NIUN, P.O-LALATI, TEHSIL-GHUMARWIIN,- DISTT-BILASPUR, H.P.
29. SH KASHMIR SINGH, S/O SH SEKHU RAM, VILL & P.O-GUGGA SALOH, TEHSIL & DISTT- KANGRA, H.P.
30. (A) MRS. ROSHANI DEVI WD/O LATE SH. PARKASH CHAND,
    (B) SH PANKAJ KUMAR S/O LATE SH PARKASH CHAND BOTH R/O VILL-LUGHATI, P.O-KACHHERA, TEHSIL-PALAMPUR, H.P
    (C) SMT. ANJU DEVI D/O LATE SH PARKASH CHAND, W/O SH PAWAN DEEP, R/O VILL-KANGRI, P.O-BHAWANA, TEHSIL-PALAMPUR, DISTT-KANGRA, H.P.
    (D) SMT. MANJU D/O LATE SH PARKASH CHAND, W/O SH RAJESH KUMAR, R/O VILL-GHEAR, P.O-BHAWANA, TEHSIL-PALAMPUR, DISTT.KANGRA, H.P
31. SH KARAM CHAND S/O SH DUMNU RAM, VILL & P.O-DHALLON, TEHSIL & DISTT-KANGRA, H.P.
32. SH SURESH ASGHAR, S/O SH. SANTOSH ASGHAR, VILL & P.O-BANURI, TEHSIL-PALAMPUR, DISTT.-KANGRA, H.P.
33. SH JGINDER SINGH S/O SH. JALLA RAM, V.P.O.-DARGELLA, TEHSIL-SHAHPUR, DISTT-KANGRA, H.P.
34. SH MOHINDER SINGH S/O LATE SH BELI RAM, VILL-KIORIANA, P.O BANDI, TEHSIL-SHAHUR, DISTT-KANGRA, H.P.
35. SH JASBIR SINGH, S/O LATE SH DEVI LAL, VILL & P.O-ICHHI, TEHSIL & DISTT-KANGRA, H.P.
36. SH KRISHAN CHAND S/O BELI RAM, VILL-AMTRAR, P.O-SUNEHAR, TEHSIL & DISTRICT KANGRA, H.P

37. SH SATISH KATOCH S/O SH GIAN CHAND, VILL-ROPARI, P.O-LAMBGAON, TEHSIL-JAISINGPUR, DISTT-KANGRA, H.P
38. SH DEVINDER KUMAR SHARMA S/O SH JAGTAMBA PRASAD, VILL-CHHATTTER, P.O-JALPARE, TEHSIL-JOGINDERNAGAR, DISTT-MANDI, H.P
39. SH. BIDHI CHAND. GOVT. ACCOMMODATION, QTR 32, NEAR SAINIK REST HOUSE, DHARAMSHALA, DISTT-KANGRA, H.P
40. SH RAJIV DUGGAL, S/O SH R.P DUGGAL, R/O JAWAHAR NAGAR, DHARAMSHALA, DISTT-KANGRA, H.P
41. SH TRILOCHAN SINGH PATHAINA, S/O BAKHTAWAR SINGH PATHANIA, R/O VILL-CHUTHA, P.O-NERTI, TEHSIL-SHAHPUR, DISTT-KANGRA, H.P
42. SH SUNIL KUMAR HANS S/O SH. DURGA DASS HANS, R/O CIVIL BAZAR, DHARAMSHALA, DISTT- KANGRA, H.P.
43. SH HARINDER PAUL S/O SH ABHAY PAUL SHARMA, VILL & P.O-SERATHANA, TEHSIL & DISTT. KANGRA, H.P
44. SH RAM SINGH THAKUR S/O THOTHI RAM, VPO-BAIJNATH, DISTT-KANGRA, H.P.
45. SH OM PARKASH S/O SH LATE SH RATTAN SINGH, VPO-SUDHER, TEHSIL-DHARAMSHALA, DISTT- KANGRA, H.P.
46. SH MOOL RAJ SHARMA, H.PNO.03, WARD NO 6, NEAR DFO RESIDENCE, GURUDWARA ROAD, DHARAMSHALA, DISTT-KANGRA, H.P.
47. SH HUKAM SINGH THAKUR, S/O SH TEJ RAM THAKUR, H.NO 36/05 PALACE COLONY, MANDI, DISTT-MANDI, H.P.
48. SH TEJINDER PAL RANA S/O SH MAST RAM RANA, MOHALLA PREM GALLI, P.O-MANDI, DISTT-MANDI, H.P.
49. MS. KAUSHALYA CHAUHAN W/O SH M.L. CHOUHAN, VILL & P.O-BARI-GUMANU, TEHSIL & DISTT-MANDI, H.P
50. SMT USHA GULERAIA W/O SH AMAR SINGH GULERIA, VILL-SAMLIAL, P.O-PANDOH, TEHSIL-SADAR,, DISTT-MANDI, H.P.
51. SH KARAN SINGH S/O SH BASHAKHU RAM, VILL-NAURU, P.O-BHANGROTU, TEHSIL-SADAR, DISTT-MANDI, H.P.
52. SH DAMESHWAR S/O SH SHOBHA RAM, VILL & P.O-GURKATHA, TEHSIL & DISTT-MANDI, H.P
53. SH TEJ RAM SHARMA S/O LATE SH RESHAMI SINGH, R/O H.NO 7/4, HOSPITAL ROAD, MANDI, DISTT-MANDI, H.P.
54. SH UPINDER BAHAL S/O LATE SH JASSA RAM, H. NO 44/10, BHAGWAN STREET, MANDI, DISTT MANDI, H.P.
55. SH TILAK RAJ SHARMA, S/O LATE SH HEM RAJ SHARMA, H.NO 162/2, PURANI MANDI, DISTT-MANDI, H.P.
56. MS SUMAN LATA SHARMA, D/O SH MAST RAM SHARMA, VILL-PURANA KANGRA, DISTT-KANGRA, H.P.

57. SH SUDERSHAN SINGH S/O SH AMAR SINGH PATIAL, VILL-HIRAN, P.O-KHOLA, TEHSIL-DEHRA, DISTT-KANGRA, H.P.
58. SH ANUP KUMAR S/O SH SWAMI PRAKASH, VILL & P.O-DHALOON, TEHSIL & DISTT-KANGRA, H.P
59. SH SANTOSH KUMAR S/O SH SUNKA RAM, VILL-AIMA GHUGGAR, P.O-PALAMPUR, DISTT-KANGRA, H.P.
60. SH TRILOK NATH SHARMA S/O SH GHUGHER RAM, VILL-GALOL, P.O-KAROUR, TEHSIL-NADAUN, DISTT-HAMIRPUR, H.P

... PETITIONERS

(BY MR. LOVNEEESH KANWAR, ADVOCATE)

AND

1. STATE OF H.P THROUGH PRINCIPAL SECRETARY (HEALTH) TO THE GOVT. OF H.P. SHIMLA-2.
2. THE DIRECTOR (HEALTH) HIMACHAL PRADESH, KASUMPTI, SHIMLA-9.

.. RESPONDENTS

(MR. BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

1. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 972 OF 2019

BETWEEN

SH. DHYAN SINGH S/O SHRI DAMODAR DASS VILLAGE AND POST OFFICE DHARAN TEH. THUNAG, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC BALI CHOWKI, DISTT MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

2. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 986 OF 2019

1. SH. DEVINDER KUMAR NARWAL S/O LATE SH. GANGA RAM, R/O B BLOCK A, SET NO 1. HOLLY OAK, SANJAULI, H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN., KAMLA NAHRU STATE HOSPITAL FOR MOTHER AND CHILD, SHIMLA, H.P.
2. SMT. SUSHILA NEGI W/O SH. JITENDER MEHTA, VILLAGE BARI, P.O. JAGOTI, TEHSIL ROHRU, DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, KAMLA NAHRU STATE HOSPITAL FOR MOTHER AND CHILD, SHIMLA H.P.
3. SH. RAJESH KUMAR VERMA S/O SH. SAHI RAM, RESIDENT OF VILLAGE BHALOH, P.O. GHANAHATTI, TEHSIL & DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
4. SH. HIRA PAL MEHTA S/O SH. L.R. MEHTA VILLAGE BADAID, P.O. GHANAHATTI TEHSIL & DISTT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
5. SH. RAVINDER KUMAR S/O SH. RISHI RAM SHARMA R/O VILLAGE KANHACHI, P.O. SHOGI TEHSIL & DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P
6. MRS. SUSHAMA THAKUR W/O SALIGRAM CHAUHAN, R/O VILLAGE JANKHUNI, P.O. BAGASAR, TEHSIL KARSOG & DISTRICT MANDI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
7. MRS. UPASNA W/O LATE SH. GOPAL SINGH THAKUR, VILLAGE & P.O. BAGSHAR TEHSIL KARSOG, & DISTRICT MANDI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
8. SH. HARJEET SINGH S/O SH. SANTOKH SINGH, R/O KAINTH HOUSE NEAR KAMAL KUNJ, SANJAULI, SHIMLA H.P. 171006., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P
9. SH. SUBHASH DHANTA S/O LATE SH. NARAYAN SINGH DHANTA, VILLAGE DHANTA NIWAS, NEAR KANWAR BUILDING ENGINEGHAR,

SANJAULI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P

10. SMT. ANJANA THAKUR W/O SH JAGAT THAKUR, THAKUR NIWAS, LOWER PANTHAGHATI, P.O. BEOLIA, TEHSIL & DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P
11. SH. VIJAY TITLA S/O SH. PARTAP SINGH TITLA, TOP VIEW COTTAGE NEAR LAXAMI NARYAN MANDIR, SANJAULI SHIMLA H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
12. SH. SUSHEEL KUMAR S/O LATE SH. MANMOHAN SINGH VILLAGE DALAN, P.O. VINGHAR, TEHSIL KUMAR SAIN, DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
13. SH. JAMNA DASS S/O LATE SH. RULDU RAM VILLAGE DISHTI, P.O. SAINJ TEHSIL DHAMI, DISTRICT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
14. SH. SWROOP SINGH VERMA S/O LATE SH. AJEET SINGH R/O VILLAGE GEHAR, P.O. SOGHI, TEHSIL & DIST. SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
15. SH. SURINDER SINGH VERMA S/O SH. M.S. VERMA R/O VILLAGE KUFTU, P.O. BALDEYAN, TEHSIL & DISTT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
16. SH. HARI RAM S/O LATE SH. JAGAN NATH VILLAGE ASLOU, P.O. CHAKHAR TEHSIL ARKI, DISTT SOLAN H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.
17. SH. GOPAL SINGH CHAUHAN S/O LATE SH. BESAR DUTT VILLAGE BAMAT P.O. PAHAL, TEHSIL DHAMI, DISTT. SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
18. SH. UMESH GUPTA S/O SH. PREM LAL GUPTA R/O V& P.O. SUNNI, TEHSIL SUNNI, DISTT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
19. SH. LALIT KUMAR SHARMA S/O LATE SH. MOHAN LAL SHARMA, SHARMA BUILDING LOWER TUTU SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.
20. SH. MULKAH RAJ S/O SHRI RANJEET SINGH, PRESENTLY SENIOR LAB TECHNICIAN, CIVIL HOSPITAL SANDHOLE, DISTT. MANDI, H.P., PRESENTLY RESIDING IN V & PO SANDHOLE, DISTT. MANDI, H.P.

21. SH. AMAR JEET S/O SHRI ACHHAR SINGH, R/O VILL AND POST OFFICE SEHLI, TEHSIL KOTLI, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN C.M.O. OFFICE MANDI, DISTT MANDI, H.P.
22. SMT. SANTOSH KUMARI W/O SHRI DINESH KUMAR, R/O HOUSE NO. 115/3, VILL. PUNGH, POST OFFICE CHATROKHRI, THE. SUNDERNAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CHC RATTI, DIST MANDI, H.P.
23. SMT. PREM LATA W/O SHRI NARESH LAKHANPAL, VPO BHAROTU, TEH. SUNDERNAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CHC RATTI, DISTT MANDI, H.P.
24. SMT. NEELAM KUMARI W/O SHRI SANT RAM, HOUSE NO. 187/4 RAVI NAGAR MANDI TEH. AND DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CMO OFFICE MANDI, DISTT MANDI, H.P
25. SH. GHANSHYAM S/O SHRI PREM SINGH, VILLAGE JHANJHAIL, POST OFFICE ROPARI, TEHSIL SARKAGAHT, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CMO OFFICE MANDI, DISTT MANDI, H.P.
26. SMT. RAJINDRA KUMARI W/O SHRI DALIP SINGH, RESIDENT OF NEAR RADHA KRISHAN S.S. SCHOOL, JAIL ROAD MANDI, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.
27. SH. ACHHAR SINGH SON OF SHRI LACHHMAN SINGH, VILLAGE GEHRA, POST OFFICE THONA, TEH. SARKAGHAT, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.
28. SH. RAJINDER KUMAR SON OF LATE SHRI SAMPURAN SINGH, VILLAGE RASMAIN, POST OFFICE SUNDERNAGAR, TEH. SUNDERNAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC CHOWK BLOCK ROHANDA, DISTT. MANDI, H.P.
29. SH. DHAYN SINGH S/O SHRI DAMODAR DASS VILLAGE AND POST OFFICE DHARAN TEH. THUNAG, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC BALI CHOWKI, DISTT MANDI, H.P.
30. SH. BIRI SINGH YADAV S/O LATE SHRI MANGAT RAM, RESIDENT OF VILLAGE SHADLA POST OFFICE KATINAHI, TEH. SADAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC GOKHURE BLOCK KOTLI, MANDI, DISTT. MANDI, H.P.
31. SH. SANT RAM S/O LATE SHRI AMABKA RAM, VILLAGE BATOUR, POST OFFICE SEHLI, TEH. KOTLI DISTT. MANDI, H.P. PRESENTLY

WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.

32. SH. VIRENDER SINGH CHAUHAN S/O SHRI BACHITTAR SINGH CHAUHAN, VILLAGE KUNI, POST OFFICE AND TEH. LADBHAROL, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL, JOGINDER NAGAR, DISTT. MANDI, H.P.
33. SH. VINOD KUMAR S/O SHRI DHANI RAM VILLAGE AND POST OFFICE MAJHARNU, TEH. JOGINDERNAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT MANDI, H.P.
34. SH. SUNDER LAL S/O SHRI GOPAL DASS, VILLAGE BAGOUN, POST OFFICE PANJGAIN, DISTT. BILASPUR, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT. MANDI, H.P.
35. SH. NAGENDER KUMAR S/O SHRI MOHAN SINGH, R/O VILLAGE KUHALDA, POST OFFICE ROPARI-KALEHAERU, TEHSIL JOGINDER NAGAR, DISTT MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT MANDI, H.P.
36. SH. ASHOK KUMAR SHARMA S/O SH. RAM DEV SHARMA RESIDENT OF TYPE III STAFF RESIDENCES, BLOCK II, SET NO. 8 RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, DISTRCIT KANGRA H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, H.P.
37. SH. PRADEEP SINGH S/O SH. BISANA SINGH RESIDENT OF TYPE III STAFF RESIDENCES, BLOCK II, SET NO. 3, RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, DISTRCIT KANGRA, H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANTA, H.P.
38. SH. DEV ANAND NEGI S/O SH. RATTAN DASS NEGI, VILLAGE SERI P.O. BAKHALAG, TEHSIL ARKI, DISTT. SOLAN, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN IGMC, SHIMLA DISTT. SHIMLA, H.P.

PETITIONERS

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

3. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 997 OF 2019

1. RAJAN BHIMTA S/O SHRI PREM SINGH, VILLAGE BAREON, KALATA-KI-SEER, P.O PANOG, TEHSIL-KOTHAI, DISTRICT SHIMLA, H.P.
2. DHARAM PARKASH SHARMA S/O LATE SHRI DURGA NAND SHARMA, VILLAGE BAGAIR, P.O THAILA VIA MASHOBRA, TEHSIL SUNI, DISTT. SHIMLA, H.P.
3. KHEM RAJ GUPTA S/O LATE SHRI M.L. GUPTA VILLAGE & P.O HALOG (DHAMI) TEHSIL & DISTT. SHIMLA, H.P.
4. ARUNA KUMARI D/O P.L PAPTA, VILLAGE THANA, TEHSIL ROHRU, DISTT. SHIMLA, H.P.
5. RAJESH ROKA S/O SHRI M.B. ROKA, R/O ROCK COTTAGE, RAM NAGAR, P.O CHAURAH MAIDAN, SHIMLA H.P.
6. AJAY SHARMA S/O LATE SHRI DURGA DUTT SHARMA, SET-5-6, BLOCK NO. 16, US CLUB, SHIMLA.H.P.
7. KUNDAN SINGH S/O LATE SHRI SUNDAR SINGH, SUN SHINE BUILDING, NEAR SAHANI BUILDING BELOW CHILDREN PARK, SANJAULI, SHIMLA, H.P.
8. ASHOK KUMAR TANDON S/O LATE SHRI MAM CHAND FLAT NO-2, BLOCK-B, VERMA APARTMENTS, NEAR PETROL PUMP, SANJAULI, SHIMLA-6, HP.
9. RAVINDER SINGH KANWAR S/O SHRI NARAIN SINGH KANWAR, OLD BLOCK, SET-4, TYPE II, MED. HOSTEL, HOLYOAK, SANJAULI, SHIMLA-6, H.P.
10. KAPOOR SINGH JISHTU S/O SHRI NARAYAN JISHTU, MOHAN BHAWAN (TOP FLOOR) LOWER KHALINI, SHIMLA-3, H.P.
11. BALIBIR SINGH THAKUR S/O LATE SH. D.R. THAKUR R/O SET NO. 26 CORSTROPHEN ESTATE, TYPE-2 LAKKAR BAZAR, SHIMLA-171001, HP
12. NAVEEN SOOD S/O SHRI K.C. SOOD, V.P.O. SHOGHI, NEAR RLY STATION, SHOGHI, DISTT. SHIMLA, H.P.

PETITIONERS

(BY MR. PAWAN K. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

4. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1019 OF 2019

SH. DEV ANAND NEGI S/O SH. RATTAN DASS NEGI RESIDENT OF VILLAGE SERI P.O. BAKHALAG, TEHSIL ARKI DISTT. SOLAN, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN IGMC, SHIMLA DISTT. SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

5. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1029 OF 2019

SH. SANT RAM S/O LATE SHRI AMABKA RAM RESIDENT OF VILLAGE BATOUR, POST OFFICE SEHLI, TEH. KOTLI, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

6. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1040 OF 2019

SH. PRADEEP SINGH S/O SH. BISANA SINGH RESIDENT OF TYPE III STAFF RESIDENCES, BLOCK II, SET NO. 3 RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, DISTRCIT KANGRA H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

7. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1048 OF 2019

SH. RAVINDER KUMAR S/O SH. RISHI RAM SHARMA R/O VILLAGE KANHACHI, P.O. SHOGI, TEHSIL & DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

8. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1082 OF 2019

SH. RAJESH KUMAR VERMA S/O SH. SAHI RAM RESIDENT OF VILLAGE BHALOH, P.O. GHANAHATTI, TEHSIL & DISTRICT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

9. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1087 OF 2019

SH. SUBHASH DHANTA S/O LATE SH. NARAYAN SINGH DHANTA, RESIDENT OF DHANTA NIWAS NEAR KANWAR BUILDING ENGINEGHAR, SANJAULI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

10. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1095 OF 2019

SMT. SUSHAMA THAKUR W/O SALIGRAM CHAUHAN, R/O VILLAGE JANKHUNI, P.O. BAGASAR, TEHSIL KARSOG & DISTRICT MANDI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

11. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1101 OF 2019

SMT. SANTOSH KUMARI W/O SHRI DINESH KAPUR, R/O HOUSE NO. 115/3, VILL. PUNGH, POST OFFICE CHATROKHRI, THE. SUNDERNAGAR, DISTT. MANDI, H.P. H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CHC RATTI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

12. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1102 OF 2019

SH. NAGENDER KUMAR S/O SHRI MOHAN SINGH, R/O VILLAGE KUHALDA, POST OFFICE ROPARI-KALEHAERU, TEHSIL JOGINDER NAGAR, DISTT MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

13. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1103 OF 2019

1. RAMESHWAR DUTT SHARMA S/O LATE SHRI CHET RAM SHARMA, 2-B JAGDEV APARTMENTS, VIKASNAGAR, SHIMLA-9, HP
2. MULK RAJ S/O SHRI MAHANDO RAM, VILLAGE HALTI, P.O DRAMAN, TEHSIL-CHOWARI, DISTRICT CHAMBA, H.P.
3. GEETA DEVI W/O SHRI NARESH BHETTAN, KUBER BUILDING, TOP FLOOR, NEAR CHILDREN PARK, SANJAULI, SHIMLA-6, HP.

PETITIONERS

(BY MR. PAWAN K. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

14. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1106 OF 2019

SH. BIRI SINGH YADAV S/O LATE SHRI MANGAT RAM, RESIDENT OF VILLAGE SHADLA, POST OFFICE KATINAHI, TEH. SADAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC GOKHURE BLOCK KOTLI, MANDI, DISTT. MANDI, HP.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

15. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1108 OF 2019

SH. SWROOP SINGH VERMA S/O LATE SH. AJEET SINGH R/O VILLAGE GEHAR, P.O. SOGHI, TEHSIL & DIST. SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

16. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1109 OF 2019

SH. RAJINDER KUMAR SON OF LATE SHRI SAMPURAN SINGH, RESIDENT OF VILLAGE RASMAIN, POST OFFICE SUNDERNAGAR, TEH. SUNDERNAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN PHC CHOWK BLOCK ROHANDA, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

17. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1111 OF 2019

SH. SURINDER SINGH VERMA S/O SH. M.S. VERMA R/O VILLAGE KUFTU, P.O. BALDEYAN, TEHSIL & DISTT SHIMLA H.P. PRESENTLY WORKING AS CHIEF LABORATORY TECHNICIAN, ZONAL LEPROSY HOSPITAL, DHARAMPUR, DISTRICT SOLAN, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

18. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1112 OF 2019

SH. ACHHAR SINGH SON OF SHRI LACHHMAN SINGH, VILLAGE GEHRA, POST OFFICE THONA, TEH. SARKAGHAT, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

19. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1117 OF 2019

SH. JAMNA DASS S/O LATE SH. RULDU RAM VILLAGE DISHTI, P.O. SAINJ TEHSIL DHAMI, DISTRICT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

20. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1121 OF 2019

SMT. ANJANA THAKUR W/O SH JAGAT THAKUR, THAKUR NIWAS, LOWER PANTHAGHATI, P.O. BEOLIA, TEHSIL & DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

21. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1127 OF 2019

SH. UMESH GUPTA S/O SH. PREM LAL GUPTA R/O V& P.O. SUNNI, TEHSIL SUNNI, DISTT SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, CIVIL HOSPITAL, SUNNI, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

22. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1130 OF 2019

SH. GOPAL SINGH CHAUHAN S/O LATE SH. BESAR DUTT RESIDENT OF VILLAGE BAMAT P.O. PAHAL, TEHSIL DHAMI, DISTT. SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

23. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1135 OF 2019

SH. SUSHEEL KUMAR S/O LATE SH. MANMOHAN SINGH VILLAGE DALAN, P.O. VINGHAR, TEHSIL KUMAR SAIN, DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

24. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1139 OF 2019

SH. VIJAY TITLA S/O SH. PARTAP SINGH, RESIDENT OF TITLA TOP VIEW COTTAGE NEAR LAXAMI NARYAN MANDIR, SANJAULI SHIMLA H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

25. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1141 OF 2019

1. HEM RAJ SHARMA S/O SHRI MEHAR CHAND R/O SHARMA NIWAS BELOW JAI RAM BHAWAN, CEMETERY ROAD, SANJAULI, SHIMLA-6.
2. BIAS DEV NEGI S/O SHRI BHAGAT SAIN NEGI R/O. BLIZZZARD VIEW, BELOW MOTO WORLD NAV BAHAR, SHIMLA-2.
3. KRISHAN KUMAR S/O LATE SHRI LAGNU RAM R/O FLAT NO. 10 BLOCK-15, HOUSING BOARD COLONY, SANJAULI, SHIMLA-6.
4. VINEETA BRAMTA S/O SHRI S.R. PIRTA R/O BRAMTA HOUSE, PHASE-1, SECTOR-1, NEW SHIMLA.
5. SUKH DEV VERMA S/O SHRI PAT RAM VERMA R/O. VILLAGE TAROL PO BHOJNAGAR, TEHSIL KASAULI, DISTRICT SOLAN, H.P.
6. SUSHIL KUMAR S/O SHRI JAI LAL SHARMA R/O VILLAGE BORTI BRAHMANA POST OFFICE CHANDI SUB TEHSIL KUTHAR, DISTRICT SOLAN, H.P.
7. BRIJ LAL S/O LATE SHRI TULSI RAM R/O. VILLAGE BHADRON POST OFFICE HAWAN TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

8. SURINDRA CHOPRA S/O SHRI MOTI RAM R/O CHOPRA NIWAS, NEAR VIJ NIWAS, SANJAULI, SHIMLA-6,
9. ANISH SHYAM S/O SHRI PREM SHYAM R/O VILLAGE CHIMLA POST OFFICE KOTGARH, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.
10. SANTOSH JAGTA S/O LT. SHRI PURAN CHAND JAGTA R/O VILLAGE URO PO SHINGLA TEHSIL RAMPUR, DISTRICT SHIMLA, H.P.
11. NIRMAL THAKUR D/O LATE SHRI SITA RAM THAKUR R/O VILLAGE BAHAWAN POST OFFICE BAKHALAG, TEHSIL ARKI, DISTRICT SOLAN, H.P.
12. MAHESH CHAND VERMA S/O M.S. VERMA R/O ARSHIYA TUTI KANDI, SHIMLA.
13. MANGLA SOOD D/O LATE SHRI MADAN GOPAL SOOD R/O CHINT KOOT NIWAS NEAR MEDICAL HOSPITAL, SANJAULI CHOWK, SHIMLA
14. RAJINDER KUMAR SHARMA S/O LATE SHRI PREM LAL SHARMA R/O VILLAGE AND POST OFFICE BERI RAZEDIAN (JUDHNI) SADAR, BILASPUR, H.P.
15. PREM NATH SHARMA S/O SHRI JAGAN NATH SHARMA R/O BHAGWATI NIWAS, NEAR BELOW MOTO WORLD, NAV BAHAR, SHIMLA-2.
16. KULDEEP SHARMA S/O LATE SHRI HARBANS RAM SHARMA R/O VILLAGE BHATOH POST OFFICE MASERAN, TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.
17. MAHENDER SINGH VERMA S/O LATE SHRI MAST RAM VERMA, R/O VILLAGE KALWI POST OFFICE BASANTPUR TEHSIL SUNI, DISTRICT SHIMLA H.P.
18. JITENDER SINGH RANA S/O SHRI BHIM SINGH R/O VILLAGE PAKHAR POST OFFICE TIHRA TEHSIL SUJANPUR TIHRA DISTRICT HAMIRPUR, H.P.
19. RAM LAL S/O SHRI RUPI RAM R/O VILLAGE SHANAND POST OFFICE KUMARSAIN, DISTRICT SHIMLA, H.P.
20. PURAN CHAND SHARMA S/O LATE SHRI MOHAN LAL R/O NEAR BUS STAND, KARSOG, DISTRICT MANDI, H.P.
21. ASHISH KUMAR DOGRA S/O LATE SHRI LAL DASS R/O DOGRA NIWAS, MEHLI POST OFFICE KASUMPTI, SHIMLA.
22. RAVINDER SINGH S/O SHRI SOHAN LAL R/O VILLAGE AND POST OFFICE ALATHU, TEHSIL SADAR, DISTRICT MANDI, H.P.
23. MAN MOHAN SINGH PAL S/O LATE SHRI ASHA RAM PAL R/O. SHIV KUTI, TUTI KANDI SHIMLA.
24. SHIV RAM THAKUR S/O SHRI PANJU RAM THAKUR R/O VILLAGE GADYARA POST OFFICE DRUBBAL TEHSIL JOGINDERNAGER, DISTRICT MANDI, H.P.

25. NEEL KUMAR S/O LATE SHRI KHYALI RAM R/O VILLAGE CHURARI-BEHAL POST OFFICE HAWAN TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.
26. BABU RAM VERMA S/O SHRI GOPI CHAND VERMA R/O VILLAGE CHHAUNTI POST OFFICE LUHRI TEHSIL ANNI, DISTRICT KULLU, H.P.
27. MAST RAM SHARMA S/O SHRI DURGA RAM SHARMA R/O SHREE DURGA APARTMENTS LOWER SANGTI POST OFFICE SANJAULI, SHIMLA-6
28. NARPAT RAM S/O SHRI DEBU RAM R/O VILLAGE AND POST OFFICE BIR TEHSIL AND DISTRICT MANDI, H.P.
29. VEENA DEVI D/O. DHARAM PAL R/O CORRESTOPHEN ESTATE, SET NO. 17, LAKKAR BAZAR, SHIMLA.
30. PYAR SINGH KANWAR S/O SHRI BHAGAT SINGH KANWAR R/O VILLAGE JHANDI POST OFFICE KUNIHAR TEHSIL ARKI, DISTRICT SOLAN, H.P
31. HATENDER CHAUHAN S/O SHRI RANGIL SINGH CHAUHAN R/O BYE PASS ROAD DHALI, NEAR BATISH COLONY, BELOW DEEPAK GUEST HOUSE
32. SHER SINGH S/O LATE SHRI ROSHAN LAL R/O SANGETA BHAWAN, LOWER CHAKKAR, SHIMLA.
33. BHAGAT RAM VERMA S/O LATE SHRI NARAIN SINGH VERMA R/O CHAUHAN NIWAS, CEMETERY SANJAULI, SHIMLA-6.
34. ROOP LAL SHARMA S/O SHRI TEK CHAND SHARMA R/O VILLAGE KALOUTA POST OFFICE MAHUN TEHSIL KARSOG, DISTRICT MANDI, H.P.
35. VIJAY KUMAR PATHAK S/O LATE SHRI RATTAN LAL PATHAK, R/O SHIV SHANT RATTAN BHAWAN, VILLAGE MAZYAT, POST OFFICE TOTU, SHIMLA.
36. GIRISH KUMAR MAHANT S/O SHRI GHANSHYAM DASS MAHANT, R/O. MAHANT NIWAS, NEAR R.V.K. SCHOOL, KASUMPTI, SHIMLA-9.
37. ASHWANI KUMAR S/O DES RAJ R/O F-3, BHAJI HOUSE, BOTH WELL LODGE, NEAR IGMC, SHIMLA
38. GOPAL SOOD S/O SHRI DHARAM CHAND SOOD R/O SET NO.1, BLOCK NO.3, NEW BUTAIL BUILDING, LOWER BAZAR, SHIMLA.
39. SHEELA KASHYAP D/O. SHRI JAI RAM R/O VIVEK NIWAS NEAR DEV VATIKA KAMLA NAGAR, CHURAT ROAD, SHIMLA.
40. KAMESHWAR THAKUR S/O LATE SHRI DILA RAM THAKUR R/O VILLAGE GHLOTH POST OFFICE OKHRU, TEHSIL ARKI, DISTRICT SOLAN, H.P.
41. NEELAM SHARMA D/O SHRI B.L. RAINA R/O. TYPE III B, SET NO. 14, KASUMPTI, (NEAR PARIMAHAL), SHIMLA.

42. NORTHAN PALZER NEGI S/O LATE SHRI JORGAY RAM NEGI R/O VILLAGE KARLA POST OFFICE SPILLON, TEHSIL POOH, DISTRICT KINNAUR, H.P.
43. CHAMAN LAL S/O SHRI SINGHO RAM R/O VILLAGE BINNA POST OFFICE PATKA TEHSIL BHATTIYAT DISTRICT CHAMBA, H.P.
44. KARUNA KAPOOR D/O SHRI RAM SARAN R/O SET NO. 37-A, TITLA HOTEL JAKHOO, SHIMLA
45. ARVIND KUMAR DOGRA S/O SHRI SAT PAL R/O VILLAGE AND POST OFFICE RAJPUR JASWAN, TEHSIL AMB, DISTRICT UNA, H.P.
46. CHANDER KANTA SHARMA D/O LATE SHRI MOHAN LAL SHARMA R/O VILLAGER SERI POST OFFICE GUMMA TEHSIL AND DISTRICT SHIMLA, H.P.
47. KAMLA BHARDWAJ D/O LATE SHRI GAULT RAM R/O VILLAGE ROHROO NEAR TOWER GANGTOLI POST OFFICE ROHROO, TEHSIL ROHROO, DISTRICT SHIMLA, H.P.
48. SANTOSH KUMARI D/O. JAGVEER SINGH R/O SET NO. 12, MEDICAL COLONY, R.H. NAHAN, DISTRICT SIRMAUR, H.P.
49. MAHESH KUMAR S/O SHRI KARISHAN CHAND R/O VILLAGE AND POST OFFICE KOLAR, PAONTA SAHIB DISTRICT SIRMAUR, H.P.
50. ANULEKHA W/O SHRI MAHESH KUMAR VILLAGE & POST OFFICE KOLAR, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.
51. ABIDA KHANAM D/O. MIRZA HUSEN BEG, R/O. HOUSE NO. 60/9 KUMHAR GALLI, NAR MASJID RANI TAL NAHAN, DISTRICT SIRMAUR, H.P.
52. ROOP CHAND S/O SHRI MANI RAM R/O SET NO. 37, MEDICAL COLONY, R.H. NAHAN, DISTRICT SIRMAUR, H.P.
53. SUSHMA SHARMA D/O SHRI J.L. SHARMA R/O ATRI NIWAS, LOWER PANTHAGHATI KASUMPTI, SHIMLA, H.P.
54. HARINDER SINGH MEHTA S/O SHRI DEVINDER SINGH R/O VERMA APARTMENTS, ABOVE SABZI MANDI, SET NO.4, HIM GIRI COLONY, NEW DHALLI, SHIMLA, H.P.
55. REETA CHAUHAN D/O SHRI M.R. KASHYAP R/O PADAM NIWAS, N.A.C. ROAD, DHALLI, SHIMLA, H.P.
56. TIKA RAM SHARMA S/O LATE SHRI UDHAM RAM SHARMA R/O VILLAGE MUNGNA POST OFFICE CHAMBA, TEHSIL SUNI, DISTRICT SHIMLA.
57. GITA RAM BANSAL S/O SHRI GORKHOO RAM R/O ANDROL POST OFFICE NEHRA TEHSIL AND DISTRICT SHIMLA, H.P.
58. HARJIT SINGH S/O LATE SHRI UDHO RAM R/O. NEAR M.C. LANE SUBHASH NAGAR/RULDU BHATTA, SHIMLA.
59. KHAILI RAM SHARMA S/O SHRI DURGA RAM SHARMA R/O VILLAGE BALA PO DAHAD TEHSIL JHANDUTTA, DISTRICT BILASPUR, H.P.

60. SURINDER JASROTIA S/O LATE SHRI UTTAM SINGH JASROTIA R/O MOHALLA UPPER SURARA POST OFFICE, TEHSIL AND DISTRICT CHAMBA, H.P.
61. OM PARKASH S/O LATE SHRI HARI RAM R/O VILLAGE RATH (KUHANI) POST OFFICE SAROL, TEHSIL AND DISTRICT CHAMBA, H.P.
62. NARESH RANA S/O LATE SHRI GIAN SINGH RANA R/O MOHALLA SURADA POST OFFICE CHAMBA, TEHSIL AND DISTRICT CHAMBA, HP
63. AMAR SINGH S/O LATE SHRI GORKH R/O MOHALLA RAMGARH POST OFFICE CHAMBA, TEHSIL AND DISTRICT CHAMBA, H.P.
64. SANJAY KUMAR S/O SHRI UTTAM CHAND R/O VILLAGE AND POST OFFICE SAROL, TEHSIL AND DISTRICT CHAMBA, H.P.
65. CHANCHAL KUMAR S/O LATE SHRI RATTAN CHAND R/O VILLAGE & POST OFFICE SAROL TEHSIL AND DISTRICT CHAMBA, H.P.
66. MADAN KUMAR S/O SHRI ASHWANI KUMAR R/O MOHALLA & POST OFFICE SULTANPUR TEHSIL AND DISTRICT CHAMBA, H.P.
67. KUSUM LATA D/O MUNSHI RAM R/O MOHALLA SURADA POST OFFICE CHAMBA, TEHSIL AND DISTRICT CHAMBA, H.P.
68. VIJAY KUMAR S/O LATE SHRI HARINDER PAL R/O VILLAGE AND POST OFFICE MANGLA, TEHSIL AND DISTRICT CHAMBA, H.P.
69. RUDRESHWAR KUMAR S/O SHRI ASHWANI KUMAR R/O VILLAGE BHALOTHU POST OFFICE LUDU (KATHANA) TEHSIL AND DISTRICT CHAMBA, H.P.
70. OM PARKASH S/O LATE SHRI LAL CHAND R/O MOHALLA DHAROG POST OFFICE TEHSIL AND DISTRICT CHAMBA, H.P.
71. MUMARIK ALI S/O LATE SHRI AZIZ DEEN R/O VILLAGE AND POST OFFICE DIUR TEHSIL SALOONI, DISTRICT CHAMBA, H.P.
72. AMAR SINGH S/O SHRI DHANI RAM R/O VILLAGE LECH PO GEHRA TEHSIL AND DISTRICT CHAMBA, H.P.
73. JOGINDER SINGH S/O SHRI NANAK CHAND R/O VILLAGE PANJSEI POST OFFICE & TEHSIL BHARMOUR, DISTRICT CHAMBA.
74. JOGINDER SINGH S/O LATE SHRI MUNSHI RAM R/O VILLAGE SANCHUEI POST OFFICE AND TEHSIL BARMOUR, DISTRICT CHAMBA.
75. MAN SINGH S/O LATE SHRI SHALKO RAM R/O VILLAGE AND POST OFFICE SAROO TEHSIL AND DISTRICT CHAMBA, H.P.
76. KULDEEP SINGH KANWAR S/O SHRI GIAN SINGH KANWAR R/O VILLAGE MANJHAR POST OFFICE KOT BEGA TEHSIL KASAULI DISTRICT SOLAN, H.P.
77. RAM DUTT S/O LATE SHRI SHANKARU RAM R/O VILLAGE DHALANJI POST OFFICE NAINA TIKKAR TEHSIL PACHHAD, DISTRICT SIRMAUR, H.P.

78. SURESH KUMAR S/O LATE SHRI HEAM SHANKAR R/O VILLAGE BHAROL, POST OFFICE KOTTI TEHSIL AND DISTRICT SOLAN, H.P.
79. SANT RAM S/O SHRI DILA RAM R/O VILLAGE MAKRI POST OFFICE MAKRI MARKAND VIA JUKHALA TEHSIL SADAR, DISTRICT BILASPUR, H.P.
80. SURAT RAM KASHYAP S/O LATE SHRI RULDU RAM R/O VILLAGE BADA NEAR MAMTI SERVICE STATION POST OFFICE KUMARHATTI, TEHSIL AND DISTRICT SOLAN, H.P.
81. KHEM CHAND VERMA S/O LATE SHRI H.R. VERMA R/O VILLAGE SHEEL POST OFFICE KAKKAR HATTI TEHSIL AND DISTRICT SOLAN, H.P.
82. BHAJAN SINGH S/O SHRI JALPATU RAM R/O HOUSE NO. 211, SECTOR-2, SHYLAK NAGAR, JHARMAJRI POST OFFICE BAROTIWALA, DISTRICT SOLAN, H.P.
83. NARESH KUMAR S/O SHRI DASU RAM R/O VILLAGE TUKARI POST OFFICE KUNIHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
84. YOG MAYA S/O SHRI ISHWAR DASS R/O VILLAGE AND POST OFFICE CHAURA TEHSIL NICHAR, DISTRICT KINNAUR, H.P.
85. ANOKHI RAM KAUSHAL S/O SHRI NIKA RAM R/O VILLAGE NAGER POST OFFICE KUNIHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
86. CHANDU RAM VERMA R/O LATE SHRI BARDU RAM R/O VILLAGE MALIWALI POST OFFICE SARYANJ TEHSIL ARKI, DISTRICT SOLAN, H.P.
87. MANOHAR LAL S/O SHRI MAHA NATH RAM R/O VILLAGE ANJI POST OFFICE KOTI, TEHSIL AND DISTRICT SOLAN, H.P.
88. ABHINAS S/O LATE SHRI MADHAV KUMAR R/O VILLAGE SYAWAN POST OFFICE KUNIHAR, TEHSIL ARKI, DISTRICT SOLAN, HP.
89. MOHAN SINGH GARG S/O LATE SHRI MUNNU RAM R/O VILLAGE KOTHI POST OFFICE KUNIHAR TEHSIL ARKI DISTRICT SOLAN, H.P.
90. HARI RAM S/O SHRI VAZIRU RAM R/O GEETA NIWAS, NEAR RADHA SOAMI SATSANG TALAB KUNIHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
91. RAM LAL S/O SHRI THANTHI RAM R/O VILLAGE KOTHI POST OFFICE KUNIHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
92. RAJESH GUPTA S/O SHRI NAND LAL GUPTA R/O VILLAGE AND POST OFFICE ARKI TADDU MOHALL-1 WARD NO.5, TEHSIL ARKI, DISTRICT SOLAN, H.P.
93. KAUSHLYA D/O UTTAM SHARMA VILLAGE & POST OFFICE ARKI WARD NO.4, TEHSIL ARKI, C/O PARKASH GUPTA DISTRICT SOLAN, H.P.
94. SURESH KUMAR S/O SHRI RAM CHAND R/O VILLAGE GAJRERI, POST OFFICE NAVGAON, TEHSIL ARKI, DISTRICT SOLAN, H.P.

95. HARDEEP SINGH KANG S/O S. PRITAM SINGH R/O HOUSE NO. 51, WARD NO. 7, NEAR M.C. PARK, NALAGARH, DISTRICT SOLAN, H.P.
96. RAKESH KUMAR S/O SHRI DHANI RAM R/O RAMILLA NIWAS Q. NO. 3, IST HOUR JUBRI DHAR CHURT ROAD, LOWER DHALLI, SHIMLA-12.
97. PRABHU RAM S/O SHRI LACHHMAN SINGH R/O VILLAGE HALDWARA, POST OFFICE SANDHOL, TEHSIL SANDHOL, DISTRICT MANDI, H.P.
98. MANGAT RAM S/O SHRI JHUSU RAM R/O DEV SHAKTI KUNJ NORTH OAK, SANJAULI, SHIMLA-6.
99. BALWAN CHAND KAHSYAP S/O LATE SHRI ADAM RAM R/O SHANTI NIWAS, EVER SUNNY, SHIMLA-1.
100. RAGHUBIR SINGH CHAUHAN S/O LATE SHRI AMAR SINGH CHAUHAN R/O AMAR NIWAS, SUNDALE COLONY, NEAR 44 BLOCK RAJHANA ROAD SECTOR-4, NEW SHIMLA, H.P.
101. RAMA DEVI D/O LATE SHRI ANANT RAM CHAUHAN R/O GOPAL COTTAGE, FLOWERDALE CHHOTA SHIMLA, SHIMLA-2, H.P.

PETITIONERS

(BY MS. RANJANA PARMAR, SENIOR ADVOCATE
WITH MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
3. DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

26. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1143 OF 2019
SMT. UPASANA W/O LATE SH. GOPAL SINGH CHAUHAN, RESIDENT OF VILLAGE & P.O. BAGSHAR, TEHSIL KARSOG & DISTRICT MANDI, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA. H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

27. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1146 OF 2019

SMT. SUSHILA NEGI W/O SH. JITENDER MEHTA, RESIDENT OF VILLAGE BARI, P.O. JAGOTI, TEHSIL ROHRU, DISTRICT SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, KAMLA NAHRU STATE HOSPITAL FOR MOTHER AND CHILD, SHIMLA. H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

28. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1148 OF 2019

SH. LALIT KUMAR SHARMA S/O LATE SH. MOHAN LAL SHARMA, SHARMA BUILDING LOWER TUTU SHIMLA H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

29. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1151 OF 2019

SMT. RAJINDRA KUMARI W/O SHRI DALIP SINGH, RESIDENT OF NEAR RADHA KRISHAN S.S. SCHOOL, JAIL ROAD, MANDI, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN ZONAL HOSPITAL MANDI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

30. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1155 OF 2019

SH. VINOD KUMAR S/O SHRI DHANI RAM VILLAGE AND POST OFFICE MAJHARNU, TEH. JOGINDER NAGAR, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN, CIVIL HOSPITAL JOGINDER NAGAR, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

31. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1162 OF 2019

SH. MULKH RAJ S/O SHRI RANJEET SINGH, PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL SANDHOLE, SUB TESHSIL SANDHOL, DISTT. MANDI, H.P. PRESENTLY RESIDING IN V&PO SANDHOLE, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

32. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1163 OF 2019

SH. HARJEET SINGH S/O SH. SANTOKH SINGH R/O KAINTH HOUSE NEAR KAMAL KUNJ, SANJAULI, SHIMLA H.P. 171006., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

33. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1174 OF 2019

SH. ASHOK KUMAR SHARMA S/O SH. RAM DEV SHARMA RESIDENT OF TYPE III STAFF RESIDENCES, BLOCK II, SET NO. 8 RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, DISTRCIT KANGRA, H.P., PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, RAJINDER PRASHAD GOVERNMENT MEDICAL COLLEGE TANDA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

34. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1175 OF 2019

SH. HIRA PAL MEHTA S/O SH. L.R. MEHTA, RESIDENT OF VILLAGE BADAID, P.O. GHANAHATTI TEHSIL & DISTT. SHIMLA, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN, DDU HOSPITAL, SHIMLA, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

35. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1178 OF 2019
SMT. NEELAM KUMARI W/O SHRI SANT RAM, RESIDENT OF HOUSE NO. 187/4 RAVI NAGAR MANDI TEH. AND DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CMO OFFICE MANDI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

36. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1181 OF 2019
SH. HARI RAM S/O LATE SH. JAGAN NATH RESIDENT OF VILLAGE ASLOU, P.O. CHAKHAR TEHSIL ARKI, DISTT. SOLAN, H.P. PRESENTLY WORKING AS SENIOR LABORATORY TECHNICIAN DDU HOSPITAL, SHIMLA H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

37. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1216 OF 2019
SH. SUNDER LAL S/O SHRI GOPAL DASS, VILLAGE BAGAOUN, POST OFFICE PANJGAIN, DISTT. BILASPUR,H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

38. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1221 OF 2019
SH. GHANSHYAM S/O SHRI PREM SINGH, VILLAGE JHANJAIL, POST OFFICE ROPARI, TEHSIL SARKAGHAT, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CMO OFFICE MANDI, DISTT. MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

39. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1232 OF 2019
SH. VIRENDER SINGH CHAUHAN S/O SHRI BACHITTAR SINGH CHAUHAN, RESIDENT OF VILLAGE KUNI, POST OFFICE AND TEH. LADBHAROL, DISTT.

MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN CIVIL HOSPITAL JOGINDER NAGAR, DISTT MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

40. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 1363 OF 2019
SH. AMAR JEET S/O SHRI ACHHAR SINGH, R/O VILL AND POST OFFICE SEHLI, TEHSIL KOTLI, DISTT. MANDI, H.P. PRESENTLY WORKING AS SENIOR LAB TECHNICIAN C.M.O. OFFICE MANDI, DISTT MANDI, H.P.

PETITIONER

(BY MR. MUKUL SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. THE DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA.

RESPONDENTS

(BY MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 673 OF 2019 AND CONNECTED MATTERS
DECIDED ON: 11.07.2022

Constitution of India, 1950 - Service Law - Pay revision matter - Petitions by Senior Laboratory Technicians in Himachal Pradesh, seeking revision of their pay scales to match those of their counterparts in Punjab – **Held** -

Petitions were dismissed regarding backdated pay scale revisions, but allowed for revisions from May 1, 2013 - Pending applications were disposed of accordingly. (Para 40)

Cases referred:

Punjab State Power Corporation Limited v. Rajesh Kumar Jindal and others, (2019) 3 SCC 547;

Punjab State Electricity Board and another v. Thana Singh and others, (2019) 4 SCC 113;

These petitions coming on for pronouncement of order this day, the court passed the following:

O R D E R

Since similar questions of facts and law are involved in all these petitions, same were being heard together and are now being disposed of vide this common judgment. However, for the sake of clarity, facts of CWPOA No. 673 of 2019 are being discussed herein below.

2. Petitioners, are working as Senior Laboratory Technicians with the respondent Department, which is the next promotional post for the cadre of Laboratory Attendants. Copy of relevant extract of the Recruitment and Promotion Rules for the post of Senior Laboratory Technician i.e. "The HP Health and Family Welfare Department Sub ordinate class-III services Rectt. & promotion and certain conditions of service (Amendment) Rules, 1986" is annexed as Annexure P-1. Senior Laboratory Technicians in the respondent Department are entrusted the duties of over-all in charge of the laboratory work in various medical colleges hospitals and play a pivotal role in the medical process by assisting the diagnostic decision of the medical officers.

3. State of Himachal Pradesh had been adopting the pay pattern of Punjab in the matters of pay scales applicable to its employees. In the State of Punjab, Senior Laboratory Technicians approached the High Court of Punjab and Haryana, praying therein for revision of their pay scales with effect from 1978 till subsequent stages on the ground that the pay scale being paid to them do

not commensurate with their qualifications and experience held and nature of duties being performed by them. High Court of Punjab and Haryana in a number of cases i.e. CWP No. 13425 of 1995, titled Ravinder Kumar and others v. State of Punjab and others, CWP no. 13426 of 1995 titled Ved Parkash Mangla v. State of Punjab and others, CWP No. 14095 of 1999 titled Amarjit Singh v. State of Punjab and others, CWP No. 15274 of 2003 titled Manju Sharma v. State of Punjab and CWP No. 4343 of 2003, titled as Sikandar Singh v. State of Punjab etc., allowed following pay scales to the Senior Laboratory Technicians:

Date	Previous	Revised
1.1.1978	510-940 680-1120 (20% SG)	825-1580
1.1.1986	1410-2460	2000-3500

4. Though the aforesaid decision rendered by High Court of Punjab and Haryana was laid challenge in appeal before the Division Bench in LPA No. 1438 of 2001, but the same was dismissed and the decision rendered by High Court of Punjab and Haryana in Manju Sharma (supra) came to be upheld. Pursuant to the aforesaid decision rendered by High Court of Punjab and Haryana, State of Punjab granted revision of pay scale in the State vide office orders issued from time to time, as is evident from copies of the same dated 27.8.2002 (Annexure P-4), 16.5.2003 (Annexure P-5), 14.7.2005 (Annexure P-6), 12.12.2005 (Annexure P-7) and 20.1.2006 (Annexure P-8). Record further reveals that the revised pay scale of Rs.2000-3500/- fixed with effect from 1.1.1986 stands further revised with effect from 1.1.1996 to Rs. 6400-10640 in the State of Punjab. Government of Punjab issued a Notification dated 11.4.2011 (Annexure P-9), granting thereby following revised pay scales to the category of Senior Laboratory Technician:

w.e.f. 1.1.1978	825-1580
w.e.f. 1.1.986	2000-3500

w.e.f. 1.1.1996 6400-10640

5. Petitioners herein, who are Senior Laboratory Technicians in the State of Himachal Pradesh and are corresponding category for which revised pay scale has been made payable by the Government of Punjab, made oral as well as written representation (Annexure P-10), praying therein for revision of pay scales at par with their counterparts in Punjab in terms of decision dated 22.5.2003. Aforesaid representation was responded vide letter dated 5.6.2003 (Annexure P-11), whereby it was informed that the matter was considered at Government level and necessary action shall be taken with regard to the same. Since for a long period nothing was heard from the respondents, petitioners again filed representation dated 6.11.2003 (Annexure P-12) reiterating and reasserting their request for payment of revised pay scale to the category of the petitioners on Punjab pattern. It appears that the respondents paid no heed to the aforesaid representation field by the petitioner, as such, they again sent representations dated 7.9.2008 and 3.1.2010 (Annexures P-13 and P-13A), requesting the respondents to revise the pay scales on Punjab pattern, but since no response was received from the respondents, petitioners earlier approached this Court by way of writ petitions, mostly in the year 2011, which were transferred in 2015 to erstwhile Himachal Pradesh Administrative Tribunal, on its establishment and thereafter again transferred to this Court on abolition of the Tribunal and registered as such. Since prayer in all the petitions is same and similar, it would suffice to reproduce main reliefs sought in CWPOA No. 673 of 2019, which are as under:

> "That the instant petition may kindly be allowed and a writ in the nature of mandamus may kindly be issued directing the respondents to grant to the petitioners, the revised pay-scales granted to the Senior Lab Technicians in the State of Punjab with effect from the dates from the same has been paid to the latter, vide Annexures P-4 and P-8, read with Annexure P-9, with all consequences, including grant of further

revised scale in accordance with the general conversion table w.e.f. 1.1.2006.

That arrears of higher pay found payable consequent to the grant of such fixation of pay scales with effect from 1978 and subsequent revisional dates, be paid to the petitioners with upto date interest thereupon @ 12% from the date of filling due."

6. Grievance of the petitioners, as highlighted in the petitions and as has been further canvassed by Ms. Ranjana Parmar, learned Senior Advocate duly assisted by Mr. Karan Singh Parmar, Advocate and Mr. Loveneesh Kanwar, Mr. Mukul Sood and Mr. Pawan K. Sharma, Advocates, appearing for the petitioners in all respective petitions, is that on the analogy of Punjab, they being similarly situate to the category of Senior Laboratory Technicians in the State of Punjab are also entitled to pay revision with effect from 1978 and as per further revisions. Petitioners assert that since Government of Himachal Pradesh follows Punjab pattern in the matter of pay scales, it ought to have revised the pays scales of the petitioners with effect from 1978, as has been done in the case of their counterparts in Punjab, pursuant to direction issued by the High Court of Punjab and Haryana in LPA No. 1438 of 2001. Learned Counsel appearing for the petitioners vehemently argued that the action on the part of the respondents in deviating from consistently followed policy is illegal and unconstitutional. They further argued that the petitioners are similarly situate to the Senior Laboratory Technicians in the Department of Health in the State of Punjab with regard to duties being discharged and responsibility being shouldered by them. Learned Counsel appearing for the petitioners further submitted that parity inter se Senior Laboratory Technicians in Himachal Pradesh and Punjab is evident from the fact that the petitioners herein were placed in the same pre-revised pay scale, in which their counterparts in Punjab were placed. They further stated that the petitioners and their counterparts in Punjab were similarly placed in the pre-

revised pay scales, as such, there is no justification in denying the benefit of revision to the petitioners in deviation of the revision made in the case of their counterparts in Punjab. Learned Counsel appearing for the petitioners further argued that the failure on the part of the respondents to implement revised pay scale in the case of the petitioners at par with their counterparts in Punjab has led to defeat the principle of legitimate expectations of the petitioners, at the hands of the respondents. They further submitted that the scale of Senior Laboratory Technician as per amended Rules, Annexure P-1 clearly suggests that pay scale admissible to the petitioners at the time of entry in the cadre was Rs. 510-940, 680-1120 (20% Selection Grade), which was the same as that payable to the Senior Laboratory Technicians in Punjab with effect from 1.1.1978 (pre-revised). To demonstrate aforesaid parity, learned Counsel appearing for the petitioners invited attention of this Court to Office Memorandum dated 17.7.1995 issued by the Director Health Services to all the Chief Medical Officers in the State (Annexure P-14). They submitted that bare perusal of aforesaid communication clearly reveals that pay scale of the petitioners on 1.1.1986 was same as of their counterparts in Punjab i.e. Rs. 1400-2460.

7. Mr. Ajay Vaidya, learned Senior Additional Advocate General, while opposing the claim of the petitioners, vehemently argued that matter of grant of pay scale to any category is a matter in the realm of executive decision and is an exclusive discretion of the Government and same cannot be claimed as a matter of right. He argued that decision regarding grant of particular pay scale to any category is taken by the Government after considering various factors viz. financial status/constraints, resources and other relevant factors. He further argued that State of Himachal Pradesh is not legally bound to follow Punjab pattern of pay scales. Mr. Vaidya, while inviting attention of this Court to the reply filed by the State, argued that the State of Himachal Pradesh may not follow the pay scales given on the basis of decision of High

Court of Punjab and Haryana, He further argued that in Punjab, there are three categories of Laboratory Technicians i.e. Medical Laboratory Technician Grade-2, Medical Laboratory Technician Grade 1 and Senior Laboratory Technician, whereas, in Himachal Pradesh, there is only one category of Laboratory Technician, which has been redesignated as Senior Laboratory Technician with effect from 24.1.1981. In view of above, Mr. Vaidya argued that simply on the basis of similarity in nomenclature, no legal, legitimate or enforceable right accrues in favour of the petitioners to claim higher pay scales. He further argued that the representations filed by the petitioners were examined at Government level in consultation with the advisory department and same after thorough examination stood rejected. In support of his afore contentions, Mr. Vaidya, invited attention of this Court to judgment passed by Hon'ble Apex Court in State of Himachal Pradesh v. P.D. Attri and others, Civil Appeal No. 2033 of 1996 decided on 11.2.1999, Mr. Vaidya argued that each State has its own individualistic way of governance under the Constitution and one State is not bound to follow the Rules and Regulations applicable to the employees of the other State or if it had adopted the same Rules and Regulations, it is not bound to follow every change brought in the Rules and Regulations in the other State. Mr. Vaidya further argued that if claim of the petitioners is accepted, it would not only lead to huge financial implication but would also invite multiplicity of litigation as all other persons working in different categories in the State would start raising claim on similar analogy and there would be no end to it.

8. Lastly, Mr. Vaidya, learned Senior Additional Advocate General invited attention of this Court to decision dated 16.4.2013 taken by the Government, whereby pay scales of the petitioners have been revised on the basis of judgment passed by High Court of Punjab and Haryana in CWP No. 13274 of 2003 titled Manju Sharma and others v. State of Punjab, further upheld by Division Bench in LPA No. 1438 of 2011 with effect from 1.5.2013 and argued

that once pay of the petitioners has been revised on Punjab pattern, present petition has been rendered infructuous.

9. I have heard the Learned Counsel appearing for the parties and perused the record.

10. Having heard Learned Counsel appearing for the parties and perused the pleadings adduced on record, by respective parties, it is clear that the facts as have been taken note herein above are almost undisputed, as such, need not be discussed again. In nutshell, petitioners have sought a direction to the respondents to pay them revised pay scale at par with the Senior Laboratory Technicians in the State of Punjab, with all consequential benefits.

11. Prayer made on behalf of the petitioners has been opposed on the ground that the State of Himachal Pradesh is not bound to follow Punjab pattern. It is also not in dispute that during the pendency of the cases, Government of Himachal Pradesh, vide decision dated 16.4.2013, has already granted revision of pay scales to the petitioner with effect from 1.5.2013, whereas said is being claimed by the petitioners from the date, their counterparts in Punjab were given such benefit.

12. Since benefit, as is being claimed in the instant petition already stands granted to the petitioners vide decision dated 16.4.2013 taken by the Government of Himachal Pradesh with effect from 1.5.2013, only question which remains to be decided in the instant petition is that, "whether the petitioners are entitled to revision of pay scales on the analogy of Punjab with effect from 1.1.1978 and at all subsequent stages on the ground that State of Himachal Pradesh in principle follows Punjab in the matter of pay scales?"

13. Before ascertaining the correctness and genuineness of the rival contentions/submissions made by Learned Counsel appearing for the parties and exploring answer to the aforesaid questions of law, this court deems it necessary to discuss the scope of judicial review in the matters of pay revision by the State.

14. By now, it is well settled that normally the courts should not interfere with the recommendations of an expert body, as it is exclusive domain of the State to decide pay scales to be paid to a particular class/category, which it normally decides on the basis of recommendations made by the Pay Commission, which is a proper authority to decide upon the issues and decision of a statutory body like Pay Commission is not subject to judicial review.

15. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **P.U. Joshi** v. **Accountant General,** (2003) 2 SCC 632, wherein Hon'ble Apex Court has held that a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service. Hon'ble Apex Court held in the judgment supra as under:

> "10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and

> cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

16. Reliance is placed upon judgment rendered by Hon'ble Apex Court on 5.3.2020 in case **Union of India** v. **M.V. Mohanan Nair,** wherein Hon'ble Apex Court held that interference with the recommendations of the expert body like Pay Commission and its recommendations for the MACP, would have serious impact on the public exchequer Hon'ble Apex Court in judgment supra held as under:

> "51. The ACP Scheme which is now superseded by MACP Scheme is a matter of government policy. Interference with the recommendations of the expert body like Pay Commission and its recommendations for the MACP, would have serious impact on the public exchequer. The recommendations of the Pay Commission for MACP Scheme has been accepted by the Government and implemented. There is nothing to show that the Scheme is arbitrary or unjust warranting interference. Without considering the advantages in the MACP Scheme, the High Courts erred in interfering with the government's policy in accepting the recommendations of the Sixth Central Pay Commission by simply placing reliance upon Raj Pal's case. The impugned orders cannot be sustained and are liable to be set aside."

17. Under Entry No. 41 of Schedule 7 of the Constitution of India, State Government has exclusive jurisdiction on State Public Services. The pay scales and service conditions prescribed under Article 309 are alone applicable in the State. Thus, pay scales of Punjab cannot be applied until the State Government issues its own orders.

18. Main argument/submission raised on behalf of the petitioners that the State of Himachal Pradesh is bound to follow pay pattern fixed by Punjab, already stands negated/rejected by Hon'ble Apex Court in the celebrated case titled State of Himachal Pradesh v. P.D. Attri, (1999) 3 SCC 317, wherein it has been categorically held that the State is not bound to follow the rules and regulations applicable to the employees of other State and even if it has been following the same, it is not bound to follow every change made by the other State.

19. In the aforesaid facts, Hon'ble Apex Court held that even though State of Himachal Pradesh, as per policy and practice had been adopting pay scales for its employees as sanctioned from time to time by the State of Punjab and Haryana but yet State of Himachal Pradesh is not bound to follow every change brought in the rules and regulations in the other State. Hon'ble Apex Court held that every State has its own individualistic way of governance under the Constitution. No law commands it to follow the pay scales granted by another State. Hon'ble Apex Court has held as under:

> "5. The case of the respondents is not based on any Constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab & Haryana High Court and their pay-scales from the same date. They do not allege any violation of any Constitutional provision or any other provision of law. They say it is so because of "accepted policy and common practice" which according to them are undisputed. We do not think we can import such vague principles while interpreting the provisions of law. India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the employees of the other State or if it had adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other State. The question then arises before us is if the State of Himachal Pradesh has to follow every change brought in the States of Punjab & Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab & Haryana. The answer has to be in negative. No

argument is needed for that as anyone having basic knowledge of the Constitution would not argue otherwise. True, the State as per "policy and practice" had been adopting the same pay-scales for the employees of the High Court as sanctioned from time to time for the employees of the Punjab & Haryana High Court and it may even now follow to grant pay-scales but is certainly not bound to follow. No law commands it to do so.

6. The State of Punjab was reorganised into States of Punjab, Haryana and Himachal Pradesh, to begin with, was a Union Territory and was given the status of full statehood in 1970. Since employees of the composite States of Punjab were taken in various Departments of the State of Himachal Pradesh in order to safeguard the seniority, pay-scales etc., the State of Himachal Pradesh followed the Punjab pattern of pay-scales. After attaining the status of full statehood, High Court of Himachal Pradesh formulated its own rules and regulations for its employees. It adopted the pattern of Punjab & Haryana High Court rules of their employees. When Punjab & Haryana High Court gave effect to certain portion of its Rules from 25.9.1985 by notification dated 23.1.1986 as a result of which redesig-nation of the posts of Senior Translators and Junior Translators were equated to the posts in Punjab Civil Secretariat, the Himachal Pradesh High Court similar effect was given to in its rules for its employees. When the Punjab & Haryana High Court gave effect to those rules from 23.1.1975, the State Government did not agree to the recommendations of the Chief Justice of the Himachal Pradesh High Court to follow the same suit. It is true that till now, Himachal Pradesh High Court has been following the rules applicable to the employees of the Punjab & Haryana High Court and it may go on following those rules as may be amended by the Punjab & Haryana High Court from time to time, but certainly it is not bound to so follow. No law commands the State Government to follow the rules applicable to the employees of the Punjab & Haryana High Court to the employees of the Himachal Pradesh High Court. That being the position, it is not necessary for us to examine different qualifications for appointment to the posts of Senior Translators and Junior Translators that may exist between Punjab & Haryana High Court and the Himachal Pradesh High Court and also as to the mode of their recruitment/place-ment in the service. Moreover, any change in the

pay- scales following Punjab & Haryana High Court can set in motion chain reaction for other employees which may give rise to multiplicity of litigation among various categories of employees. Rules of each High Court have to be examined independently. There cannot be any such law that Himachal Pradesh High Court has to suo motu follow the same rules as applicable to the employees working in the Punjab & Haryana High Court."

20. In view of the exposition of law in P.D. Attri supra, it is to be seen as to whether the petitioners have been able to establish violation of constitutional or other legal provisions when they lay their claim based upon parity qua a post or similarly situate post in Punjab or pay scale granted in the other State.

21. In the case at hand, though petitioners have claimed that the category of Senior Laboratory Technicians in the State of Himachal Pradesh is similar to the category of laboratory technician serving in Punjab in the Health Department, as regards the nature of duties discharged as well as responsibilities shouldered by them but in the instant petition, they have not made any whisper regarding nature of work done by them so as to compare them with their counterparts in the State of Punjab.

22. Leaving everything aside, this court finds that there exists three categories of laboratory technicians in the State of Punjab in different pay scales i.e.

Name of post	Pay scale with effect from 1.1.1986	Pay scale with effect from 1.1.1996
Medical Laboratory Technician, Grade-1	1410-2460	4550-7220
Medical Laboratory Technician, Grade-2	1800-3200	5800-9200
Senior Laboratory Technician	2000-3500	6400-10640

23. In the State of Himachal Pradesh, there exists only one category of laboratory technician in the Health and Family Welfare Department i.e. Laboratory Technician in the pay scale of Rs. 510-940 (1.1.1978), 1410-2460 (1.1.1986) and 5000-8100 (1.1.1996). Category of laboratory technician was subsequently re-designated as Senior Laboratory Technician in the State on 24.1.1981. A comparison of the position existing in the two States clearly reveals that the category of Senior Laboratory Technician in Punjab is at third level from the initial stage whereas, in the State of Himachal Pradesh, it is initial rank of laboratory technician and on the top of everything, the categorization of Medical Laboratory Technician Grades 1 and 2, does not exist in the State of Himachal Pradesh. There are no promotional avenues for the category of Senior Laboratory Technician in the State of Punjab, whereas in the State of Himachal Pradesh, promotional avenue has been created for the Senior Laboratory Technicians i.e. post of Chief Laboratory Technician with pay scale of Rs. 1640-2925 (1.1.1986) and 5480-8925 (1.1.1996).

24. No legal, legitimate or enforceable right accrues in favour of the petitioners to claim higher pay scale on the basis of similarity in nomenclature, if any.

25. Ms. Parmar, learned senior counsel appearing for the petitioners, argued that since State of Himachal Pradesh had been consistently following practice of adopting Punjab pay scales and had subsequently granted pay revision on the analogy of Punjab, action of the respondents in denying pay revision to the petitioners, as has been granted to their counterparts in Punjab, on the basis of judgment passed by High Court of Punjab and Haryana, is not sustainable in the eye of law.

26. However, aforesaid argument deserves outright rejection in view of specific law laid down by Hon'ble Apex Court in P.D. Attri, wherein it has been held that even if State of Himachal Pradesh as per practice has been granting

pay scales to its employees, it is not bound to follow every change brought about in the rules and regulations in other States.

27. Division Bench of this Court in a bunch of cases had an occasion to deal with the question, which has fallen for determination in the cases at hand. Vide order dated 22.9.2020, Division Bench of this Court in case titled **State of Himachal Pradesh & others** v. **Dr. Suman Sharma**, CWP No. 2710 of 2018 and other connected matters, decided on 22.9.2020, while placing reliance upon various judemnts rendered by Hon'ble Apex Court, has held that the State of Himachal Pradesh is not bound to follow the Rules and Regulations as applicable to the employees of Punjab or other States, even if it has adopted some rules and regulations, it is not bound to follow every change brought in such rules and regulations in other State. Division Bench held as under:

"4. Observations:

Regarding following the Punjab Pattern of Pay-Scale.

4(i) Reliance upon the notification dated 21.12.2011 issued by State of Punjab for claiming Grade Pay of Rs.6600/- is misplaced. This notification was issued by Government of Punjab and not by Government of Himachal Pradesh. Even though petitioner-State has admitted that by and large it takesinto consideration the Punjab pattern of pay-scale. But the fact cannot be lost sight of that the petitioner-State examines the matter of pay-scales in view of it own staffing pattern, Recruitment & Promotion Rules, method of recruitment, educational qualifications, geographical/traditional/territorial conditions and financial resources and then fixes the pay-scales for its employees by framing statutory Rules under Article 309 of Constitution of India. Government of Himachal Pradesh is not legally bound to follow Punjab pattern pay-scales.

In (1999) 3 SCC 217 titled State of H.P. vs. P.D. Attri and others, Hon'ble Apex Court held that even if State of Himachal Pradesh as per policy & practice has been adopting pay-scales for its employees as sanctioned from time to time by States of Punjab and Haryana yet State of Himachal Pradesh is not bound to follow it or if it had adopted rules and regulations applicable to employees of other State even then it is not bound to follow every change brought in the

rules and regulations in the other State. Every State has its own individualistic way of governance under the Constitution. No law commands it to follow pay scales granted by any other State. Relevant paras of the judgment are extracted hereinafter:-

> "5. The Case of the respondents is not based on any Constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab and Haryana High court and their pay-scales from the same date. They do not allege any violation of any Constitutional provision or any other provision of law. They say it is so because of "accepts policy and common practice" which according to them are undisputed. We do not think we can import such vague principles while interpreting the provisions of law. India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the employees of the other State or if it had adopted the same rules andregulations, it is not bound to follow every change brought in the rules and regulations in the other State. The question then arises before us is if the State of Himachal Pradesh has to follow every change brought in the States of Punjab and Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab and Haryana. The answer has to be in negative. No argument is needed for that as anyone having basic knowledge of the Constitution would not argue otherwise, True, the State as per "policy and practice' had been adopting the same pay-scales for the employees of the High court as sanctioned from time to time for the employees of the Punjab and Haryana High court and it may even now follow to grant pay-scales but is certainly not bound to follow. No law commands it to do so
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> 6 The State of Punjab was reorganised into States of Punjab, Haryana and Chandigarh. Chandigarh, to begin with, was a Union Territory and was given the status of full Statehood in 1970. Since employees of the composite States of Punjab were taken in various Departments of the State of Himachal Pradesh in order to safeguard the seniority, pay-scales etc. , the State of Himachal Pradesh followed the Punjab pattern of pay-scales. After attaining the status of full statehood, High court of

> Himachal Pradesh formulated its own rules and regulations for its employees. It adopted the pattern of Punjab and Haryana High court rules of their employees. When Punjab and Haryana High court gave effect to certain portion of its Rules from 25/9/1985 by notification dated 23/1/1986 as a result of which redesignation of the posts of Senior Translators and Junior Translators were equated to the posts in Punjab Civil Secretariat, in the Himachal Pradesh High court similar effect was given to in its rules for its employees. When the Punjab and Haryana High court gave effect to those rules from 23/1/1975, the State government did not agree to the recommendations of the chief justice of the Himachal Pradesh High court to follow the same suit. It is true that till now, Himachal Pradesh High court has been following the rules applicable to the employees of the Punjab and Haryana High court and it may go on following those rules as may be amended by the punjab and Haryana High court from time to time, but certainly it is not bound to so follow. No law commands the State government to follow the rules applicable to the employees of the Punjab and Haryana High court to the employees of the Himachal Pradesh High court. That being the position, it is not necessary for us to examine different qualifications for appointment to the posts of Translators and Junior Translators that may exist between Punjab and Haryana High court and the Himachal Pradesh High court and also as to the mode of their recruitment/placement in the service. Moreover, any change in the pay-scale following Punjab and Haryana High court can set in motion chain reaction for other employees which may give rise to multiplicity of litigation among various categories of employees. Rules of each High court have to be examined independently. There cannot be any such law that Himachal Pradesh High court has to suo motu follow the same rules as applicable to the employees working in the Punjab and Haryana High court".

It will also be apposite to refer here to a judgment rendered on 16.10.2014 by a Single Bench of this Court in CWP No.8425/2010 titled Balvinder Singh Mahal Vs. State of H.P. and others to the effect that State of

Himachal Pradesh is not required to follow Punjab or any other Government's pattern of pay scale. Relevant paras of the judgment are extracted hereunder:-

> "7. In view of the exposition of law in P.D. Attri's case (supra), it has to be seen as to whether the petitioner has been able to establish violation of any constitutional or any other legal provision when he has laid claim based upon parity with the posts with similarly situate persons in the State of Punjab and claiming pay scales granted in the said State.
>
> 8. The petitioner nowhere in the petition has made even whisper regarding the nature of the work done by him so as to compare it with his counterparts in State of Punjab. Further, he has not even mentioned the educational qualifications, the working conditions and other relevant factors so as to make it possible for this Court to come to a conclusion with regard to similarity in the nature of work performed by the petitioner vis-a- vis his counterparts in the adjoining State of Punjab. The petitioner has simply relied upon the judgment of the Hon'ble Supreme Court in Union of India versus Dineshan K.K. (2008) 1 SCC 586, State of Kerala versus B.Renjith Kumar and others (2008) 12 SCC 219 and Hukam Chand Gupta versus Director General, Indian Council of Agricultural Research and others(2012) 12 SCC 666.
>
> 9. No doubt, the aforesaid cases deal with the doctrine of equal pay for equal work, but the same is not an abstract doctrine capable of being enforced in a Court of law. However, this principle has no mathematical application in every case and a number of factors have to be considered before applying this principle. This principle requires consideration of various dimensions of a given job and normally the applicability of this principle must be left to be evaluated and determined by an expert body and the Court should not interfere till it is satisfied that the necessary material on the basis whereof the claim is made is available on record with necessary proof and that there is equal work of equal quality and all other relevant factors are fulfilled."

In (2017) 4 SCC 449 titled Secretary Mahatama Gandhi Mission and another vs. Bhartiya Kamgar Sena and others in following paras, it was held that even the recommendations of pay commission are not binding on the Government of India. They are meant for administrative guidance. The Government of India may reject or accept the recommendations either fully or partly. Even if Government of India accepts that recommendations of Pay Commission, then also it has no authority to compel the States to adopt structure applicable to Government of India.

"60. The Sixth Pay Commission appointed by the Government of India is only a body entrusted with the job of making an assessment of the need to revise the pay structure of the employees of the Government of India and to suggest appropriate measures for revision of the pay structure. The recommendations of the pay commission are not binding on the Government of India, much less any other body. They are only meant for administrative guidance of the Government of India. The Government of India may accept or reject the recommendations either fully or partly, though it has never happened that the recommendations of the pay commission are completely rejected by the Government so far.

61. Once the Government of India accepted the recommendations of the pay commission and issued orders signifying its acceptance, it became the decision of the Government of India. That decision of the Government of India created a right in favour of its employees to receive pay in terms of the recommendations of the Sixth Pay Commission and the Government of India is obliged to pay.

62 The fact that the Government of India accepted the recommendations of the Sixth Pay Commission (for that matter any pay commission) does not either oblige the States to follow the pattern of the revised pay structure adopted by the Government of India or create any right in favour of the employees of the State or other bodies falling within the legislative authority of the State. The Government of India has no authority either under the Constitution or under any law to compel the States or their instrumentalities to adopt the pay structure applicable to the employees of the Government of India."

In Civil Appeal No.2016/2020, titled Union of India and others Vs. M.V. Mohanan Nair, decided on 5.03.2020, Hon'ble Apex Court held that Court should not interfere with the recommendations of the expert body. When the Government has accepted the recommendation of the Pay Commission and has also implemented those, any interference by the Court would have a serious impact on the public exchequer. It was observed that it is the function of the Government which normally acts on the recommendations of the Pay Commission, which is the proper authority to decide upon the issues and decision of experts bodies like the Pay Commission is not ordinarily subject to judicial review.

Therefore, Grade Pay of Rs.6600/- cannot be released to the respondent merely on the ground that Punjab Government grants this grade pay to its Senior Lecturer/Assistant Professor/Reader. Punjab pattern of pay scales will not be ipso facto binding upon the petitioner-State.

28. At this stage, Ms. Ranjana Parmar, learned Senior Advocate argued that there is ample material available on record suggestive of the fact that the nature of work performed by the petitioners in the State of Himachal Pradesh is same as of their counterparts in Punjab. She also argued that the nature of duties discharged as well as responsibilities shouldered by the petitioners in the State of Himachal Pradesh are similar to that of their counterparts in the State of Himachal Pradesh, which fact is evident from the fact that the petitioners were placed in same pre-revised pay scales as their counterparts in the State of Punjab were placed. She argued that careful perusal of the minutes of meeting of the Expert Committee held on 16.4.2013 under the Chairmanship of Principal Secretary (Finance) (Annexure R-4) clearly reveals that the Finance Department vide 28.9.2012 revised the grade pay of Senior Laboratory Technician from Rs.3200 to Rs.3600 treating it at par with lowest feeder category of Medical Laboratory Technician, Grade-2 in Punjab, which has been allowed grade pay of Rs.3600/- with effect from 1.12.2011 and has been allowed pay scale of Rs. 4550-7220 with effect from 1.1.1996 in place of Rs. 3330-6200 in terms of High Court of Punjab and Haryana order.

29. However, having carefully perused the minutes of meeting, Annexure R-4, dated 16.4.2013, this court finds no force in the submissions made by learned senior counsel for the petitioners, because, if the minutes of meeting of the Expert Committee are read in their entirety, they clearly reveal that the State of Himachal Pradesh nowhere granted benefit of pay revision to the category of petitioners with effect from 1.5.2013 on the basis of judgment rendered by High Court of Punjab and Haryana, rather, it after having taken note of detailed note presented to it, observed that though always there has been parity in the pay scales given to the Senior Laboratory Technician in

Health and Family Welfare Department with that of Senior Laboratory Technician in Punjab, prior to judgment passed by High Court of Punjab and Haryana but State of Himachal Pradesh is not bound to follow Punjab pay scales revised /granted from back dates, on the basis of judgment passed by High Court of Punjab and Haryana. Expert Committee has specifically recorded in its finding that the parity/pay scales granted to Senior Laboratory Technician cannot be accepted in its totality and there is no cadre of Chief Laboratory Technician in the Health Department in Punjab.

30. Petitioners may be right in contending that the duties and responsibilities of the category of Senior Laboratory Technicians are same since the very beginning, however, promotional avenue for the post of Senior Laboratory Technician in the State of Himachal Pradesh is Chief Laboratory Technician, which category is at the top in the hierarchy and supervisory category of petitioners. Leaving everything aside, as has been noticed herein above, in the State of Punjab, there exist three categories of laboratory technicians in different pay scales i.e. Medical Laboratory Technician Grade-I, Medical Laboratory Technician Grade-II and Senior Laboratory Technician in different pay scales, whereas, in the State of Himachal Pradesh there exists only one category i.e. laboratory technician which now stands redesignated as Senior Laboratory Technician with effect from 24.1.1981.

31. In an order passed in case titled **Punjab State Power Corporation Limited** v. **Rajesh Kumar Jindal and others**, (2019) 3 SCC 547, Hon'ble Apex Court has held that following factors are to be kept in view, while fixing pay structure viz. (i) method of recruitment; (ii) level at which recruitment is made; (iii) the hierarchy of service in a given cadre; (iv) minimum educational/technical qualifications required; (v) avenues of promotion; (vi) the nature of duties and responsibilities; and (vii) employer’s capacity to pay, etc.

32. Hon'ble Apex Court, while detailing factors as detailed herein above, categorically held that the burden of proof is on the person claiming parity. Hon'ble Apex Court has held as under:

> "20. Burden of proof on the person claiming parity of pay scale:-
> Ordinarily, the scale of pay is fixed keeping in view the several factors i.e. (i) method of recruitment; (ii) level at which recruitment is made; (iii) the hierarchy of service in a given cadre; (iv) minimum educational/technical qualifications required; (v) avenues of promotion; (vi) the nature of duties and responsibilities; and (vii) employer's capacity to pay, etc.
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> 21. It is well settled that for considering the equation of posts and the issue of equivalence of posts, the following factors had been held to be determinative:-
>
> (i) The nature and duties of a post;
>
> (ii) The responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged;
>
> (iii) The minimum qualifications, if any, prescribed for recruitment to the post; and
>
> (iv) The salary of the post (vide Union of India and Another v. P.K. Roy and Others AIR 1968 SC 850).

33. In **Punjab State Electricity Board and another** v. **Thana Singh and others**, (2019) 4 SCC 113, Hon'ble Apex Court held that it is the domain of the employer to classify its employees/posts on the basis of qualifications, duties and responsibilities of the posts concerned and to prescribe different pay scales accordingly. Article 14 of the Constitution of India would get attracted only if there is discrimination between same set of employees and not otherwise and to prove this discrimination, burden will be on the person claiming parity, who has to discharge it by producing material before the court. Determination of parity or disparity in duties and responsibilities is a complex issue and same should be left to the expert body. Hon'ble Apex Court has held in the judgment supra as under:

> 19. The appellant-Board being an autonomous body governed by its own regulations, it was for the Board to classify its employees/posts on the basis of qualifications, duties and responsibilities of the posts concerned. If the classification has reasonable nexus with the objective sought to be achieved, the Board would be justified in prescribing different pay scales. Article 14 of the Constitution of India would be applicable only when a discrimination is made out between the persons who are similarly situated and not otherwise. It is the duty of an employee seeking parity of pay to prove and establish that they have been discriminated. In State of Haryana and Another v. Tilak Raj and Others (2003) 6 SCC 123, this Court held that
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> > "11. ....to claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination."
>
> 20. Burden of establishing parity in pay scale and employment is on the person claiming such right. There were neither pleadings nor any material produced by the respondents to prove that the nature of work performed by the Sub Fire Officers is similar with that of the Head Clerks and the Internal Auditors to claim parity of pay scale. As pointed out earlier, the burden lies upon the party who claims parity of pay scale to prove similarity in duties and responsibilities. In the writ petition, respondents have only claimed parity of pay scale with those of the employees working under the Punjab Government which was not accepted by the learned Single Judge. Determination of parity or disparity in duties and responsibilities is a complex issue and the same should be left to the expert body. When the expert body considered revision of pay for various posts, it did not revise the pay scale of Sub Fire Officers. When the expert body has taken such a view, it is not for the courts to substitute its views and interfere with the same and take a different view."

34. Since the petitioners have failed to establish on record that the factors required to be considered, while fixing pay scales, were not examined by the respondents and they were performing similar duties as are /were being

performed by their counterparts, no illegality can be said to have been committed by the respondents, while not acceding to the prayer made on behalf of the petitioners for grant of revised pay scales with effect from 1978. State being competent authority has already granted revised pay scales as was being claimed by the petitioners with effect from 1.5.2013, as is being received by their counterparts in the State of Punjab. No doubt, aforesaid benefit came to be accorded to the category of laboratory technicians in the State of Punjab with effect from 1978 but definitely, State of Himachal Pradesh is /was not bound by the decision rendered by High Court of Punjab and Haryana, whereby State of Punjab came to be specifically directed to give pay revised from 1978.

35. Since the State of Himachal Pradesh is not bound to follow each and every change brought in the rules and regulations in other States, its action inasmuch as granting grade pay of Rs. 4800/- is a measure personnel to them with effect from 1.5.2013, cannot be said to be bad in law.

36. Though Learned counsel appearing for the petitioners submitted that the petitioners herein may be granted said revision from 1978 on notional basis and thereafter on actual basis with effect from 1.5.2013 but since it is the exclusive domain of the State Government to decide the pay scales and State, in its wisdom has already decided to give said benefit to the category of the petitioners with effect from 1.5.2013, any intervention of this Court at this stage would not only lead to multiplicity of litigation but would also cause heavy financial burden upon State exchequer.

37. Recently, Hon'ble Apex Court in **Indian Ex Servicemen Movement & Ors.** v. **Union of India & Ors**, Writ Petition (Civil) No. 419 of 2016, decided on 16.3.2022, commonly known as “One Rank One Pension” case has held that the executive is therefore, well within its limits to prescribe a policy keeping in view the financial implications. Hon'ble Apex Court in judgment supra held as under:

> "40. As opposed to the factual matrix in Nakara (supra), where the liberalised pension scheme was not made applicable to employees who had retired prior to the cut-off date, in this case the OROP principle is applicable to all retired army personnel, irrespective of the date of retirement. The cut-off date is only prescribed for determining the base salary used for computing the pension. While for those who retired on or after 2014, the last drawn salary is used for computing the pension; for those who retired prior to 2014, the average of the salary drawn in 2013 is used. This policy only seeks to protect those who retired before 2014 since the last drawn salary of the prior retirees might be too low and incomparable to the pay of the 2014 retirees. Moreover, if the maximum salary drawn is to be used as the base value instead of taking the average salary, an additional outlay of Rs 1,45,339.34 crores would be incurred. The executive is therefore, well within its limits to prescribe a policy keeping in view the financial implications."

38. Otherwise also, by way of an additional affidavit filed on 24.3.2022 the respondent-State has placed on record copy of letter dated 5.1.2022 issued by the Additional Chief Secretary (Finance) to the office of Advocate General, whereby it has been conveyed that the Government has decided to pay grade pay of Rs. 4800/- to the category of petitioner with effect from 1.5.2013 and as such, the grievance of the petitioners stands resolved, inasmuch the desired grade pay /pay scale has been paid to them.

39. In view of the various judgments taken note herein above, the State of Himachal Pradesh is not bound to follow every change brought about in the rules and regulations of the State of Punjab, as such, petitioners cannot seek a direction from this Court to extend the benefit of revision of pay scales, which otherwise has been granted by the respondents with effect from 1.5.2013, from back date i.e. 1.1.1978.

40. In view of detailed discussion made herein above, all the petitions are dismissed to the extent revision of pay scale has been sought from back date

and to the extent, pay revision has been granted by the respondents with effect from 1.5.2013, the petitions are allowed/disposed of.

Pending applications, if any, in all the petitions stand disposed of.

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

Between:-

1. AVTAR SINGH 39 YEARS S/O HANS RAJ

2. GURDEV SINGH S/O MAAN SINGH
SONS OF S/O SHRI RALLU,R/O VILLAGE DAKHRU MAJRA,
TEHSI BADDI, DISTRICT SOLAN, HIMACHAL PRADESH

3. GURPREET SINGH, S/O SH. SUKHDEV SINGH
R/O VILLAGE RAMGARH ROD, TEHSIL PEHOWA, DIST. KURUKSHETRA, HARYANA

PETITIONERS

(BY MR. DINESH BHANOT, ADVOCATE)

AND

1. STATE OF H.P.THROUGH SECRETARY (HOME) TO THE GOVERNMENT OF H.P., SHIMLA-2.

2. MAHAVIR SPINING MILLS LTD., PRESENTLY KNOWN AS VARDHMAN TEXTILES LTD, SAI ROAD BADDI, TEHSIL BADDI,PARGNA PLASSI, TEHSIL NALAGARH, DISTRICT SOLAN, HIMACHAL PRADESH THROUGH IT'S AUTHORIZED SIGNATORY RANVIJAY SINGH MANAGER (LEGAL & LIAISON)

.. RESPONDENTS

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

(MR. SANJEEV MANKOTIA, ADVOCATE
FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC NO. 731 OF 2022
DECIDED ON: 22.08.2022

Code of Criminal Procedure, 1973- Section 482 - Quashing of FIR & Judgment of conviction - Parties agree to settle the dispute amicably -**Held** - Compounding of the offence post-conviction - Quashes FIR and Judgment of conviction and order of sentence - Petition disposed off - Accused acquitted of the charges. (Para 13,17)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497;

Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303;

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

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

O R D E R

By way of instant petition filed under S. 482 CrPC, prayer has been made on behalf of the petitioners for quashing of FIR No. 125, dated 13.9.2010 under Ss. 147, 427, 447, 451, 506 and 149 IPC registered at Police Station Baddi, District Solan, Himachal Pradesh and also for quashing the judgment of conviction and order of sentence dated 3.8.2019 passed by learned Judicial Magistrate First Class, Court No.2, Nalagarh in Cr. Case No. 78/2 of 2012 titled State v. Amrit Lal etc., on the basis of compromise arrived inter se parties.

2. Precisely, the facts of the case, as emerge from the record, are that the FIR as detailed herein above, came to be lodged at the behest of one Mahesh Arora, Chief Executive of respondent No.2, whereby he alleged that the land comprised in Khasra No. 113 measuring 21 Bigha 5 Biswa situated in Village Bhatoli Khurd, Pargana and Tehsil Nalagarh, District Solan, Himachal Pradesh was purchased by respondent No.2 i.e. Vardhman Textiles Ltd. from one Shri Rallu for consideration on 29.6.1994. Complainant alleged that after payment of total amount of consideration, company took possession of the land in question and set up a structure for the purpose of posting security of

the company. Complainant further alleged that since 31.3.1995, the company is in possession of the land, for all intents and purposes but on 12.9.2010 at 12.20 pm, petitioners-accused, armed with dangerous weapons, came on the spot and uprooted the wall with the help of a JCB machine. He alleged that when the said persons were deterred by the Security personnel of the company, they fled from the spot, but while leaving, extended threats to the security guard that in case they interfere in the matter, they will be run over and killed by JCB machine. On the basis of aforesaid complaint made by the aforesaid representative of the company FIR sought to be quashed in the instant proceedings, came to be lodged against the petitioner.

3. After completion of investigation police presented *Challan* in the competent court of law i.e. learned Judicial Magistrate First Class Nalagarh, who on the basis of the evidence led on record by the prosecution, held the accused guilty of having committed offences punishable under Ss. 147, 447, 451, 427, 506 and 149 IPC and convicted and sentenced them as under:

Section r/w S. 149 IPC	Sentence	Fine	In default
147 IPC	Six months simple imprisonment	Rs.2,000 each	Simple imprisonment for one month
427 IPC	Simple imprisonment for one year	Rs.2000 each	Do
447 IPC	Simple imprisonment for six months	Rs.1,000/- each	Do
451 IPC	Simple imprisonment for six months	Rs.1,000/- each	Do
506 IPC	Simple imprisonment for one year	Rs.1,000/- each	Do

4. Being aggrieved and dissatisfied with judgment of conviction recorded by learned trial Court, accused approached learned Additional Sessions Judge, Nalagarh, where an appeal is stated to be pending, but before the same could be decided finally, petitioners and respondent No.2 entered into compromise, whereby, both the parties have resolved to settle their dispute inter se them amicably. In the aforesaid background, petitioners have approached this court in the instant proceedings, praying therein for quashing of FIR as also the judgment of conviction and order of sentence passed by learned Judicial Magistrate First Class.

5. Vide order dated 10.8.2022, this court. while directing respondent-State to ascertain the factum of compromise, if any, arrived inter se parties, also deemed it necessary to summon the parties, especially respondent No.2, at those instance, FIR sought to be quashed in the instant proceedings came to be registered. Though instructions of respondent State are still awaited, but an authorized representative of respondent No.2, Ranvijay Singh, has come present.

6. Mr. Ranvijay Singh, states that he is working as Manager (Legal & Liaison) with the respondent No.2 and has been duly authorized to appear and make statement on behalf of respondent No.2 before this Court. He states that during the pendency of appeal before learned Additional Sessions Judge, Nalagarh, parties have entered into comprise and resolved to settle the dispute inter se them amicably. He states that since all the accused have already apologized for their misbehaviour and undertaken not to repeat such acts in future coupled with the fact that the possession of the land stands delivered to the company, respondent No.2/company shall have no objection in case prayer made on behalf of the accused for compounding of the offence and for quashing of the judgment of conviction and order of sentence passed by

learned trial Court is accepted and they are acquitted of the charges framed against them. While admitting the contents of Annexure P-3, which is a copy of No Objection Certificate issued by the respondent No.2, he also admitted his signatures on the same. His statement is taken on record.

7. Mr. Sudhir Bhatnagar, learned Additional Advocate General, after having heard, aforesaid statement having been made by authorized representative of respondent No.2, states that since the respondent No.2, at those instance FIR was lodged against the accused, has compromised the matter with the accused, no fruitful purpose shall be served in continuing with the criminal prosecution of the accused. He states that otherwise also, appeal having been filed by accused is likely to succeed on account of statement made by authorized representative of respondent No.2, on oath before this court, as such, respondent-State shall have no objection in case prayer made instant petition is allowed..

8. The question which now needs consideration is whether FIR in question can be ordered to be quashed when Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466 has specifically held that power under S. 482 CrPC is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.

9. At this stage, it would be relevant to take note of the judgment passed by Hon'ble Apex Court in **Narinder Singh** (supra), whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of

the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.
>
> 29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such

> cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

10. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

11. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and

serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But

the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

12. Hon'ble Apex Court in its judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017

arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:
>
> > "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."
>
> 14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:
>
> > "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal

Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have

settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

13. In the case at hand, the offences alleged to have been committed by the accused though are serious but in view of the fact that it is a family dispute and complainant has started residing with the petitioners, who are her in-laws, as such, keeping in view the future of the complainant and her children and further the fact that the complainant has compromised the matter with the accused and complainant is no more interested in pursuing the case further, there are bleak and remote chances of conviction of accused and as such, this court sees no impediment in accepting the prayer made by petitioners for quashing of FIR. Otherwise also, no fruitful purpose would be served in case proceedings against the accused are allowed to continue, as such, prayer made in the petition at hand can be accepted.

14. Now another question which arises for consideration is whether this Court can order compounding of offence post-conviction. The Hon'ble Apex Court in **Ramawatar** vs. **State of Madhya Pradesh**, Cr. Appeal No. 1393 of 2011, decided on 25th October, 2021 [2021 SCC OnLine SC 966], has held as under:-

> "9. Having heard learned Counsel for the parties at some length, we are of the opinion that two questions fall for our consideration in the present appeal. First, whether the jurisdiction of this Court under Article 142 of the Constitution can be invoked for quashing of criminal proceedings arising out of a 'non-compoundable offence? If yes, then whether the power to quash proceedings can be extended to offences arising out of special statutes such as the SC/ST Act?
>
> 10. So far as the first question is concerned, it would be ad rem to outrightly refer to the recent decision of this Court in the case of Ramgopal & Anr v. The State of Madhya Pradesh , wherein, a two Judge Bench of this Court consisting of two of us (N.V. Ramana, CJI & Surya Kant, J) was confronted with an identical question. Answering in the affirmative, it has been clarified that the jurisdiction of a Court under Section 320 Cr.P.C cannot be construed as a proscription against the invocation of inherent powers vested in this Court under Article 142 of the Constitution nor on the powers of the High Courts under Section 482 Cr.P.C. It was further held that the

> touchstone for exercising the extraordinary powers under Article 142 or Section 482 Cr.P.C., would be to do complete justice. Therefore, this Court or the High Court, as the case may be, after having given due regard to the nature of the offence and the fact . that the victim/complainant has willingly entered into a settlement/compromise, can quash proceedings in exercise of their respective constitutional/inherent powers.

15. The Apex Court in Ramgopal (Supra) further postulated that criminal proceedings involving non-heinous offences or offences which are predominantly of a private nature, could be set aside at any stage of the proceedings, including at the appellate level. The Court, however, being conscious of the fact that unscrupulous offenders may attempt to escape their criminal liabilities by securing a compromise through brute force, threats, bribes, or other such unethical and illegal means, cautioned that in cases where a settlement is struck post-conviction, the Courts should, inter alia, carefully examine the fashion in which the compromise has been arrived at, as well as, the conduct of the accused before and after the incident in question. While concluding, the Court also formulated certain guidelines and held:

> "19... Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations." [Emphasis Applied]

16. In view of the aforesaid law laid down by Hon'ble Apex Court coupled with the fact that both the parties have resolved to settle the matter amicably and further the complainant has no objection in acceding to the prayer made

on behalf of the petitioner, this court finds no impediment in accepting the prayer for compounding of the offence post-conviction.

17. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR No. 125, dated 13.9.2010 under Ss. 147, 427, 447, 451, 506 and 149 IPC registered at Police Station Baddi, District Solan, Himachal Pradesh as also the judgment of conviction and order of sentence dated 3.8.2019 passed by learned Judicial Magistrate First Class, Court No.2, Nalagarh in Cr. Case No. 78/2 of 2012 titled State v. Amrit Lal etc., are quashed and set aside. Petitioners are acquitted of the charges framed against them in the said FIR/proceedings. Petitioners shall be at liberty to withdraw the appeal filed by them before learned first appellate Court.

18. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

Copy Dasti.

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

Between:-

SMT. USHA CHAUHAN
W/O SH. T.R. MEHTA,
R/O FLAT NO. 402, BASANT VIHAR,
KASUMPTI, SHIMLA.

PETITIONER

(BY MR. VAIBHAV TANWAR, ADVOCATE)
AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY (EDUCATION)
SHIMLA, H.P.

2. DIRECTOR HIGHER EDUCATION
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA.

3. SH. PUNAM SHARMA
PRESENTLY POSTED AT GSSS KASHMIR,
DISTRICT HAMIRPUR, H.P.

4. SH. SUNIL KUMAR
PRESENTLY POSTED AT GSSS SUDHIAL BHUMPAL
DISTRICT HAMIRPUR, H.P.

5. SH. ARUN KUMAR
PRESENTLY POSTED AT GSSS KUJJI,
DISTRICT SIRMOUR, H.P.

6. SH. SANJEEV KUMAR
PRESENTLY POSTED AT GSSS OACHGHAT,
DISTRICT SOLAN, H.P.

7. SH. RAKESH KUMAR
PRESENTLY POSTED AT GSSS SARKAGHAT,

DISTRICT MANDI, H.P.

8. SH. RAJENDER SINGH
PRESENTLY POSTED AT GSSS HATWAR,
DISTRICT BILASPUR, H.P.

9. SH. VINAY KUMAR
PRESENTLY POSTED AT GSSS UDAIPUR,
DISTRICT CHAMBA, H.P.

10. SH. AJAY KUMAR
PRESENTLY POSTED AT GSSS MAIR,
DISTRICT HAMIRPUR, H.P.

11. SH. RAJEEV KUMAR CHA
PRESENTLY POSTED AT GSSS HAWANI,
DISTRICT MANDI, H.P.

12. SH. NAVEEN BHANDARI
PRESENTLY POSTED AT GSSS RAJOL,
DISTRICT KANGRA, H.P.

13. SH. ADARSH SHARMA
PRESENTLY POSTED AT GSSS BAGAIN,
DSITRICT SHIMLA, H.P.

14. SMT. SUDHA SHARMA
PRESENTLY POSTED AT GSSS BANIKHET
DISTRICT CHAMBA, H.P.

15. SMT. ROJNI DOGRA
PRESENTLY POSTED AT GSSS (B) DHARAMSHALA
DISTRICT KANGRA H.P.

16. SH. SOM DUTT
PRESENTLY POSTED AT GSSS SANGRAH
DISTRICT SIRMOUR, H.P.

17. SH. GHANSHYAM

PRESENTLY POSTED AT GSSS GUGAGHAT,
DISTRICT HAMIRPUR, H.P.

18. SMT. CHETNA KUMARI
PRESENTLY POSTED AT GSSS BIAR,
DISTRICT HAMIRPUR, H.P.

19. SH. VIJENDER KUMAR
PRESENTLY POSTED AT GSSS SANIODEEDAG
DISTRICT SIRMOUR, H.P.

20. SMT. RAKHI BALI
PRESENTLY POSTED AT GSSS (G) CHAMBA
DISTRICT CHANBA, H.P.

21. SH. ARVIND KUMAR
PRESENTLY POSTED AT GSSS SWAHAN,
DISTRICT BILASPUR, H.P.

22. SH. RAVINDER SINGH
PRESENTLY POSTED AT MATLAHAR
DISTRICT KANGRA, H.P.

23. SH. BHUPINDER SINGH
PRESENTLY POSTED AT GSSS RAJHOON,
DISTRICT KANGRA, H.P.

24. SH. ANOOP KUMAR
PRESENTLY POSTED AT GSSS BANI,
DISTRICT HAMIRPUR, H.P.

RESPONDENTS

(MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL WITH
MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL &
MR. SUNNY DHATWALIA,

ASSISTANT ADVOCATE GENERAL
FOR R-1 AND R-2)

NEMO FOR R-3 TO R-24

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 1145 OF 2019
DECIDED ON: 14.9.2022

Constitution of India, 1950 - Service Law - Promotion denied despite submission of Master's degree provisional certificate – **Held** - Denial of promotion was unjustified, especially when the petitioner's qualification was established before the DPC meeting - Ordered the respondents to grant petitioner the promotion from the date her juniors were promoted, along with all consequential benefits. (Para 15,17)

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

O R D E R

Precisely the question, which has fallen for consideration in the case at hand is, "whether promotion to the petitioner to the post of Lecturer (School Cadre) Chemistry, who was a Trained Graduate Teacher, could be denied for allegedly hers having not submitted Masters Degree in Chemistry. especially when she had submitted a provisional certificate alongwith mark-sheet, showing her to have acquired the degree of masters in Chemistry?"

2. For having bird's eye view, necessary facts as emerge from record are that on 26.6.1998, petitioner joined as Trained Graduate Teacher in the education Department and in that capacity worked till 13.7.2010. After having obtained Masters degree in Chemistry on 28.3.2008 from Annamalai University, petitioner informed the Principal of the School concerned, who vide communication dated 19.4.2008 (Annexure P-3) apprised Director Higher Education, the factum with regard to petitioner's having completed Master of Science (Chemistry) enabling Department to include her name in the zone of

consideration for promotion to the post of Lecturer (School Cadre). Careful perusal of communication dated 19.4.2008 issued under the signature of Principal Government Senior Secondary School Junga reveals that the complete case of the petitioner for promotion to the post of PGT Chemistry/Lecturer Chemistry(School Cadre) was sent to the office of Director Higher Education. However, the petitioner was promoted to the post of Lecturer (School Cadre) on 13.7.2010 as is evident form communication dated 13.7.2010, Annexure P-4, whereas, as per seniority No. 7504 of the petitioner in the cadre of Trained Graduate Teachers, she ought to have been promoted in the year 2008, ahead of private respondents, who were promoted as Lecturer (School Cadre) on 16.7.2008. Perusal of promotion orders dated 16.7.2008 and 12.8.2008, whereby Trained Graduate Teachers junior to the petitioner were promoted to the post of Lecturer (School Cadre) and had completed master degree after 31.12.2007, reveals that the candidate, who had completed master's degrees after 31.12.2007 were considered for promotion to the post of Lecturer (School Cadre). Though, the petitioner completed master degree on 28.3.2008, as is evident from Annexure P-2 provisional certificate issued by Annamalai University, but her case was not considered by DPC held on 15.7.2008.

3. Being aggrieved with the aforesaid illegal action of the respondents, petitioner filed representation to the Director Higher Education, vide Annexures P-8 and P-9, but since no attention was paid to the aforesaid request made by petitioner, she was compelled to approach this Court, praying therein for following main relief(s):

> "1. The petitioner may be ordered to be promoted from the due date i.e. as on dated: 16.7.2008, when the persons junior to the petitioner were wrongly promoted before her, along with all the consequential benefits."

4. It may be noted that earlier the petitioner filed writ petition before this court, which was transferred to the Himachal Pradesh Administrative Tribunal

and on its abolition, same has again been transferred to this court and registered as such.

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

6. Having heard learned counsel for the parties and perused material available on record, especially the reply filed by respondents Nos. 1 and 2, this court finds that the facts as have been taken note herein above, have not been disputed, rather admitted in the reply filed by respondents. Respondents in their reply have tried to justify their action in not promoting the petitioner alongwith private respondents on the ground that at the time of convening Departmental Promotion Committee on 15.7.2008, petitioner had not obtained the Master's Degree. Apart from above, it has been stated in reply that since Master's Degree was not submitted to the department on or before 15.7.2008, petitioner could not be promoted to the post of Lecturer (School Cadre) in her subject alongwith other eligible candidates. There is no dispute that the petitioner was ranking above the private respondents in seniority list. It also emerges from the reply filed by respondents Nos. 1 and 2 that after having convened DPC on 15.7.2008, a panel was drawn and candidates, who could not be promoted pursuant to recommendations of Departmental Promotion Committee made on 15.7.2008, were subsequently considered in the review DPC held on 19.6.2009. However, since name of the petitioner was not considered in regular DPC held on 15.7.2008, her name again was not considered in review DPC held on 19.6.2009. However, as has been taken note here in above, petitioner was promoted as Lecturer (School Cadre) in the year 2010.

7. If the reply filed by respondents Nos. 1 and 2 is read in its entirety, it has not been disputed that a provisional certificate issued by the Annamalai University, showing the petitioner to have passed Master's Degree in

Chemistry was submitted by the petitioner before meeting of DPC held on 15.7.2008.

8. Petitioner was ignored by the DPC on 15.7.2008 only for the reason that she had not submitted her Master's Degree in Chemistry but once it stands duly admitted that before 15.7.2008, Principal, Government Senior Secondary School, where the petitioner was working at the relevant time, had submitted case of the petitioner complete in all respects to the Director Higher Education enabling it to consider case of petitioner for promotion as Lecturer (School Cadre) alongwith others, there was no occasion for the respondents to deny the legitimate claim of the petitioner on the ground that she did not possess Master's Degree on 15.7.2008 when regular Departmental Promotion Committee was convened.

9. Respondents in their reply in para-3 have categorically admitted that the petitioner had submitted provisional certificate and degree was issued by University on 20.11.2008. Vide communication dated 5.11.2013 (Annexure PA annexed with the rejoinder) learned counsel for the petitioner sought information under Right to Information Act, 2005 from Directorate of Higher Education to the following effect:

> "1. Whether the following TGTs' Science who were promoted as Lecturer (School Cadre), Chemistry on 16.7.2008 and on 12.8.2008 had submitted their original/final Masters Degree at the time of regular DPC held on 15.7.2008, if NO, then on what basis they were promoted?

Name	Seniority No.	Date of appointment
Suresh Kumar	6443	14.10.1996
Sanjeev Kumar	7967	7.2.200
Naveen Bhandari	9942	9.4.2001
Rakesh Kumar	9316	18.1.2001
Rajender Singh	9543	20.2.2001

Abha Gupta	6851	31.3.1997
Ravinder Singh	10560	9.10.2001
Anil Kumar	7278	28.6.1998

10. Public Information Officer vide communication dated December, 2013 (Annexure PB annexed with rejoinder) supplied following information

> "Department do prepare panel amongst in service TGT's who have completed Master degree and supporting relevant documents/ certificates are verified from original certificate by Principal/ Headmaster concerned and cases are submitted to department alongwith attested photo copies of relevant documents. Hence, original certificates of any candidates are not demanded until and unless there is some doubt in any documents. However, before including any name in the panel for promotion it is ensured that the TGT concerned have actually acquired complete Master degree from recognized University. Any case submitted for inclusion int eh promotion panel of PGT on the basis of provisional certificate by the candidates are not considered until and unless candidate produce consolidated marks sheet of degree issued by recognized University.

11. Careful perusal of aforesaid information supplied under Right to Information Act, 2005 clearly reveals that the candidates, who had passed their Master's Degree after 31.12.2007, were considered for promotion on 15.7.2008 by the Departmental Promotion Committee.

12. In the case at hand, it is not in dispute that the petitioner besides having submitted provisional certificate also submitted mark sheet showing her to have passed Master's Degree in Chemistry, but yet the Department opted not to include her in the list of candidates considered for promotion by the DPC held on 15.7.2008.

13. It has been wrongly averred by the respondents Nos.1 and 2 in reply that petitioner acquired Master's degree on 20.11.2008 because documents placed on record clearly reveal that though the petitioner herein had passed

Master's Degree in Chemistry on 28.3.2008, but degree in her favour was granted on 20.11.2008.

14. Needless to say, University at first instance grants detailed mark sheet alongwith provisional certificate and usually degrees are issued after some time. Since the petitioner had submitted mark sheet showing her to have passed Master's Degree in chemistry and provisional certificate issued by the University concerned, department ought to have considered the case of the petitioner for promotion as Lecturer (School Cadre) alongwith others in DPC held on 15.7.2008. Since case of the petitioner was not considered on 15.7.2008, her name was again not considered in the review DPC dated 19.6.2008, as she was not in the zone of consideration drawn by regular DPC held on 15.7.2008. Petitioner was promoted to the post of Lecturer (School Cadre) in the year 2010, whereas, persons junior to her in seniority list were promoted in the year 2008. Since the petitioner was fully eligible to be promoted to the post of Lecturer (School Cadre) on 15.7.2008, prayer made in the instant petition deserves to be allowed, especially when it stands established on record that the persons junior to the petitioner were promoted ahead of her pursuant to recommendation of Departmental Promotion Committee held on 15.7.2008.

15. Merely for want of degree, petitioner could not be denied promotion from due date, especially when factum of her having acquired Master's Degree on 28.3.2008 i.e. much prior to convening of regular DPC on 15.7.2008 stood established on record on account of documents furnished by Principal of school to the Director Higher Education.

16. Consequently, in view of above, this court finds merit in the present petition and same is allowed and action of the respondents in not granting promotion to the petitioner to the post of Lecturer (School Cadre) Chemistry with effect from 16.7.2008 is held to be bad and accordingly same is quashed and respondents are directed to grant promotion to the petitioner to the post

of Lecturer (School Cadre) Chemistry from the date her juniors were promoted to the post concerned pursuant to DPC 15.7.2008 alongwith all consequential benefits.

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

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

Between:-

SMT. SHIKHA TANWAR, W/O SH. ANIL TANWAR,
R/O COSY CORNER, BOILEAUGANJ,SHIMLA,
PRESENTLY POSTED AT GSSS KUNIHAR, DISTRICT SOLAN, H.P.

PETITIONER

(BY MR. VAIBHAV TANWAR, ADVOCATE)
AND

25. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY (EDUCATION)
SHIMLA, H.P.

26. DIRECTOR HIGHER EDUCATION
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA.

27. SH. PURSHOTAM KUMAR
PRESENTLY POSTED AT GSSS SAMOH,
DISTRICT BILASPUR, H.P.

28. SH. GITA NAND
PRESENTLY POSTED AT AT GSSS MANDAP,
DISTRICT MANDI, H.P.

29. SH. SURESH KUMAR
PRESENTLY POSTED AT GSSS NAGAR,
DISTRICT KULLU, H.P.

30. SMT. SHARDA DEVI
PRESENTLY POSTED AT GSSS NAMHOL
DISTRICT BILASPUR, H.P.

31. SH. DALJEET SINGH
PRESENTLY POSTED AT GSSS DHAMETA
DISTRICT KANGRA, H.P.

32. SH. AJAY KUMAR
PRESENTLY POSTED AT GSSS CHAMIAN,
DISTRICT SOLAN, H.P.

33. SMT. PUNAM SHARMA
PRESENTLY POSTED AT GSSS KASHMIR,
DISTRICT HAMIRPUR, H.P.

34. SH. SUNILA KUMAR
PRESENTLY POSTED AT GSSS SUDHIAL BHUMPAL
DISTRICT HAMIRPUR, H.P.

35. SH. ARUN KUMAR
PRESENTLY POSTED AT GSSS KUJJI,
DISTRICT SIRMOUR, H.P.

36. SH. SANJEEV KUMAR
PRESENTLY POSTED AT GSSS OACHGHAT,
DISTRICT SOLAN, H.P.

37. SH. RAKESH KUMAR
PRESENTLY POSTED AT GSSS SARKAGHAT,
DISTRICT MANDI, H.P.

38. SH. RAJENDER SINGH
PRESENTLY POSTED AT GSSS HATWAR
DISTRICT BILASPUR, H.P.

39. SH. VINAY KUMAR
PRESENTLY POSTED AT GSSS UDAIPUR,
DISTRICT CHAMBA, H.P.

40. SH. AJAY KUMAR
PRESENTLY POSTED AT GSSS MAIR,
DISTRICT HAMIRPUR, H.P.

41. SH. RAJEEV KUMAR
PRESENTLY POSTED AT GSSS HAWANI,

DISTRICT MANDI, H.P.

42. SH. NAVEEN BHANDARI
PRESENTLY POSTED AT GSSS RAJOL,
DISTRICT KANGRA, H.P.

43. SH. ADARSH SHARMA
PRESENTLY POSTED AT GSSSS BAGAIN,
DSITRICT SHIMLA, H.P.

44. SMT. SUDHA SHARMA
PRESENTLY POSTED AT GSSS BANIKHET
DISTRICT CHAMBA, H.P.

45. SMT. ROJNI DOGRA
PRESENTLY POSTED AT GSSS (B) DHARAMSHALA
DISTRICT KANGRA H.P.

46. SH. SOM DUTT
PRESENTLY POSTED AT GSSS SANGRAH
DISTRICT SIRMOUR, H.P.

47. SH. GHANSHYAM
PRESENTLY POSTED AT GSSS GUGAGHAT,
DISTRICT HAMIRPUR, H.P.

48. SMT. ABHA GUPTA
PRESENTLY POSTED AT GSSS SUJANPUR,
DISTRICT HAMIRPUR, H.P.

49. SH. ANIL KUMAR
PRESENTLY POSTED AT GSSS MASROOR,
DISTRICT KANGRA, H.P.

50. SH. LALIT MOHAN,
PRESENTLY POSTED AT GSSS DHUNDLA,
DISTRICT UNA, H.P.

51. SMT. CHETNA KUMARI
PRESENTLY POSTED AT GSSS BIAR,
DISTRICT HAMIRPUR, H.P.

52. SH. VIJENDER KUMAR
PRESENTLY POSTED AT GSSS SANIODEEDAG
DISTRICT SIRMOUR, H.P.

53. SMT. RAKHI BALI
PRESENTLY POSTED AT GSSS (G) CHAMBA
DISTRICT CHAMBA, H.P.

54. SH. ARVIND KUMAR
PRESENTLY POSTED AT GSSS SWAHAN,
DISTRICT BILASPUR, H.P.

55. SH. RAVINDER SINGH
PRESENTLY POSTED AT MATLAHAR
DISTRICT KANGRA, H.P.

56. SH. BHUPINDER SINGH
PRESENTLY POSTED AT GSSS RAJHOON,
DISTRICT KANGRA, H.P.

57. SH. ANOOP KUMAR
PRESENTLY POSTED AT GSSS BANI,
DISTRICT HAMIRPUR, H.P.

RESPONDENTS

(MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL WITH
MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL &
MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL
FOR R-1 AND R-2)

NEMO FOR R-3 TO R-34

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 1282 OF 2019
DECIDED ON: 14.9.2022

Constitution Of India, 1950 - Service Law - Promotion denial based on alleged failure to submit a Master's Degree certificate - **Held** - Court clarified that though the degree was issued later, the petitioner had completed her Master's before the DPC meeting - Court found merit in the petitioner's claim - Directed the respondents to grant promotion to the petitioner from the date her juniors were promoted, along with consequential benefits. (Para 16)

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

O R D E R

Precisely the question, which has fallen for consideration in the case at hand is, 'whether promotion to the petitioner to the post of Lecturer (School Cadre) Chemistry, who was a Trained Graduate Teacher, could be denied for allegedly hers having not submitted Masters Degree in Chemistry. especially when she had submitted a provisional certificate alongwith mark-sheet, showing her to have acquired the degree of masters in Chemistry?"

17. For having bird's eye view, necessary facts as emerge from record are that on 26.11.1994, petitioner joined as Trained Graduate Teacher in the education Department and in that capacity worked till 13.7.2010. After having obtained Masters degree in Chemistry on 28.3.2008 from Annamalai University, petitioner informed the Principal of the School concerned, who vide communication dated 16.8.2008 (Annexure P-3) apprised Director Higher Education, the factum with regard to petitioner having completed Master of Science (Chemistry) enabling Department to include her name in the zone of consideration for promotion to the post of Lecturer (School Cadre). Careful perusal of communication dated 16.8.2008 issued under the signature of Principal Government Senior Secondary School (Boys), Shimla reveals that the

complete case of the petitioner for promotion to the post of PGT Chemistry/Lecturer Chemistry(School Cadre) was sent to the office of Director Higher Education. However, the petitioner was promoted to the post of Lecturer (School Cadre) on 13.7.2010 as is evident form communication dated 13.7.2010, Annexure P-4, whereas, as per seniority No. 4926 of the petitioner in the cadre of Trained Graduate Teachers, she ought to have been promoted in the year 2008, ahead of private respondents, who were promoted as Lecturer (School Cadre) on 16.7.2008. Perusal of promotion orders dated 16.7.2008 and 12.8.2008, whereby Trained Graduate Teachers junior to the petitioner were promoted to the post of Lecturer (School Cadre) and had completed master degree after 31.12.2007, reveals that the candidate, who had completed master's degrees after 31.12.2007 were considered for promotion to the post of Lecturer (School Cadre). Though, the petitioner completed master degree on 28.3.2008, as is evident from Annexure P-2 provisional certificate issued by Annamalai University, but her case was not considered by DPC held on 15.7.2008.

18. Being aggrieved with the aforesaid illegal action of the respondents, petitioner filed representation to the Director Higher Education, vide Annexures P-8 and P-9, but since no attention was paid to the aforesaid request made by petitioner, she was compelled to approach this Court, praying therein for following main relief(s):

> "1. The petitioner may be ordered to be promoted from the due date i.e. as on dated: 16.7.2008, when the persons junior to the petitioner were wrongly promoted before her, along with all the consequential benefits."

19. It may be noted that earlier the petitioner filed writ petition before this court, which was transferred to the Himachal Pradesh Administrative Tribunal and on its abolition, same has again been transferred to this court and registered as such.

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

21. Having heard learned counsel for the parties and perused material available on record, especially the reply filed by respondents Nos. 1 and 2, this court finds that the facts as have been taken note herein above, have not been disputed rather admitted in the reply filed by respondents. Respondents in their reply have tried to justify their action in not promoting the petitioner alongwith private respondents on the ground that at the time of convening Departmental Promotion Committee on 15.7.2008, petitioner had not obtained the Master's Degree. Apart from above, it has been stated in reply that since Master's Degree was not submitted to the department on or before 15.7.2008, petitioner could not be promoted to the post of Lecturer (School Cadre) in her subject alongwith other eligible candidates. There is no dispute that the petitioner was ranking above the private respondents in seniority list. It also emerges from the reply filed by respondents Nos. 1 and 2 that after having convened DPC on 15.7.2008, a panel was drawn and candidates, who could not be promoted pursuant to recommendations of Departmental Promotion Committee made on 15.7.2008, were subsequently considered in the review DPC held on 19.6.2009. However, since name of the petitioner was not considered in regular DPC held on 15.7.2008, her name again was not considered in review DPC held on 19.6.2009. However, as has been taken note here in above, petitioner was promoted as Lecturer (School Cadre) in the year 2010.

22. If the reply filed by respondents Nos. 1 and 2 is read in its entirety, it has not been disputed that a provisional certificate issued by the Annamalai University, showing the petitioner to have passed Master's Degree in Chemistry was submitted by the petitioner before meeting of DPC held on 15.7.2008.

23. Petitioner was ignored by the DPC for promotion on 15.7.2008 only for the reason that she had not submitted her Master's Degree in Chemistry but once it stands duly admitted that before 15.7.2008, Principal, Government Senior Secondary School, where the petitioner was working at the relevant time, had submitted case of the petitioner complete in all respects to the Director Higher Education enabling it to consider case of petitioner for promotion as Lecturer (School Cadre) alongwith others, there was no occasion for the respondents to deny the legitimate claim of the petitioner on the ground that she did not possess Master's Degree on 15.7.2008 when regular Departmental Promotion Committee was convened.

24. Respondents in their reply in para-3 have categorically admitted that the petitioner had submitted provisional certificate and degree was issued by University on 20.11.2008. Vide communication dated 5.11.2013 (Annexure PA annexed with rejoinder), learned counsel for the petitioner sought information under Right to Information Act, 2005 from Directorate of Higher Education to the following effect:

> "1. Whether the following TGTs' Science who were promoted as Lecturer (School Cadre), Chemistry on 16.7.2008 and on 12.8.2008 had submitted their original/final Masters Degree at the time of regular DPC held on 15.7.2008, if NO, then on what basis they were promoted?

Name	Seniority No.	Date of appointment
Suresh Kumar	6443	14.10.1996
Sanjeev Kumar	7967	7.2.200
Naveen Bhandari	9942	9.4.2001
Rakesh Kumar	9316	18.1.2001
Rajender Singh	9543	20.2.2001
Abha Gupta	6851	31.3.1997
Ravinder Singh	10560	9.10.2001
Anil Kumar	7278	28.6.1998

25. Public Information Officer vide communication dated December, 2013 (Annexure PB annexed with rejoinder), supplied following information

> "Department do prepare panel amongst in service TGT's who have completed Master degree and supporting relevant documents/ certificates are verified from original certificate by Principal/ Headmaster concerned and cases are submitted to department alongwith attested photo copies of relevant documents. Hence, original certificates of any candidates are not demanded until and unless there is some doubt in any documents. However, before including any name in the panel for promotion it is ensured that the TGT concerned have actually acquired complete Master degree from recognized University. Any case submitted for inclusion int eh promotion panel of PGT on the basis of provisional certificate by the candidates are not considered until and unless candidate produce consolidated marks sheet of degree issued by recognized University.

26. Careful perusal of aforesaid information supplied under Right to Information Act, 2005 clearly reveals that for inclusion in the panel of PGT on the basis of provisional certificate by candidates, they are not considered until and unless candidates produce original consolidated mark sheet /degree issued by University.

27. In the case at hand, it is not in dispute that the petitioner besides having submitted provisional certificate also submitted mark sheet showing her to have passed Master's Degree in Chemistry, but yet the Department opted not to include her in the list of candidates considered for promotion by the DPC held on 15.7.2008.

28. It has been wrongly averred by the respondents Nos.1 and 2 in reply that petitioner acquired the master's degree on 20.11.2008 because documents placed on record clearly reveal that though the petitioner herein had passed Master's Degree in Chemistry on 28.3.2008, but degree in her favour was granted on 20.11.2008.

29. Needless to say, University at first instance grants detailed mark sheet alongwith provisional certificate and usually degrees are issued after some

time. Since the petitioner had submitted mark sheet showing her to have passed Master's Degree in chemistry and provisional certificate issued by the University concerned, department ought to have considered the case of the petitioner for promotion as Lecturer (School Cadre) alongwith others in DPC held on 15.7.2008. Since case of the petitioner was not considered on 15.7.2008, her name was again not considered in the review DPC dated 19.6.2008, as she was not in the zone of consideration drawn by regular DPC held on 15.7.2008. Petitioner was promoted to the post of Lecturer (School Cadre) in the year 2010, whereas, persons junior to her in seniority list were promoted in the year 2008. Since the petitioner was fully eligible to be promoted to the post of Lecturer (School Cadre) on 15.7.2008, prayer made in the instant petition deserves to be allowed, especially when it stands established on record that the persons junior to the petitioner were promoted ahead of her pursuant to recommendation of Departmental Promotion Committee held on 15.7.2008.

30. Merely for want of degree, petitioner could not be denied promotion from due date, especially when factum of her having acquired Master's Degree on 28.3.2008 i.e. much prior to convening of regular DPC on 15.7.2008 stood established on record on account of documents furnished by Principal of school to the Director Higher Education.

31. Consequently, in view of above, this court finds merit in the present petition and same is allowed and action of the respondents in not granting promotion to the petitioner to the post of Lecturer (School Cadre) Chemistry with effect from 16.7.2008 is held to be bad and accordingly same is quashed and respondents are directed to grant promotion to the petitioner to the post of Lecturer (School Cadre) Chemistry from the date her juniors were promoted to the post concerned pursuant to DPC 15.7.2008 alongwith all consequential benefits.

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

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

BETWEEN

ABHINAY GARG
S/O DHARAMPAL,
R/O VPO BARSI, TEHSIL BALH,
DISTRICT MANDI, H.P.
AGED ABOUT 37 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

2. CRIMINAL MISCELLANEOUS PETITION (MAIN) NO. 2136 OF 2022

BETWEEN
RAHIL GARG
SON OF SHRI SURINDER KUMAR
RESIDENT OF HOUSE NO. 103/12,
RAM NAGAR, MANDI, TEHISL SADAR,
DISTT. MANDI, H.P.'
AGED 21 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

3. CRIMINAL MISCELLANEOUS PETITION (MAIN) NO. 2138 OF 2022

BETWEEN
SURENDER KUMAR
SON OF SHRI NARAYAN DASS
RESIDENT OF HOUSE NO. 103/12 RAM NAGAR,
MANDI, DISTT. MANDI, H.P.
AGED 59 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

4. CRIMINAL MISCELLANEOUS PETITION (MAIN) NO. 2139 OF 2022

BETWEEN
YASH PAL
SON OF SHRI NARAYAN DASS,
RESIDENT OF HOUSE NO. 103/12 RAM NAGAR,
MANDI, DISTT. MANDI, H.P.

AGED 58 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

5. CRIMINAL MISCELLANEOUS PETITION (MAIN) NO. 2140 OF 2022

BETWEEN
SATISH KUMAR
SON OF SHRI KUMAR CHAND,
RESIDENT OF VILLAGE & POST OFFICE, KOT,
TEHSIL TAUNI DEVI,
DISTT. HAMIRPUR, H.P.
AGED 37 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,

ASSISTANT ADVOCATE GENERAL)

6. CRIMINAL MISCELLANEOUS PETITION (MAIN) NO. 2141 OF 2022

BETWEEN
SAHIL GARG,
SON OF SHRI SURINDER KUMAR
RESIDENT OF HOUSE NO. 103/12 RAM NAGAR,
MANDI, DISTT. MANDI, H.P.
AGED 22 YEARS

PETITIONER

(BY MR. AJAY KOCHHAR, MS. AVNI KOCHHAR
& MR. BHAIRAV GUPTA AND MR. SAHIL MALHOTRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

INVESTIGATING OFFICER PRESENT.

CRIMINAL MISCELLANEOUS PETITION (MAIN)
NOS. 1967, 2136, 2138-2141 OF 2022
DECIDEDON: 30.9.2022

Code of Criminal Procedure, 1973 - Section 439- **Indian Penal Code, 1860 -** Sections 302, 147, 148 and 149- Bail - Discussed the applicability of Section 149 IPC and the principle of common intention in cases where individual actions lead to a collective offense - **Held** - Grant of bail based on presumption of innocence until proven guilty, with stringent conditions to ensure court appearance and prevent interference - Decision based on case specifics, with a reminder of bail as the norm, and any breach leading to bail cancellation. (Para 11, 15, 20)

Cases referred:
Jeet Ram v. State of H.P Latest HJL 2003(HP) 23;
Manoranjana Sinh alias Gupta vs CBI, (2017) 5 SCC 218;
Prasanta Kumar Sarkar vs Ashis Chatterjee and another (2010) 14 SCC 496;

These petitions coming on for orders this day, the court passed the following:

O R D E R

Since all the petitions arise out of same FIR, they were taken up together for hearing and are being disposed of vide this common order.

2. Bail petitioners namely Abhinay Garg, Rahil Garg, Surender Kumar, Yash Pal, Satish Kumar and Sahil Garg have approached this court in the instant proceedings filed under S 439 CrPC, praying therein for grant of regular bail in FIR No. 71 dated 17.3.2022, registered at Police Station Sadar, Mandi, under Ss.302, 147, 148 and 149 IPC. Respondent-State has filed status report and Investigating Officer has come present with record.

3. Perusal of status report/record reveals that on 17.3.2022 at about 5.00 pm, police after having received information that one person Raj Kumar alias Raju has drowned in Beas river, reached the spot and found that the deceased, with a view to save his life, jumped into Beas river. Complainant Surender, who is an eye witness, got recorded his statement under S.154 CPC that on 17.3.2022 at 11.00 am he had gone to Seri Mach for celebrating *Holi* and at about 3.30 pm, when he reached back home, he saw Raj Kmar running on bank of *Beas* river. He alleged that 9-10 people including 4-5 ladies, were chasing Raj Kumar carrying stones in their hands. Complainant alleged that deceased Raj Kumar jumped into river and sat on boulder on other side of the river. However, 4-5 people after crossing bridge reached near Raj Kumar alias Raju from other side and gave blow of *Danda* on his head, due to which Raj Kumar alias Raju fell in river. Complainant alleged that though deceased Raj Kumar raised his head and arms twice or thrice in water but ultimately he drowned. In the aforesaid background, FIR, as detailed herein above, came to

be lodged against persons namely Dharampal, Surinder Kumar, Sahil Garg, Yash Pal, Rahil Garg, Abhinay Garg, Satish Kumar, Damyanti and Smt. Kamlesh Kumari. Accused Damyanti and Kamlesh Kumari stand enlarged on bail vide order dated 3.8.2022 passed by this court in CrMP(M) Nos. 871 and 1133 of 2022, whereas, all the remaining accused as named above are behind bars. Since *Challan* stands filed in the competent court of law and nothing remains to be recovered from bail petitioners, they have approached this court in the instant proceedings, for grant of bail.

4. Mr. Narinder Guleria, learned Additional Advocate General, while fairly acknowledging the factum with regard to filing of *Challan* the competent court of law, contends that though nothing remains to be recovered from the bail petitioners, but keeping in view gravity of offence alleged to have been committed by the bail petitioners, they do not deserve leniency and their prayer for bail deserves outright rejection. While making this court peruse the record, learned Additional Advocate General submits that there is overwhelming evidence to demonstrate that all the petitioners made deceased Raj Kumar alias Raju jump into river *Beas* to save his life. However, above named deceased died after being drowned and as such, bail petitioners have been rightly booked for commission of offences punishable under Ss. 302, 147, 148 and 149 IPC. Learned Additional Advocate General further submits that there is an eye witness to the effect that all the bail petitioners were hurling stones at the deceased Raj Kumar alias Raju, who with a view to save his life jumped into *Beas* river and thereafter sat on boulder on the other side of the river, but yet some of the accused came from opposite side and gave blow of *Danda* on his head, as a consequence of which, deceased drowned. Lastly, Mr. Guleria submits that since all the petitioners have indulged in heinous crime, it may not be interest of justice to enlarge them on bail, because, in the event of being enlarged on bail, they may flee from justice or tamper with prosecution evidence.

5. Having heard learned counsel for the parties and perused material available on record this court finds that prior to the alleged incident, some altercation took place inter se bail petitioner Abhinay Garg and deceased Raj Kumar alias Raju, who allegedly gave blow of pressure pipe on the head of Abhinay Garg. Family members of Abhinay Garg, who are bail petitioners herein, with a view to take revenge, chased Raj Kumar alias Raju, who after having seen persons coming after him, jumped into river. Though deceased Raju after having crossed *Beas* river, sat on boulder on the other side of the river, but one of accused Dharampal, with other accused, reached other side of the river and gave blow of *Danda* on the head of deceased Raj Kumar alias Raju, as a consequence of which, he fell down in the river and ultimately drowned.

6. In nutshell, case of prosecution against the bail petitioners is that they compelled deceased Raj Kumar alias Raju to jump in river *Beas*, because at the relevant time, all the accused named in the FIR, were throwing stones at him. However, having seen CCTV and video recording made available to this court by Mr. Bhairav Gupta, learned counsel for the petitioners, this court finds that though some of the persons can be seen throwing stones at the deceased Raj Kumar alias Raju, while he had jumped in the river, but once he had crossed the river and sat on boulder on the other side, no stones were thrown by the bail petitioners, rather at that time, one of the co-accused Dharampal, after having crossed bridge came from opposite side alongwith two persons and gave blow of *Danda* on the head of deceased, as a consequence of which, he fell in river Beas and ultimately drowned. No doubt, in CCTV and video footages, persons can be seen throwing stones at the deceased but the fact remains that the deceased Raj Kumar alias Raju died after being hit on his head by accused Dharampal with a *Danda*, which fact stands substantiated with the report of post portem, wherein cause of death of deceased has been mentioned as *sub dural hemorrhage on parietal region*.

There is no mention, if any, with regard to external injury, if any, caused on the person of deceased, after his being hit by stones, if any, thrown by the bail petitioners.

7. As per post-mortem report, cause of death of the deceased is drowning, which only happened after his having fallen in the river on account of blow of *Danda* given on his head by one of accused Dharampal. It is not in dispute that while stones were being thrown by the bail petitioners, deceased Raj Kumar alias Raju had jumped into river and crossed the same successfully. After having crossed Beas river, the deceased was sitting on boulder, on the other side of river, which can be seen in the video/CCTV footage. It is only after his being hit on head by Dharampal with a *Danda*, that he fell in river and ultimately drowned.

8. It has come in the investigation that on the date of incident, *Holi* fair was being organized at Seri Mach and entire family of one of bail petitioner Abhinay Garg, who was hit by Raj KUMAR alias Raju, was present in Holi fair, but unfortunately thereafter things took an ugly turn and family of Abhinay Garg, who was given blow with pressure pipe on his head by the deceased, chased the deceased Raj Kumar alias Raju and he, with a view to save his life, jumped into river Beas.

9. No doubt, material available on record reveals that the bail petitioners were throwing stones at the deceased but whether they had a common intention to kill the deceased, is a question to be decided in trial, in the totality of evidence led on record by Investigating Agency especially when there is overwhelming evidence available on record, suggestive of the fact that the deceased after crossing *Beas* river sat on boulder on opposite side and then fell in river after being hit on his head by one of accused Dharampal. Had accused Dharampal not given blow of *Danda* on the head of deceased, deceased would not have fallen in the river and drowned. It is only due to blow of *Danda* given by Dharampal, that he fell in river Beas and drowned.

10. No doubt, bail petitioners are accused of a heinous crime of murder, but, whether their mere presence on the spot alongwith main accused, would also make them liable for commission of offence, if any, under S.302 IPC, is a question to be determined in totality of evidence led on record by Investigating Agency. While deciding question of grant /refusal of bail, court is to keep in mind gravity of offence alleged to have been committed by accused named in the FIR but by now it is settled that gravity of offence would not be the sole criteria to decide this question, rather other competing factors viz., prima facie case, nature and gravity of accusation, punishment involved, apprehension of repetition of offence and witnesses being influenced, are to be seen.

11. In the case at hand, the only role attributed to the bail petitioners is that they were pelting stones at the deceased, as a consequence of which, he was compelled to jump into river *Beas*, however, as has been noticed herein above, deceased after having seen people coming after him, jumped into river and crossed the same successfully, meaning thereby that the deceased did not drown on account of pelting of stones by the bail petitioners, rather, he successfully crossed the river *Beas* but thereafter, fell from boulder, after being hit on his head by accused Dharampal. Mere pelting of stones by the bail petitioners may not necessarily lead to the conclusion that they had common object of killing deceased as such, applicability of S.149 IPC in the facts of the case at hand, is a debatable question, which shall be definitely decided in the totality of evidence led on record by Investigating Agency by learned trial Court.

12. Reliance is placed upon Judgment rendered by this Court in **Jeet Ram** v. **State of H.P.**, reported in Latest HJL 2003(HP) 23, wherein it has been held as under:

> "7. As is the case of the prosecution, the only role attributed to the accused persons is that they caught hold of the deceased and their co-accused Savitri and Bimla pelted stones at him and thereafter

Bhupender gave him the fatal blow with a 'Draft'. Prima facie it is difficult to believe that when a person is caught hold of by three persons two other persons are pelting stones at him, then such person and those persons who have caught hold of him will not sustain any injury. Therefore, the version regarding pelt ing of stones and holding of the deceased is prima facie clouded by suspicion as none of the accused persons who are alleged to have caught hold of the deceased while co-accused Savitri and Bimla were pelting stones at the deceased did not receive any injury whatsoever and no injury caused by the pelting of stones was found on the per son of the deceased. Mere catching hold of the deceased by the accused persons may not necessarily lead to the conclusion that they haw the common object of killing the deceased as the applicability of Section 149, IPC, In the facts of the ease, is a debatable question.

8. In Thakar Singh v. State of Punjab, 1969 Cur LJ 810 (relied upon by the learned Counsel for the accused persons to substantiate his contention) wherein the case of the prosecution was that accused Niranjan Singh caught hold of the deceased and fell him down and accused Thakar Singh throttled his neck, the Punjab and Haryana High Court held as under :

> "..... It is not a case in which it can be legitimately contended on behalf of the prosecution that there was any pre-planned common intention on the part of both Niranjan Singh and his father Thakar Singh in throttling the deceased. There could be no such intention on the part of Niranjan Singh even in executing his act of catching hold of the boy by the arms and throwing him down on the ground. The act of throttling by Thakar Singh followed per se and was independent of the act of throwing the boy down by Niranjan Singh. Thus, there is no community of intention in the act performed by Niranjan Singh and that executed by Thakar Singh. The two are distinct ones and one has nothing to do with the other. No intention on the part of Niranjan Singh from his act could be inferred in common with the intention of throttling by Thakar Singh, which followed later on. It is not a case in which it could be held that throwing down was committed by Niranjan Singh in furtherance of the common intention of throttling by Thakar Singh. Thus, the applicability of Section 34 of the Indian Penal Code is uncalled for. Niranjan Singh appellant could not be held vicariously liable by virtue of that Section. This is additional ground of his being entitled to acquittal."

9. In Jaspal Singh v. State of Haryana, 1986 (2) Recent CR 582 (2) wherein one of the accused caught hold of the deceased while armed with a stick but did not cause any injury to the deceased whereas his co-accused caused injuries to the deceased which resulted in his death, the Punjab and Haryana High Court granted bail to the accused who had only caught hold of the deceased while on the following premise :

> "Though the motive was with the petitioner and he caught hold of the deceased while armed with a stick, he did, not cause any injury to the deceased. Rather his co-accused did cause injuries to the deceased which resulted in his death. In this situation, applicability of Section 34 Indian Penal Code is a moot point. It would thus be apt that the petitioner gets the concession of bail."

10. In Kuldip Singh v. State of Punjab, 1994 (3) Rec Cri R 137 : (1994 Cri LJ 2201) (SC) where one of the accused inflicted the injury on the head of the injured with sharp edged weapon and the second accused gave 'Lathi' blow on his shoulder causing simple injury allegedly with the common intention of accused in an attempt to commit the murder of the injured, the Hon'ble Supreme Court held that the injury on the head of the injured was serious one and proved to be grievous, therefore, the offence under Section 307, I.P.C. is made out against Kuldip Singh who caused such injury but in so far as the other co-accused is concerned, he inflicted only one blow on the shoulder with the 'Lathi' causing swelling, therefore, it could not be said that he shared the common intention along with the Kuldip Singh in attempt to commit the murder of the injured."

13. Since it is admitted case of the prosecution that the deceased fell after having been given blow by *Danda,* it would be too premature at this stage to conclude complicity of the bail petitioners in the alleged offence, who were incidentally present on the spot on account of *Holi* fair.

14. Though, the case at hand is to be decided by learned Court below in the totality of the evidence collected on record by prosecution, but keeping in view the aforesaid glaring aspects of the matter, this court sees no reason to let the bail petitioners incarcerate in jail, for an indefinite period during trial, especially, when *Challan* stands filed and nothing remains to be recovered

from them. It appears that the entire family of Abhinay Garg, who was allegedly given beatings by deceased Raj Kumar alias Raju, has been put behind the bars.

15. Hon'ble Apex Court and this Court in a catena of cases have repeatedly held that one is deemed to be innocent, till the time, he/she is proved guilty in accordance with law. Apprehension expressed by laag.. that in the event of bail petitioners being enlarged on bail, they may not only flee from justice but may also harm the victim-prosecutrix, can be best met by putting the bail petitioners to stringent conditions.

16. Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49 has held that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative.

17. In **Manoranjana Sinh alias Gupta** versus **CBI**, (2017) 5 SCC 218, Hon'ble Apex Court has held that the object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

18. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down various principles to be kept in mind, while deciding petition for bail viz. prima facie case, nature and

gravity of accusation, punishment involved, apprehension of repetition of offence and witnesses being influenced.

19. In view of above, bail petitioners have carved out a case for themselves, as such, present petitions are allowed. Petitioners are ordered to be enlarged on regular bail subject to their furnishing bail bonds in the sum of Rs.30,000/- each with one local surety in the like amount to the satisfaction of the learned trial Court, besides the following conditions:

(a) They shall make themselves available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;
(b) They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
(c) They shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and
(d) They shall not leave the territory of India without the prior permission of the Court.

20. It is clarified that if the petitioners misuse the liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

21. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these petitions alone. The petitions stand accordingly disposed of.

A downloaded copy of this order, shall suffice for the concerned authority to accept the bail bonds/surety from the bail petitioners, without insisting for a certificate copy thereof. Authenticity of this order may be verified from the official website of this court.

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

Between:-

SHRI RAJESH KUMAR S/O SH. DHARAM CHAND,R/O VILLAGE SHILLA KIPPER, POST OFFICE DUDAR, TEHSIL SADAR, DISTRICT MANDI, (H.P.), PRESENTLY WORKING AS BOOKING CLERK,
HIMACHAL ROAD TRANSPORT CORPORATION, SUNDER NAGAR, DISTRICT MANDI- 175001 (H.P.)

PETITIONER

(BY MR. RAKESH KUMAR DOGRA, ADVOCATE)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION
   THROUGH ITS MANAGING DIRECTOR,
   SHIMLA-171003 (H.P.)

2. REGIONAL MANAGER,
   HIMACHAL ROAD TRANSPORT CORPORATION,
   REGIONAL OFFICE, MANDI,
   DISTRICT MANDI,-175001 (H.P.)

3. THE REGIONAL MANAGER,
   HIMACHAL ROAD TRANSPORT CORPORATION,
   REGIONAL OFFICE, SUNDER NAGAR,
   DISTRICT MANDI-(H.P.)

4. SH. AMAR NATH SALARIA,
   DIVISIONAL MANAGER,
   HIMACHAL ROAD TRANSPORT CORPORATION,
   DIVISIONAL OFFICE, MANDI,
   DISTRICT MANDI,-175001 (H.P.)

5. SMT. RADHA DEVI
   SUPERINTENDENT GRADE I-CUM-
   INQUIRY OFFICER,

HIMACHAL ROAD TRANSPORT CORPORATION,
DIVISIONAL OFFICE, MANDI,
DISTRICT MANDI-175001 (H.P.)

6. SH. RAJ KUMAR
SUPERINTENDENT GRADE II
HIMACHAL ROAD TRANSPORT CORPORATION,
MANDI, DISTRICT MANDI-175001 (H.P.)

7. SH. NARESH KUMAR
SR. ASSISTT.
HIMACHAL ROAD TRANSPORT CORPORATION,
MANDI, DISTRICT MANDI,-175001 (H.P.)

RESPONDENT

(MS. SHUBH MAHAJAN, ADVOCATE
FOR R-1 TO R-3)

NEMO FOR R-4

R-5 TO R-7 EX PARTE

CIVIL WRIT PETITION
NO. 2315 OF 2020
DECIDED ON: 04.08.2022

Constitution Of India, 1950- Service Law - Suspension of the Petitioner from his post for making indecent remarks against Divisional Manager - Alleged procedural irregularities **-Held** - Biases in the inquiry and appellate processes, questioning the legitimacy of penalties imposed - Adhering to the principles of natural justice - Ruled in favor of the petitioner- Quashing penalties and directing entitlement to consequential benefits. (Para 26, 27,28, 30)

Cases referred;

Allahaband Bank v. Krishna Narayan Tewari, (2017) 2 SCC 308;
Kuldeep Singh v. The Commissioner of Police and others, AIR 1999 SC 677;
Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570;

Union of India and others v. R.P. Singh, 2014 AIR SCW 3475;

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

O R D E R

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

"(i) That the impugned inquiry report dated 26.06.2018 contained in Annexure P-16, impugned punishment order dated 10.04.2019 contained in Annexure P-20 passed by respondent No.4 and office order dated 15.06.2020 contained in Annexure P-25 passed by respondent No.1 rejecting the appeal of the petitioner may kindly be quashed and set-aside being constitutionally void, arbitrary, illegal, discriminatory, void ab-initio, non-est, ultra vires and against the principles of natural justice, by issuing a writ of Certiorari;

(ii) That the writ in the nature of mandamus may kindly be passed directing the respondents to treat the period of suspension from 22.01.2016 to 21.04.2016 as on duty and remaining consequential benefits be released to the petitioner alongwith interest @ 9% per annum;

(iii) That the writ in the nature of mandamus may also be passed directing the respondents to consider the case of the petitioner for promotion to the next higher post of Inspector/Cashier from the date persons junior to him have already been promoted as such and consequential benefits be released to the petitioner. \

(iv) That the writ in the nature of mandamus may also be passed directing the respondent No.1 to initiate disciplinary action against the respondent Nos. , 6 and 7 who intentionally and willfully failed to comply with the provisions of Rule 14 (35) of the CCS (CC&A) Rules, 1965 and did not attend the inquiry proceedings despite notices/summons issued to them by the respondent No.5."

34. Precisely, the facts of the case, as emerge from the record, are that the petitioner was initially appointed as a Booking Clerk on contract basis,

under the Kith and Kin Policy of the respondent-Corporation on 25.5.1998. Subsequently vide order dated 25.5.1999, services of petitioner were regularized and since then he is working regularly with the respondent Corporation. Record reveals that on 21.1.2016, one Shri Narain Dass, Driver, in the office of HRTC Mandi leveled allegations against the petitioner that he made indecent remarks against respondent No.4 i.e. Divisional Manager, Himachal Road Transport Corporation, Divisional Office Mandi. Taking cognizance of aforesaid complaint made by Shri Narain Dass, respondent No.4, placed the petitioner under suspension vide order dated 22.1.2016 (Annexure P-1) and fixed his headquarters at HRTC Sarkaghat. On 1.2.2016, charge sheet was served upon the petitioner by respondent No.2. Petitioner submitted reply to the memo on 8.2.2016 (Annexure P-3) and thereafter on 27.10.2017 (Annexure P-5) submitted written statement of defence to Inquiry Officer. Inquiry Officer was requested to supply defence/additional documents, but such documents were not supplied to the petitioner and as such, he was compelled to approach erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 1501 of 2019. By way of aforesaid Original Application, petitioner also laid challenge to his suspension order dated 22.1.2016.

35. In the aforesaid Original Application, petitioner filed MA No. 682 of 2018 levelling therein allegations against Inquiry Officer that despite there being request of petitioner, defence/ additional documents were not supplied to him. However, aforesaid prayer made by the petitioner came to be dismissed as being premature. Vide aforesaid order, learned Tribunal below also observed that as regards initiation of departmental proceedings in accordance with rule 14(35) of Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter, 'Rules'), applicant would be at liberty to press his prayer before Inquiry Officer as per rules/law.

36. Interestingly, in the case at hand, Defence Assistant of the petitioner vide communication dated 14.9.2017, Annexure P-6, though submitted list of five witnesses as detailed on back side of said communication but witness at Sr. Nos. 2 and 5 Neel Mani Sharma and Rajesh Kumar (petitioner) only came forward to make deposition whereas, witnesses at Sr. No.1, 3 and 4 refused to come forward to depose and as such, Defence Assistant representing the petitioner vide communication dated 18.12.2017, requested Inquiry Officer to initiate proceedings under Sub-rule (17) of Rule 14 of the Rules, against those witnesses, who despite summons failed to come present for getting their statements recorded. However, fact remains that neither witnesses at Sr. Nos. 1, 3 and 4 came to depose nor Inquiry Officer recommended action against them in terms of sub-rule (17) of Rule 14 of the Rules. On 26.6.2018 (Annexure P-16), Inquiry Officer concluded the enquiry, wherein allegations against petitioner were found to be proved and Inquiry Officer recommended Disciplinary Authority for action in accordance with law.

37. Divisional Manager, HRTC, who was proposed witness No.1, vide order dated 10.1.2019 (Annexure P-17), after having received Inquiry Report from Inquiry Officer (Annexure P-16), called upon the petitioner to make representation against the penalty proposed to be imposed against him. Petitioner, while responding to aforesaid communication, vide letter dated 13.2.2019 (Annexure P-18) invited attention of the Disciplinary Authority to the fact that he cannot exercise power of Disciplinary Authority because he was cited as one of the witnesses. However, fact remains that the Divisional Manager, ignoring said objection of the petitioner, vide order dated 10.4.2019, (Annexure P-20) imposed penalty of "reduction of his two stages in a time scale of pay for a period of three years w.e.f. 01.05.2019" and it was further ordered that, "he will not earn increments of pay during the period of reduction and after the expiry of his reduction in the time scale of pay, the reduction will not have the effect of his postponing future increments of pay.

38. Being aggrieved by said order passed by Divisional Manager, respondent No.4 (Annexure P-20), petitioner filed an OA No. 2486 of 2019, however, same was dismissed vide order dated 2.7.2019 (Annexure P-23), reserving liberty to the petitioner to file statutory appeal against order dated 10.4.2019 (Annexure P-20), before the competent authority. Petitioner preferred an appeal before Managing Director, Himachal Road Transport Corporation, (Annexure P-24), reiterating therein that the disciplinary action, if any, could not be taken by Divisional Manager, as he was one of witnesses in the enquiry against petitioner. Apart from above, petitioner raised another ground in the appeal that since Divisional Manager alongwith two other witnesses failed to make himself available for deposition despite receipt of summons, they ought to have been dealt with in accordance with law. Petitioner also claimed that purposely and to cause harm to the petitioner, eye witness Balwant Kumar, Adda Incharge who was present at the time of the alleged incident, was dropped. However, the fact remains that the Managing Director ignored all the grounds raised by the petitioner and upheld Annexure P-20, vide order dated 15.6.2020 (Annexure P-25). In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein for the reliefs as reproduced herein above.

39. Precise grouse of the petitioner as has been highlighted in the petition and further canvassed by learned counsel for the petitioner is that once the Divisional Manager, Himachal Road Transport Corporation Mandi, was cited as one of the witnesses, he could not have imposed penalty, while acting as a Disciplinary Authority. Apart from above, it has been further claimed by the petitioner that since the allegation against the petitioner was that he abused Divisional Manager Mandi, in the presence of Balwant, who was never examined as a witness, Divisional Manager had otherwise no authority whatsoever to act as a Disciplinary Authority.

40. Mr. Rakesh Kumar Dogra, learned counsel for the petitioner, while inviting attention of this court to Annexure P-6, dated 14.9.2017, vehemently argued that Defence Assistant of the petitioner, Shri Lal Chand Prasad, specifically requested Inquiry Officer to summon Divisional Manager, Himachal Road Transport Corporation Mandi, because allegation against the petitioner was that he abused Divisional Manager, HRTC, Mandi, but despite notice, aforesaid officer failed to cause his presence, for making deposition and as such, vide communication dated 18.12.2018 Annexure P-7, Defence Assistant again requested Inquiry Officer to initiate proceedings under sub-rule (17) of Rule 14 of the Rules against the Divisional Manager, Mandi but, she instead of initiating action in terms of aforesaid provision of law, continued with the enquiry and finally recorded wrong finding in the Inquiry Report Annexure R-16 that the petitioner was unable to secure presence of witnesses detailed at Sr. Nos. 1,3 and 4 in the list of witnesses, whereas, on the request of petitioner notices were issued to persons cited as witnesses at Sr. Nos. 1,3 and 4 but yet they refused to appear as witnesses. Lastly, Mr. Dogra argued that since Disciplinary Authority in the case at hand was Regional Manager, HRTC, Divisional Manager HRTC had otherwise no authority to pass order imposing penalty and as such, same being passed without jurisdiction is not sustainable in the eye of law.

41. Ms. Shubh Mahajan, learned counsel for the respondents, while supporting the impugned action of the respondents contended that once Divisional Manager, Himachal Road Transport Corporation did not depose as a witness, there was no impediment, if any for him to pass order imposing penalty being Disciplinary Authority. However, learned counsel for the respondent was unable to dispute the fact that in the case at hand, Disciplinary Authority was not the Divisional Manager, Himachal Road Transport Corporation but in the case of the petitioner, Disciplinary Authority was Regional Manager. Ms. Mahajan argued that since Divisional Manager

concerned is the appointing authority/Disciplinary Authority of Booking Clerks, no illegality can be said to have been committed by Divisional Manager while passing order imposing penalty.

42. Before ascertaining the correctness and genuineness of rival submissions made by learned counsel for the parties, this court would first deal with scope and competence of this Court to intervene in the disciplinary proceedings.

43. Recently, Hon'ble Apex Court in **Allahaband Bank** v. **Krishna Narayan Tewari**, (2017) 2 SCC 308, while elaborating upon the scope of High Court to interfere in departmental enquiry, has held that the writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the Enquiry Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. Hon'ble Apex Court held in the judgment supra as under:

> "4. The High Court came to the conclusion that neither the Disciplinary Authority nor the Appellate Authority had applied their mind or recorded reasons in support of their conclusions. Relying upon the decisions of this court in Roop Singh Negi v. Punjab National Bank & Ors. (2009) 2 SCC 570, Kuldeep Singh v. Commissioner of Police & Ors. (1999) 2 SCC 10, Nand Kishore v. State of Bihar (1978) 3 SCC 366, Kailash Nath Gupta v. Enquiry Officer, Allahabad Bank & Ors. (2003) 9 SCC 480, State Bank of Bikaner & Jaipur v. Nemi Chand Nalwaya (2011) 4 SCC 584 and Mohd. Yunus Khan v. State of U.P. & Ors. (2010) 10 SCC 539, the High Court held that the order passed by the disciplinary authority and the appellate authority were unsustainable in law. The High Court found that the findings recorded by the Disciplinary Authority and affirmed by the Appellate Authority were perverse and were based on no evidence

whatsoever. The High Court observed that the Appellate Authority had not applied its mind independently and simply cut and pasted the findings of the Disciplinary Authority while dismissing the appeal.

5. On behalf of the appellant-bank it was contended before us that the High Court had exceeded its jurisdiction in re-appreciating the evidence and holding the respondent not guilty. It was argued that so long as there was some evidence on which the Disciplinary Authority could rest its findings, sufficiency or insufficiency of such evidence could not be gone into by a Writ Court. Alternatively, it was submitted that even if there was any infirmity in the orders passed by the Disciplinary Authority or the Appellate Authority, on account of absence or insufficiency of the reasons in support of the findings recorded by them, the proper course for the High Court was to remand the matter back to the Appellate Authority or the Disciplinary Authority as the case may be for doing the needful afresh. The High Court could not, on account of absence of reasons or unsatisfactory appraisal of the evidence by them, quash the order of punishment and direct release of the service benefits due to the respondent.

6. On behalf of the respondent it was on the other hand contended that the enquiry conducted against the respondent and the conclusion arrived at by the Enquiry Officer, Disciplinary Authority and the Appellate Authority suffered from fatal defects. Firstly, because the enquiry conducted by the Enquiry Officer was unfair and had resulted in gross miscarriage of justice on account of the failure of the Enquiry Officer to provide a reasonable opportunity to the respondent to lead evidence in his defense. In the second place the findings recorded by the Enquiry Officer and so also the Disciplinary Authority were unsupported by any evidence whatsoever and were perverse to say the least. In the third place, the orders were unsustainable also for the reason that the same did not disclose due and proper application of mind by the Disciplinary Authority and the Appellate Authority. The order passed by the Appellate Authority was, in particular, bad in law as the same did not examine the material on record independently and had simply relied upon the findings of the Disciplinary Authority without adverting to the points which the respondent had raised in support of his challenge. It was lastly submitted that the respondent has since superannuated and was a physical wreck having suffered a heart

attack and a debilitating stroke which had confined him to bed. Any remand of the proceedings to the Appellate Authority to pass a fresh order or the Disciplinary Authority for re-examination and fresh determination of the respondent's guilt would not only be harsh but would tantamount to denial of justice to him. The High Court was in that view justified in taking a pragmatic view of the matter and in directing continuity of service to the respondent and release of all service and retiral benefits to him upto the date of his superannuation.

7. We have given our anxious consideration to the submissions at the bar. It is true that a writ court is very slow in interfering with the findings of facts recorded by a Departmental Authority on the basis of evidence available on record. But it is equally true that in a case where the Disciplinary Authority records a finding that is unsupported by any evidence whatsoever or a finding which no reasonable person could have arrived at, the writ court would be justified if not duty bound to examine the matter and grant relief in appropriate cases. The writ court will certainly interfere with disciplinary enquiry or the resultant orders passed by the competent authority on that basis if the enquiry itself was vitiated on account of violation of principles of natural justice, as is alleged to be the position in the present case. Non-application of mind by the Enquiry Officer or the Disciplinary Authority, non-recording of reasons in support of the conclusion arrived at by them are also grounds on which the writ courts are justified in interfering with the orders of punishment. The High Court has, in the case at hand, found all these infirmities in the order passed by the Disciplinary Authority and the Appellate Authority. The respondent's case that the enquiry was conducted without giving a fair and reasonable opportunity for leading evidence in defense has not been effectively rebutted by the appellant. More importantly the Disciplinary Authority does not appear to have properly appreciated the evidence nor recorded reasons in support of his conclusion. To add insult to injury the Appellate Authority instead of recording its own reasons and independently appreciating the material on record, simply reproduced the findings of the Disciplinary Authority. All told the Enquiry Officer, the Disciplinary Authority and the Appellate Authority have faltered in the discharge of their duties resulting in miscarriage of justice. The High Court was in that view right in interfering with the orders passed by the Disciplinary Authority and the Appellate Authority.

> 8. There is no quarrel with the proposition that in cases where the High Court finds the enquiry to be deficient either procedurally or otherwise the proper course always is to remand the matter back to the concerned authority to redo the same afresh. That course could have been followed even in the present case. The matter could be remanded back to the Disciplinary Authority or to the Enquiry Officer for a proper enquiry and a fresh report and order. But that course may not have been the only course open in a given situation. There may be situations where because of a long time lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh enquiry or fresh order by the competent authority. That is precisely what the High Court has done in the case at hand. The High Court has taken note of the fact that the respondent had been placed under suspension in the year 2004 and dismissed in the year 2005. The dismissal order was challenged in the High Court in the year 2006 but the writ petition remained pending in the High Court for nearly seven years till 2013. During the intervening period the respondent superannuated on 30th November, 2011. Not only that he had suffered a heart attack and a stroke that has rendered him physically disabled and confined to bed. The respondent may by now have turned 65 years of age. Any remand either to the Enquiry Officer for a fresh enquiry or to the Disciplinary Authority for a fresh order or even to the Appellate Authority would thus be very harsh and would practically deny to the respondent any relief whatsoever. Superadded to all this is the fact that the High Court has found, that there was no allegation nor any evidence to show the extent of loss, if any, suffered by the bank on account of the alleged misconduct of the respondent. The discretion vested in the High Court in not remanding the matter back was, therefore, properly exercised.

44. Having heard learned counsel for the parties and perused material available on record vis-à-vis action impugned in the instant proceedings, this court finds that grouse of the petitioner is that he was not afforded due opportunity to prove his innocence by Inquiry Officer while conducting enquiry. Record clearly reveals that the complaint against the petitioner was lodged by one Shri Narain Dass, but complaint was with regard to abuses, if any, hurled by the petitioner against Divisional Manager, Himachal Road

Transport Corporation and as such, he can be said to be an interested party. In such like situation, Divisional Manager, Himachal Road Transport Corporation, otherwise ought to have distanced himself from the Disciplinary proceedings, so that same could be conducted in a transparent manner. But in the case at hand, Divisional Manager, who was cited as a witness by the petitioner, despite having received notice from Inquiry Officer, refused to come present for making deposition, yet, Inquiry Officer in her report has concluded that the petitioner was unable to secure presence of witnesses cited by him at Sr. Nos.1, 3 and 4, which also includes Divisional Manager, Mandi. Documents available on record clearly reveal that the Defence Assistant appointed on behalf of the petitioner repeatedly requested Inquiry Officer to secure presence of all the witnesses cited in the list of witnesses and when they failed to cause their presence despite notice, Defence Assistant vide communication dated 18.12.2017 (Annexure P-7), requested Inquiry Officer to initiate proceedings against the witnesses cited at Sr. Nos. 1,3 and 4 for theirs having not supplied additional documents to petitioner and for theirs not coming forward to make deposition but yet, no proceedings, if any, sub-rule 17 of rule 14 of the Rules ever came to be initiated against such persons, to the contrary, Inquiry Officer recorded wrong finding in the inquiry report.

45. Apart from aforesaid request to initiate proceedings against the persons named at Sr. Nos. 1, 3 and 4, Defence Assistant also requested Inquiry Officer to supply additional documents, before starting evidence of the petitioner but neither such documents were supplied to him nor due procedure as prescribed under Rule 14 of the Rules was followed by Inquiry Officer, as a consequence of which great prejudice was caused to the petitioner.

46. Though Ms. Shubh Mahajan, learned counsel for the respondent, while inviting attention of this court to the reply filed by the respondent Corporation contended that it was not the duty of the Inquiry Officer to ask

the Presenting Officer to make available all defence documents, rather, same were to be procured by the delinquent official from the concerned agency himself. However, careful perusal of sub-rule (17) of Rule 14 reveals that when regular hearing commences, the inquiring authority would ask the Presenting Officer to produce the documentary evidence. Such documents as are disputed by the Charged Officer have to be proved by the witnesses before they are taken on record. The undisputed documents would be taken on record and marked as exhibits.

47. However, in the present case, no such procedure ever came to be adopted by Inquiry Officer as such, enquiry stands vitiated on this count. Moreover, this court finds from the record that the sole eye witness Balwant, who had allegedly seen petitioner hurling abuses at Divisional Manager though was cited as a witness by the Presenting Officer, but his statement never came to be recorded. Though notice to the aforesaid person was issued by Inquiry Officer but he refused to come. Since aforesaid person was a material witness, he was required to be examined, but it appears that no effort, if any, came to be made on behalf of the Presenting Officer to ensure his presence before Inquiry Officer. Since statement of this witness could be material for the adjudication of the case at hand, this court has reasons to presume and believe that the aforesaid witness was purposely withheld from enquiry.

48. Leaving everything aside, Divisional Manager, Himachal Road Transport Corporation, who in one way or the other had personal intereset in the disciplinary proceedings, had no occasion at all to get himself associated in the disciplinary proceedings, that too as Disciplinary Authority. Though in the reply, respondents have claimed that memorandum of charge was served upon petitioner by the Divisional Manager, but record reveals that memo of charge dated 1.2.2016, Annexure P-2 was issued by Regional Manager, Himachal Road Transport Corporation Mandi. Though respondents claimed

that in case of Booking Clerks, Appointing Authority was the Divisional Manager, but if it was so, charge sheet at the first instance ought to have been issued by Divisional Manager, but since in the case at hand, charge sheet was issued by the Regional Manager, Himachal Road Transport Corporation Mandi, there appears to be merit in the claim of the petitioner that in his case appointing authority was the Regional Manager and as such, said authority only was having authority to impose penalty, if any in the Disciplinary proceedings, initiated against him.

49. It has been further claimed by the respondents in their reply that in case of Booking Clerks, charge sheet can be issued by Divisional Manager under Rule 16 which provides for minor penalties, but in the case at hand, penalty proposed to be imposed was major and as such, same could be imposed by Divisional Manager but this court is not convinced with the aforesaid submission. In case the Divisional Manager was appointing authority of Booking Clerks, he was competent to issue charge sheet but in the case at hand, charge sheet was issued by Regional Manager, who thereafter being competent authority ought to have awarded penalty if any.

50. Leaving everything aside, as observed above, even if it is presumed that Divisional Manager HRTC was competent to impose penalty, in the case at hand, he could not be a party to the disciplinary proceedings, for the reason that the allegations of hurling abuses were against said authority /person and as such, said person/authority can be said to have personal interest. In that situation he could appoint some other person and could have brought matter to the notice of Managing Director enabling him to appoint some other person as a Disciplinary Authority. Since in this case at hand, aforesaid procedure was not followed and Inquiry Officer wrongly concluded in Inquiry Report that the petitioner failed to secure presence of witnesses at Sr. No. 1, 3 and 4, Inquiry Report submitted by Inquiry Officer cannot be said to be free from bias and procedural irregularities.

51. It stands duly established on record that all steps were taken by the delinquent official /petitioner for summoning witnesses cited at Sr. Nos. 1, 3 and 4 in the list of witnesses but yet they did not come forward to make their depositions and as such, it cannot be said that the petitioner was given adequate of opportunity to prove his innocence. It is amply clear from the discussion made herein above, that the principles of natural justice were not adhered to in the case at hand. Otherwise also penalty imposed by Disciplinary Authority, by no stretch of imagination, can be said to be reasonable one because definitely the same does not commensurate with the misconduct alleged to have been committed by the petitioner, which otherwise never came to be proved in accordance with law.

52. As has been observed herein above, person namely Balwant Singh, who was an eye witness to alleged incident, though was cited as witness by the Presenting Officer but for the reasons best known to them was not made available to depose. Record reveals that Balwant Singh did not refuse to come but said that till the time he is provided expenses for traveling he would not come. However, Presenting Officer never made any effort to provide expenses to this witness to come forward for deposition, meaning thereby Presenting Officer did not want this witness to come and depose. Inaction of Presenting Officer to cause presence of material witness, compels this court to draw conclusion that such person was purposely withheld from the enquiry. Five opportunities were granted to Presenting Officer to secure presence of this witness but no steps were taken by them to secure presence of such a material witness. To the contrary, petitioner though took steps to cause presence of witnesses cited at Sr. No. 1,3 and 4 and they all were duly served but they chose not to come present but yet in the case of the petitioner, Inquiry Officer drew adverse inference against the petitioner on account of his failure to cause presence of witnesses at Sr. Nos. 1, 3 and 4.

53. Hon'ble Apex Court in the case titled as **Kuldeep Singh** v. **The Commissioner of Police and others**, reported in AIR 1999 Supreme Court 677, held that in case the inquiry proceedings are perverse and foundation is not as per the true facts, said inquiry cannot stand and would be amenable to judicial scrutiny.

54. The Apex Court in a case titled as **Roop Singh Negi** v. **Punjab National Bank and others**, reported in (2009) 2 Supreme Court Cases 570, held that it is a duty of the Inquiry Officer to scan the entire evidence in order to arrive at a finding after judging the case of all the parties, adhering to the principles of natural justice, otherwise, the inquiry is vitiated and the finding recorded is also not in accordance with law. It is apt to reproduce para 23 of the judgment herein:

> "23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

55. Specific case of the petitioner is that he was not afforded due opportunity to prove his innocence because no effort was made by Inquiry Officer to ensure presence of witnesses cited in list of witnesses. It also

emerges from record that request made by petitioner to make available additional documents, was not acceded to.

56. The Apex Court in the case titled as **Union of India and others** v. **R.P. Singh**, reported in 2014 AIR SCW 3475, held that non-supply of copy of the inquiry report to the delinquent at predecisional stage amounts to violation of principles of natural justice. It is apt to reproduce paras 25 to 28 of the judgment herein.

> "24. We will be failing in our duty if we do not refer to another passage which deals with the effect of non-supply of the enquiry report on the punishment. It reads as follows: -
>
> > "[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the [pic]concept of justice to illogical and exasperating limits. It

amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice".

25. After so stating, the larger Bench proceeded to state that the court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal finds that the furnishing of report could have made a difference to the result in the case then it should set aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/ management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome.

26. We have referred to the aforesaid decision in extenso as we find that in the said case it has been opined by the Constitution Bench that non-supply of the enquiry report is a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence. We have been apprised by Mr. Raghavan, learned counsel for the respondent, that after the decision in S.K. Kapoor's case (2011 AIR SCW 1814), the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 has issued the following directions:

"4. Accordingly, it has been decided that in all disciplinary cases where the Commission is to be consulted, the following procedure may be adopted :-

(i) On receipt of the Inquiry Report, the DA may examine the same and forward it to the Commission with his observations;

(ii) On receipt of the Commission's report, the DA will examine the same and forward the same to the Charged Officer along with the Inquiry Report and his tentative reasons for disagreement with the Inquiry Report and/or the advice of the UPSC;

(iii) The Charged Officer shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the Inquiry report/advice of UPSC is in his favour or not.

(iv) The Disciplinary Authority shall consider the representation of the Charged Officer and take further action as prescribed in sub-rules 2(A) to (4) of Rule 15 of CCS (CCA) Rules, 1965.

27. After the said Office Memorandum, a further Office Memorandum has been issued on 5.3.2014, which pertains to supply of copy of UPSC advice to the Charged Officer. We think it appropriate to reproduce the same:

"The undersigned is directed to refer to this Department's O.M. of even number dated 6.1.2014 and to say that it has been decided, in partial modification of the above O.M. that a copy of the inquiry report may be given to the Government servant as provided in Rule 15(2) of Central Secretariat Services (Classification, Control and Appeal) Rules, 1965. The inquiry report together with the representation, if any, of the Government servant may be forwarded to the Commission for advice. On receipt of the Commission's advice, a copy of the advice may be provided to the Government servant who may be allowed to submit his representation, if any, on the Commission's advice within fifteen days. The Disciplinary

> Authority will consider the inquiry report, advice of the Commission and the representation(s) of the Government servant before arriving at a final decision".
>
> 28. In our considered opinion, both the Office Memoranda are not only in consonance with the S.K. Kapoor's case (2011 AIR SCW 1814) but also in accordance with the principles of natural justice which has been stated in B. Karunakar's case (AIR 1994 SC 1074)."

57. Having scanned entire material as well as law taken note herein above, this Court has no hesitation to conclude that the Disciplinary Authority and the Inquiry Officer have violated the principles of natural justice. Otherwise also, order dated 10.4.2019 (Annexure P-25) passed by Divisional Manager Himachal Road Transport Corporation Mandi, imposing major penalty is not sustainable in the eye of law, for the reason that Divisional Manager, Himachal Road Transport Corporation being not appointing authority was not otherwise competent to pass the penalty order, coupled with the fact that he was an interested party.

58. Similarly, this court finds that the appellate authority, while considering appeal filed on behalf of the petitioner herein miserably failed to take note of grounds taken in the appeal, as a result of which serious prejudice has been caused to the petitioner, who otherwise has been awarded penalty disproportionate to alleged misconduct

59. Yet another aspect of the matter is that when allegations are levelled against respondent No.4, the then Divisional Manager, Himachal Road Transport Corporation Mandi, how he could have passed the order imposing penalty upon the petitioner. A person cannot be become a judge of his own cause. Moreover, in such situation, it cannot be ruled out that the enquiry proceedings conducted under said Divisional Manager, would be free from bias and prejudice.

60. So far order dated 15.6.2020 (Annexure P-25) is concerned, same is only a reproduction of the chronology of events and nothing more. In the concluding two paras of said order, merely it is observed that on going through the entire record of the case as well as finding of enquiry report, the undersigned has found that the sufficient opportunity has been given to the applicant during the course of enquiry but the petitioner consecutively failed to attend the hearing and also failed to produce the defence witnesses and in the next para, the appeal has been rejected. There not even an iota to show that the appellate authority has applied its judicious mind to the grounds raised in the appeal and facts attending upon the case.

61. Yet another aspect of the matter is that whether the alleged misconduct imputed against the petitioner would attract major penalty as has been awarded to the petitioner in the instant case.

62. Consequently, in view of detailed discussion and law taken into consideration this court finds merit in the petition and same is allowed. Annexure P-16, dated 26.6.2018 and Annexure P-20 dated 10.4.2019 as also Annexure P-25, dated 15.6.2020 are quashed and set aside. Petitioner shall be entitled for all the consequential benefits like counting of period of suspension as period on duty and he shall be entitled for promotion to next higher post, if otherwise eligible.

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

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

Between:-

SH. RAMESH CHAND, SON OF SH. BALDEV CHAND RESIDENT OF VILLAGE KIUN, P.O. KOTHI, TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P. PRESENTLY UNEMPLOYED

PETITIONER

(BY MR. A.K. GUPTA, ADVOCATE)

AND

1. STATE OF H.P.
   THROUGH THE PRINCIPAL SECRETARY (EDUCATION)
   WITH HEADQUARTERS AT SHIMLA-2.

2. THE DIRECTOR OF ELEMENTARY EDUCATION,
   WITH HEADQUARTERS AT SHIMLA, H.P.

3. THE DEPUTY DIRECTOR ELEMENTARY EDUCATION,
   KALPA, DISTT. KINNAUR, H.P.

RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. NARINDER GULERIA,
ADDITIONAL ADVOCATES GENERAL
WITH MS. SVANEEL JASWAL,
DEPUTY ADVOCATE GENERAL AND
MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 2854 OF 2020
DECIDED ON: 29.9.2022

Constitution Of India, 1950- Service Law - Appointment Dispute - Petitioner, the only SC/IRDP candidate was denied appointment based on residency criteria - **Held** - Court examined the legality of the notification and reservation policy - Found the petitioner eligible as the sole SC/IRDP candidate for a vacant post – Emphasized on eligibility based on merit and category - Ruled that the petitioner should be appointed within two weeks as

PET, with seniority but no financial benefits for the intervening period. (Paras 7,8,9)

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

O R D E R

Deputy Director of Elementary Education, Kinnaur, Himachal Pradesh on 31.8.2016, requested all the Employment Officers of District Kinnaur namely Pooh, Kalpa and Nichar to sponsor names of eligible candidate for the post of Physical Education Teacher (PET) including C&V category. Employment exchanges named herein above sponsored names of six candidates of Scheduled Tribe category. Besides issuing call letters to the candidates sponsored by the Employment Exchanges, a Press Note was published by Deputy Director Elementary Education, Kinnaur through DPRO District Kinnaur. Pursuant to said Press Note, petitioner, who is a resident of District Bilaspur, also applied for the post in question. Though the petitioner being a Scheduled Caste IRDP category candidate was permitted to appear in counseling process, but he was not considered for the post of PEt under SC/IRDP category on the ground that he does not belong to local Scheduled Tribe area of Kinnaur. Though the petitioner was the only candidate in the category of SC/IRDP category and had secured 48.58 marks but yet he was not selected against the post in question. Petitioner applied for information under Right to Information Act, 2005 and vide communication dated 3.3.2020 (Annexure P-1/A) placed alongwith the rejoinder, he was informed that since he is not a resident of District Kinnaur, he is not entitled to be given appointment in tribal area i.e. Kinnaur in terms instructions dated 16.8.2004 issued by the Government of Himachal Pradesh, whereby reservation is provided for posts of Class-III and IV in District cadre posts in Scheduled Tribe areas. In the aforesaid background, petitioner has approached this court

in the instant proceedings, filed under Art. 226 of the Constitution of India, praying therein for following substantive relief:

> "That the respondents may be ordered to appoint the petitioner as PET since one post is lying vacant and the restriction as envisaged in Annexure P-1 may be read down."

2. Having heard learned counsel for the parties and perused the material available on record, this court finds that the facts as have been noted herein above, are not disputed rather same stand duly admitted. It is not in dispute that the petitioner was the only available candidate in the category of SC/IRDP and had participated in interview in which he was awarded 48.58 marks. Since the petitioner was only available candidate against one post of PET under SC/IRDP category, which is still lying vacant, he was to be offered appointment but, interestingly, he was denied appointment on the ground that he does not belong to Kinnaur District and in terms of Notification dated 16.8.2004, only the persons belonging to District Kinnaur could be appointed against Class III and IV posts in District Kinnaur.

3. Mr. A.K. Gupta, learned counsel for the petitioner vehemently argued that though careful perusal of instructions dated 16.8.2004 nowhere suggests that all the posts in Class-III and Class-IV category are to be filled up from amongst the candidates belonging to District Kinnaur, but even otherwise if the aforesaid instructions are permitted to sustain, it would amount to 100% reservation in the posts, which is otherwise impermissible.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly acknowledging the factum with regard to petitioner having participated in the selection process and he being the sole candidate under SC/IRDP category, submitted that since only the persons belonging to Kinnaur District are/were to be provided appointment to Class-III and Class-IV posts in terms of Notification dated 16.8.2004 issued by Government of Himachal Pradesh, no illegality can be said to have been committed by the respondents, while denying appointment to the petitioner

5. Before ascertaining the genuineness and correctness of the rival submissions made by learned counsel for the parties, it would be apt to take note of Notification dated 16.8.2004 issued by Government of Himachal Pradesh, which is reproduced herein below

"No. PLG-F(TDM)35-1/05
Government of Himachal Pradesh
Department of Tribal Development

From

The Pr. Secretary (TD) to the
Government of Himachal Pradesh

To

1. All the Administrative Secretaries to the govt. of H.p.
2. All the Heads of Departments in H.P.
3. All the Divisional Commissioners in H.P.
4. All the Deputy Commissioner in H.P.
5. The Resident Commissioner, Pangi at Killar, Distt. Chamba, H.P.
6. The Resident Commissioner, Bharmour, Distt. Chamba
7. The Addl. Deputy Commissioner, Spiti Distt. Lahaul0-Spiti at Kaza.

Dated Shimla-2, the 16th August, 2004.

Subject: reservation in appointment to the Class-III and Class-IV Services in District Cadre posts in the Scheduled Areas.

Sir,

The matter regarding adequate representation to the local Scheduled Tribe and Scheduled Caste members of the Scheduled Areas in District cadre posts was under consideration of the State Government. In the Scheduled Areas of the State i.e. Districts of Kinnaur and Lahaul & Spiti and Pangi & Bharmour Sub-disivions of Chamba District, the average local scheduled tribes population is 69.27% and the average local Scheduled Caste population is 17.90%. The Scheduled Tribes population ranges from about 57% in Kinnaur District to abourt 85% in Pangi Sub-division of Chamba district and similarly the

population of local Scheduled Castes in the Scheduled Areas ranges from about 7% in Lahaul & Spiti District to about 26% in Kinnaur district. There is no OBC population in scheduled areas.

2. The vertical reservation prescribed in the State of Himachal Pradesh for appointment to the Class-III and Class-IV services by direct recruitment is 5% for Scheduled Tribes, 22% for Scheduled Castes and 18% for OBCs which is applicable to the District Cadre posts in Scheduled Areas also. Hence, the present reservation policy does not provide opportunities for adequate representation to the local Scheduled Tribe communities in the District Cadre posts.

3. Though, as per the 9 Judges bench judgement of the Hon'ble Supreme Court of Indira Sawhney case, reservation contemplated in clause 4 of Article 16 should not exceed 50% but at the same time, the Hon'ble Supreme Court in the same judgement in Indra Sawhney case has clearly taken a view that while 50% shall be the rule, it is necessary not to put out of consideration certain extra ordinary situations inherent in the great diversity of this country and the people. It might happen that if far flung and remote areas, the population inhabiting those remote areas, might, on account of their being out of the main stream of National Life and in view of conditions peculiar to and Characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative.

4. These areas have been scheduled in the Constitution keeping in view the remoteness, backwardness and special cultural characteristics of people living in these areas. For economic development of these areas, integrated Tribal development Project (ITDP) concept has been introduced so as to raise their level of development at par with the main stream population. However, the population in the scheduled areas still remain backward in terms of literacy, incomes etc. Their access to instructional infrastructures also is limited due to geographical constraints, lack of adequate and appropriate personnel in health and educational institutions, etc. The existing reservation policy is not only contrary to demographic composition in the scheduled areas but is also contrary to the

spirit of providing a mechanism to ensure adequate representation to these people in the Government services, thereby depriving tem of the opportunities in Government services.

5. Now, therefore, the State Government has decided to provide reservations to the local Scheduled Tribes and Scheduled Castes candidates in the Scheduled Areas of HP as early as possible in proportion to their population and accordingly prescribe the reservation in the district Cadre posts in Class-III and Class-IV grade/services to each category as under: -

i) **Kinnaur District:**

60% reservation in the posts for local Scheduled Tribes and 25% of the posts for local Scheduled Caste candidates.

ii) **Lahaul & Spiti:**

78% reservation in the posts for local Scheduled Tribes and 7% of the posts for local Scheduled Castes candidates.

iii) **Pangi Sub-division of Chamba District:**

75% reservations in the posts sanctioned for Pangi Sub-division borne on District Cadre posts for local Scheduled Tribes and 10% of such posts for local Scheduled Castes candidates.

iv) **Bharmour Sub-division of Chamba District:**

72% reservation in the sanctioned posts for Bharmour Sub-division borne on District Cadre for local Scheduled Tribes and 13% of such posts to the local Scheduled Castes candidates.

6. The local members of Scheduled Caste and Scheduled Tribes of such Scheduled Areas will not be eligible to avail reservation in District Cadre posts in the other Districts outside the Scheduled Areas. The local Scheduled Castes and Scheduled Tribes members of Pangi and Bharmour Sub-division

of Chamba District will not be eligible to avail reservation in District Cadre posts even within Chamba District against the posts sanctioned for non-Scheduled Areas of Chamba District.

7. The above instructions may be followed with immediate effect.

8. Horizontal reservation for various categories like Ex-serviceman etc. as prescribed by Department of Personnel, Government of Himachal Pradesh from time to time will be applicable as such, in the Scheduled Areas also.

This issues with concurrence of Law Department."

6. Careful perusal of instructions supra reveals that the State of Himachal Pradesh, having taken note of the fact that vertical reservation prescribed in the State of Himachal Pradesh for appointment to the Class-III and Class-IV services by direct recruitment is 5% for Scheduled Tribes, 22% for Scheduled Castes and 18% for OBCs which is applicable to the District Cadre posts in Scheduled Areas, decided to provide opportunity for adequate representation to the Scheduled Tribe in District cadre posts. As per aforesaid communication Government decided to provide reservations to the local Scheduled Tribes and Scheduled Castes candidates in the Scheduled Areas of HP as early as possible in proportion to their population and accordingly prescribed the reservation in the district Cadre posts in Class-III and Class-IV grade/services to each category. In Kinnaur 60% reservation in the posts came to be provided for local Scheduled Tribes and 25% of the posts for local Scheduled Caste candidates, meaning thereby 15% posts were yet to be filled by the other categories. In Lahul & Spiti, 78% of the posts came to be reserved for local Scheduled Tribes and 7% of the posts for local Scheduled Castes candidates . Similarly for Pangi Sub Division of Chamba, District, 75% of the posts sanctioned for Pangi Sub-division borne on District Cadre came to be reserved for local Scheduled Tribes and 10% of such posts for local Scheduled Castes candidates. In Bhamour Sub Division of Chamba District, 72% of the

sanctioned posts for Bharmour Sub-division borne on District Cadre came to be reserved for local Scheduled Tribes and 13% of such posts to the local Scheduled Castes candidates, meaning thereby though major chunk of posts are/were to be filed in from candidates belonging to the Scheduled Tribe area of the Kinnaur, Lahul and Spiti, Pangi and Bharmour, but yet in all, 15% posts are/were to be filled in from other categories.

7. Since there is no specific reservation provided against remaining 15% posts, it does not lie in the mouth of respondents to claim that even remaining 15% posts were to be filled in from amongst the candidates belonging to other categories hailing from scheduled tribe areas of Kinnaur, Lahul & Spiti and Chamba(Bharmour and Pangi).

8. Though Notification dated 16.8.2004 appears to be have been issued in complete violation of law/mandate given by Hon'ble Apex Court that in any event, reservation should not exceed 50% of total posts, but even if the very object of issuance of aforesaid Notification is seen or accepted i.e. to provide opportunity to local population to have employment in Government services, even then 15% of the posts could be filled in from candidates hailing from other parts of the State, It is not the case of the respondents that apart from the petitioner, other candidates belonging to SC/IRDP hailing from Kinnaur had applied for the post. Had any candidate belonging to SC/IRDP from Kinnaur applied for the post in question, things would have been different because, in that event, candidates haling from Kinnaur under SC/IRDP category would have claimed preference over SC/IRDP candidates of other Districts, in terms of order Notification dated 16.8.2004. But once it is not in dispute that the petitioner was the only candidate available in the category of SC/IRDP, to be appointed against the post of PET, his case could not be rejected on the ground that he does not belong to District Kinnaur, rather, the authority concerned should have considered his case against 15% left out quota, which was admittedly for other left out categories i.e. General,

OBC etc. may be from other Districts of Himachal Pradesh. As per Notification dated 16.8.2004, only 85% posts of Class-III and Class-IV are/were to be filled in form Scheduled Tribe population as such, action of the respondents in not offering appointment to the petitioner despite being eligible, is not sustainable in the eye of law as such, the same deserves to be rectified in accordance with law.

9. Consequently, in view of the detailed discussion made herein above, this court finds merit in the present petition and the same is allowed. Respondents are directed to offer appointment to the petitioner on the basis of his having participated in the interview on 29.8.2016 held for the post of PET under SC/IRDP, wherein he was admittedly the only candidate eligible as per Recruitment and Promotion Rules. Since the petitioner has been fighting for his rightful claim for more than six years, this court hopes and trusts that the needful in terms of direction contained in this order shall be done expeditiously, preferably within a period of two weeks. It is clarified that though the petitioner would be entitled to seniority on notional basis from the date of interview, but he shall not be entitled to financial benefits qua the aforesaid period.

The petition stands disposed of in the afore terms, alongwith all pending applications.

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

BETWEEN

1. DINESH KUMAR S/O PARSHOTAM DASS ATRI, VILLAGE KANDA, PO BANIKHET, TEHSIL DALHOUSIE, DISTT. CHAMBA (HP) 176303

2. SHABNAM KUMARI D/O KHEM CHAND, VILLAGE-PINGLA, P.O-GOHAR, TEH.-CHACHIOT, DISTT.-MANDI 175029

3. GIRDHARI LAL S/O BHIM SINGH, VILL. DHARWHAN, PO PAIRI TEH. BALH, DISTT. MANDI, (HP) 175008

4. VIKRANT KHATTA S/O PRAKASH CHAD, VILL RAINTA PO DHAWALA, TEHSIL DEHRA, DISTT. KANGRA, 177117

5. BHAWNA KUMARI D/O KARTAR SINGH, R/O SET NO. 3 TYPE 3 GOVT. COLONY, NEAR GOVT. ITI SOLAN (HP)

6. MANUJ SHARMA S/O SATPAL SHARMA, VPO BARI TEH JASWAN, DISTT. KANGRA PIN 176502

7. REKHA KUMARI D/O SURESH KUMAR, DOGRA HOSIERY 6B INDUSTRIAL AREA BILASPUR 174001

8. VIVEK THAKUR S/O BALVEER SINGH VILL TIHRI PO CHANDPUR TEHSIL SADAR, DISTT. BILAPUR 174004

9. SHASHI BALA D/O RAM SARAN WARD NO. 11 VPO-LAKHANPUR, TEHSIL & DISTT BILASPUR 174001

10. REETA KUMARI D/O BHANDARI LAL VILL GAUTA PO DHIWRIN TEHSIL BHORANJ DISTT HAMIRPUR 176045

11. MANESH CHANDER S/O SITAR MA VPO SURLA TEHSIL NAHAN, DISTT SIRMOUR 173001

12. VIKRANT DHIMAN S/O JOGINDER SINGH VPO GHAROH, TEHSIL DHARAMSHALA DITT KANGRA 176215

13. ANKUSH S/O RAJ KUMAR DOGRA V.P.O. KASBA KOTLA TEHSIL JASWAN DISTT. KANGRA 177111

14. ASHISH KUMAR S/O PRITAM SINGH VILL AMBARY PO RAJOL TEH. SHAHPURDISTT. KANGRA HP-176208

15. DEEPAK CHAUDHARY S/O RAI SIGH V.P.O.-ICHHI TEHSIL AND DISTRICT-KANGRA (H.P.) 176209

16. RISHANT THAKUR S/O BALBIR SIGH VPO LOHARLI, TEHSIL GHANARI, (AMB)DIST TUNA 177208

17. ASHISH KUMAR S/O JAGDISH KUMAR SHARMA VILL DALHOG PO BANIKHET TEH DALHOUSIE DISTT CHAMBA 176303

18. VIRENDER PAUL S/O RAGHUVIR SINGH VPO CHAUNTRA TEH JOGINDERNAGAR DISTT. MANDI (HP) 175032

19. PARVATI D/O MEGH SINGH VILL CHHAMYAR PO SURAH TEHSIL BALH DISTT MANDI 175027

20. PREETI SHARMA W/O HARISH KUMAR VILL. MASERAN PO PALI TEH PADHAR DISTT. MANDI (HP) 175001

21. SUPRIYA KAPOOR D/O ARUN KAPOOR VILLAGE SANYARDI, PO-TALYAR TEH SADAR, DISTT. MANDI HP 175001

22. KUMARI JYOTI D/O ROSHAN LAL VILL. BHIURA PO RAJGARH, TEHSIL BALH, DISTT. MANDI 175027

23. NARENDER KUMAR S/O DHANI RAM VILL-ARTHI, PO-KAPAHI, TEHSIL-SUNDERNAGAR, DISTT. MANDI 175002

24. PANKAJ SHARMA S/O RAKESH VILL-BADRESA PO BRANG, TEHSIL-SARKAGHAT, DISTT. MANDI 175024

25. RAKESH KUMAR S/O OM PRAKASH VPO-CHALEHLI, TEHSIL – GHUMRAWIN DISTT. BILASPUR 174003

26. KIRAN ARORA W/O AMIT ARORA H.NO. 8115 HARIPUR SUNDERNAGAR PO CHATROKHRI, DISTT. MANDI 175018

27. GURMINDER SINGH S/O GURMEL SINGH R/O SOUNT PO-NEHRAN PUKHAR, TEHSIL-DEHRA, DITT. KANGRA

28. JITENDER KUMAR S/O SH. BODHRAJ VILL-KURANI PO-BAGSIAD, TEHSIL-THUNAG, DISTT. MANDI 175035

29. KAMESHWAR SINGH S/O BAL KRISHAN VILL-CHHALAR, PO-BAGSIAD, TEHSIL-THUNAG, DISTT. MANDI HP 175035

30. SURESH KUMAR S/O KHEM CHAND VILL-GULELA PO-PATRIGHAT, TEHSIL BALDWARA, DISTT. MANDI HP 175023

31. PRAVEEN KUMAR S/O KAMAL JEET VILL-BHATOLI PO MORSINGI, TEH-GHUMARWIN, DISTT. BILASPUR

32. SUNIT KUMAR S/O NAND LAL VILL-DHANGU, PO-RATTI TEHSIL BALH DISTT MANDI (HP) 175008

33. ANMOL SHARMA S/O ASHOK KUMAR VILL-KOTLA BEHR PO BEHR KUTHERA THE-JASWAN DISTT KANGRA HP 17711

34. KEWAL KUMAR S/O RATTAN CHAND VPO-JANDOUR TEHSIL-JASWAN DISTT. KANGRA (HP) 176501

35. SEEMA DEVI D/O SH. MEHAR CHAND VPO-DALOH, TEHSIL-AMB, DIST TUNA (HP)177203

36. VIKAS S/O PAL H. NO. 192 A/3 VILL-PUNGH NEAR MAHAVIR SCHOOL TEHSIL SUNDERNAGAR, DISTT MANDI, 175018

37. ANKIT KUMAR S/O ONKAR SINGH VILL-KAJAIL PO-SAMOH TEHSIL-JAHNDUTTA DITT BILASPUR 174021

38. SANDEEP KUMAR S/O BABU RAM VILL-BALA PO-DAHAD, TEHSIL-JHANDUTTA DISTT BILASPUR 174034

39. PRIYANKA D/O ALBEL SINGH VILL-PATTA PO-TEH GHUMARWIN DISTT BILASPUR 174021

40. VIKAS PATIA S/O TARLOK SINGH VILL GARH PO PRAGPUR TEHSIL-DEHRA DIST KANGRA (HP) 177107

41. ASHISH KUMAR S/O SUBHASH CHAND VILL-KATHALG PO- PADHIUN TEHSIL –SADER DISTT MANDI (HP)175001

42. JYOTI D/O SH. DILWAG SINGH VILL-BASALAG PO-CHOULI TEHSIL-RAKKAR DISTT. MANGRA (HP) 177043

43. MANI RAM S/O SH. ROSHAN LAL VILL-TAROON PO-SAMOUR TEHSIL-DHARAMPUR DISTT MANDI HP 175050

44. POMANDER KUMAR S/O PREM SINGH VILL-TIKKAR PO-0 PARWARA TEHSIL –CHACHIOT DISTT. MANDI (HP) 175029

45. PARRAMJEET THAKUR S/O AMAR SINGH THAKUR, VILL KULWARA TEHSIL & PO SUNDERNAGAR DISTT MANDI

46. RAVINDER KAUNDAL S/O KRISHAN LAL KAUNDAL, VPO MALOH TEHSIL SUNDERNAGAR, DISTT MANDI (HP)

47. SONIKA D/O MANOHAR LAL, VILLAGE BUM PANTHER TEH GHUMARWIN, DISTT BILASPUR 174028

48. MONIKA SHARMA D/O SH. GEETA RAM, VILL KHADDAR TEHSIL CHOPPAL DISTT SHIMLA (HP)

49. MOHITESHWAR S/O CHAMAN KUMAR, VILL MASERAN PO PALI TEHSIL PADHAR DISTT MANDI (HP) 175012

50. PARARMJEET SINGH CHANDEL S/O PRATAP SINGH, VPO BARI MAJHERWAN, TEHSIL GHUMARWIN DISTT BILASPUR (HP)

51. ATINDER KAUR D/O HARNAM SINGH VILLAGE DHARWARA PO TALWARA TEHSIL GHUMARWIN DISTT. BILASPUR (HP) 174026

52. DINESH KUMARI W/O MANENDER SINGH VILLAGE PAPRAHAL PO SADYANA TEHSIL SADAR, DISTT. MANDI (HP) 175001

53. RAKSHITA SEN D/O NEK SINGH VILLAGE BANAIK PO BHOJPUR TEHSIL SUNDERNAGAR DISTT. MANDI (HP) 175002

54. KANUPRIYA D/O PANKAJ KUMAR H.NO. 105/5, CHATROKHARI PO & TEH SUNDERNAGAR 1, NEAR SHIV TEMPLE MANDI

55. AMIT CHAUDHARY S/O RATTAN LAL CHAUDHARY, WARD NO. 6 NIFT ROAD KANGRA (HP)176001

56. DALIP KUMAR THAKUR S/O MADAN LAL VILL. MANLOG PO DEOTHI, TEH SOLAN DISTT. SOLAN (HP) 173211

57. LAKSHWINDER SINGH S/O MAHASHU RAM, VILL PALAKH TEHSIL INDORA, WARD NO.1 KANGRA (HP) 176401

58. RAMESH CHAND S/O NAROTAM RAM VILL. GADHON PO BRIKHMANI TEH BALH DISTT. MANDI(HP) 175027

59. TEK SINGH S/O SHER SINGH VILL. BHOSA PO DIYA TEH BHUNTAR, DISTT. KULLU (HP) 175141

60. GOPI CHAND S/O PREM SINGH VILL. KATWALI PO BHARARU TEH JOGINDERNAGAR DISSTT. MANDI (HP) 175015

61. MONIKA W/O ASHWANI KUMAR VILL. JOL PO MUHAL TEH DEHRA, KANGRA (HP) 177117

62. VIRENDER S/O SUNDER SINGH VILL. SUNARLI TEHSIL CHOPAL DISTT. SHIMLA (HP) 171210

63. LALIT S/O KARTAR SINGH VILL. BEHRAN PO & TEHSILJHANDUTTA DISTT. BILASPUR (HP)

64. SHYAM LAL S/O LEKH RAM VILL. BEHRAN PO &TEHSIL JHANDUTTA DISTT. BILASPUR (HP)

65. ANKUSH MANDIAL S/O SH.JOGINDER SINGH R/O VILLAGE JHANIARA KALESHWAR PO LOWER GHALLOUR TEHSIL JAWALAMUKHI, DISTRICT KANGRA, H.P/

66. MUNISH THAKUR S/O SH. BHAGAT SINGH R/O VILLAGE CHOWK P.O. MAHADEV TEHSIL SUNDER NAGAR, DISTT MANDI, H.P.

67. AVNEESH SHARM S/O SH. DESH RAJ VILLAGE DUGHWAN PO GHANDALWIN TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P.

68. ARVIND KUMAR S/O SH. BISHAN DASS, VILL BEHRA PO DOMEHAR TESHISL GHUMARWIN, DISTT. BILASPUR

PETITIONERS

(BY MR. M.L. SHARMA SENIOR ADVOCATE WITH
MR. AMAN PARTH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY TECHNICAL EDUCATION, GOVT. OF H.P., SHIMLA-02

2. DIRECTOR, DEPARTMENT OF TECHNICAL EDUCATION AND VOCATIONAL TRAINING SUNDER NAGAR, DISTT. MANDI, H.P.

RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND MR. NARINDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH MS. SVANEEL JASWAL, DEPUTY ADVOCATE GENERAL AND MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL).

(MR. ADARSH K. VASHISTA, ADVOCATE,
FOR THE APPLICANTS IN CMP NO. 13093 OF 2020
IN CWP NO. 2962 OF 2019)

(MR. RAJESH KUMAR, ADVOCATE
FOR THE APPLICANTS IN CMP NO. 2471 OF 2021
IN CWP NO. 2962 OF 2021)

2. CIVIL WRIT PETITION NO. 6804 OF 2021

BETWEEN

1. TARA DEVI D/O MAST RAM VILLAGE AUHAN PO BAGSAID, TEH THUNAG DISTT MANDI HP AGE 32 YEAR

2. KAUSHALESH KUMAR S/O JAI DEV VILLAGE & PO BAGSAID TEH THUNAG DISTT MANDI HP

3. VIDYA KUMARI D/O MAST RAM VILLAGE AUHAN PO BAGSAID TEH THUNAG DISTT MANDI HP

4. PARRAMJEET SINGH S/O OM PARKASH VILLAGE NANGAL PO BEHIN TEH DEHRA DISTT KANGRA HP

5. AMIT THAKUR S/O SH. BHAGAT RAM, VILL. NERI P.O. OKHROO, DISTT. SOLAN, H.P.

PETITIONERS

(BY MR. M.L. SHARMA SENIOR ADVOCATE WITH
MR. AMAN PARTH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY TECHNICAL EDUCATION, GOVT. OF H.P., SHIMLA-02

2. DIRECTOR, DEPARTMENT OF TECHNICAL EDUCATION AND VOCATIONAL TRAINING SUNDER NAGAR, DISTT. MANDI, H.P.

RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND MR. NARINDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH MS. SVANEEL JASWAL, DEPUTY ADVOCATE GENERAL AND MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL).

3. CIVIL WRIT PETITION NO. 6877 OF 2021

BETWEEN

1. RACHANA JAGTA CHAUHAN D/O SH. PRADHUMAN JAGTA, VILL GANGTOLI TEHSIL ROHRU, DISTT SHIMLA (HP) AGE 35 YEARS

2. DEEPIKA VERMA D/O SH. MANI LAL VERMA, VILL-KANWALA, PO-NAVGAON, TEHSIL-ARKI, DISTT. SOLAN HP

3. RAVI KUMAR S/O SITA RAM, VILL & PO LAKHANPUR, TEHSIL SADAR, DISTT BILASPUR (H.P.)

4. KRISHMA VERMA D/O MANI LAL VERMA R/O VILL. KANWARLA, P.O. NAVGAON, TEHSIL ARKI, DISTT. SOLAN, H.P.

5. KAMLESH S/O SH. HARI SINGH, VILLAGE DIGA, P.O. BALOO, TEHSIL KUPVI DISTT. SHIMLA, H.P.

PETITIONERS

(BY MR. M.L. SHARMA SENIOR ADVOCATE WITH
MR. AMAN PARTH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY TECHNICAL EDUCATION, GOVT. OF H.P., SHIMLA-02

2. DIRECTOR, DEPARTMENT OF TECHNICAL EDUCATION AND VOCATIONAL TRAINING SUNDER NAGAR, DISTT. MANDI, H.P.

RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND MR. NARINDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH MS. SVANEEL JASWAL, DEPUTY ADVOCATE GENERAL AND MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL).

CIVIL WRIT PETITION
NOS. 2962 OF 2019, 6804 OF 2021 AND 6877 OF 2021
Decided on: 15.09.2022

Constitution of India, 1950 - Service Law - Cancellation of the recruitment/selection process for instructors/trainers– Petition to quash the cancellation orders and restore the selection process – **Held** - Court affirms the cancellation of the selection process - finds the cancellation justified due to procedural irregularities and lack of transparency – Petition Dismissed (Paras 32,33,34)

Cases referred:

Dr. Sarojakumari v. R. Helen Thilakom (2017)9 SCC 478;
Pradeep Kumar Rai v. Dinesh Kumar Pandey (2015) 11 SCC 493;
Union of India v. Rajesh P.U. Puthuvalnikathu (2003) 7 SCC 285;

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

O R D E R

Since, the issues raised in all these petitions and reliefs claimed therein are same and same were heard together, and are being disposed of vide this common order.

2. Being aggrieved and dissatisfied with the issuance of Office Memorandum dated 4.2.2019, issued under the signatures of Deputy Secretary (TE) to the Government of Himachal Pradesh and order dated

5.2.2019 issued by Department of Technical Education, Vocational and Industrial Training, Sundernagar, whereby entire process of recruitment /selection to the post of instructors/trainers for different trades in ITI under Student Welfare Fund in Sept 2018 came to be cancelled, petitioners herein have approached this court in the instant proceedings filed under Art. 226 of the Constitution of India, praying therein for following main relief(s).

> **Prayers in CWP No. 2962 of 2019 and CWP No. 6804 of 2021**
> "In view of the submission made hereinabove, it is most humbly prayed that present petition may kindly be allowed and impugned memorandum order dated 4.02.2019 and letter dated 05.02.2019 may kindly be set-aside and quashed. Further, respondent may kindly be directed to restore the selection process and appoint the petitioners against their respective post to which their names are sponsored vide letter dated 7.12.2019."
> **Prayer in CWP No. 6877 of 2021 and CWP No. 6804 of 2021**
> "In view of the submission made herein above it is most humbly prayed that present petition may kindly be allowed and impugned office order 11.09.2019, memorandum order dated 4.02.2019 and letter dated 05.02.2019 may kindly be set-aside and quashed. Further, respondent may kindly be directed to restore the selection process and appoint the petitioners against their respective post to which their names are sponsored vide letter dated 7.12.2019."

3. For clarity, facts, averments and documents mentioned in CWP No. 2962 of 2019, are being discussed herein below.

4. Facts, shorn of unnecessary details but relevant for the adjudication of the cases at hand are that pursuant to the approval received from Government of Himachal Pradesh vide letter dated 3.5.2018 (Annexure P-1) to fill up various posts under Student Welfare Fund/IMC in Government Industrial Training Centres, Director, Technical Education, Vocational and Industrial Training, constituted zone wise Selection Committees vide office letter dated 30.8.2018 (Annexure P-2), with a direction to all the Chairmen of the Selection Committees i.e. Principals, Industrial Training Institutes at

Sundernagar, Shahpur, Shimla and Udaipur to complete the entire process of selection strictly as per NCVT norms. In terms of aforesaid direction, Selection Committees conducted the selection process in their respective zones. Selection Committees recommended the names of selected candidates and vide communication dated 7.12.2018, Annexure P-5, Director of Technical Education, Vocational and Industrial Training sent communications to the Principal(s) of the concerned Industrial Training Centre to intimate selected candidates to report to their office alongwith certificates of educational qualifications in original and requisite experience certificates duly signed by the competent Authority within fifteen days or else it would be assumed that the candidate is not interested to join. It was further stipulated that the certificates/ all relevant documents are to be verified by the Principal concerned in respect of sponsored candidates before issuing engagement order and Principal shall be solely responsible for the same.

5. After recommendations made by the Selection Committees, some of the candidates, who had participated in the selection process, lodged complaint (Annexure P-6) to the Hon'ble Prime Minister of India, Hon'ble Chief Minister and Hon'ble Chief Justice of Himachal Pradesh alleging therein irregularities in the selection process. Complainants alleged that no proper procedure was followed, while conducting examination and members of the Selection Committees selected their own relatives. Taking cognizance of the complaint, matter was got enquired by the Director of Technical Education.

6. Shri Jogender Singh, Joint Director at the relevant time, was directed to enquire into the matter, who after having associated all the stake holders i.e. complainants and staff responsible for conducting selection process conducted inquiry and submitted his report to the Director, who vide letter dated 21.12.2018, sent the same to the Government for necessary action. On the basis of Inquiry report, vide memorandum dated 4.2.2019 (Annexure P-7),

Government directed the Directorate of Technical Education to cancel the entire selection process forthwith.

7. Complying with the aforesaid direction issued by the Government, Director, Technical Education issued directions to the Heads of Zonal Selection Committees and Industrial Training Centre, vide letter dated 5.2.2019 (Annexure P-8) thereby canceling the entire selection process.

8. Being aggrieved with the aforesaid decision taken by the Director Technical Education, some of the petitioners three in number, filed an Original Application No. 517 of 2019 titled as Krishma Verma and others vs. State of Himachal Pradesh and others, which was disposed of by the erstwhile Himachal Pradesh Administrative Tribunal vide order dated 18.7.2019, reserving liberty to the petitioners therein to file comprehensive representation to the department concerned with further direction to the respondents to decide the same expeditiously by way of speaking order.

9. In compliance to aforesaid order dated 18.7.2019, Department after having afforded opportunity of hearing to the petitioners in that case passed detailed speaking order dated 11.9.2019 (Annexure R-1, of reply of respondents Nos. 1 and 2 page 225) rejecting the representation filed by applicants in Original Application and upholding the decision of the Government to cancel the selection process. Besides above, petitioners including those three persons, who had earlier approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 517 of 2019, approached this court by way of instant petition, praying therein to quash and set aside order dated 4.2.2019 and letter dated 5.2.2019, whereby Government of Himachal Pradesh decided to cancel the selection process. However, having realized subsequently that three of the petitioners had already approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 517 of 2019, and pursuant to order passed by tribunal, respondents passed a speaking order, petitioners herein made application seeking therein to

withdraw petition on behalf of petitioners mentioned at Sr. Nos. 48, 49 and 50. Vide order dated 4.7.2020, this court permitted aforesaid petitioners to withdraw the petition. However, the fact remains that in the instant petition, no challenge ever came to be laid to order dated 11.9.2019 (Annexure R-Z) passed by Director Technical Education in terms of order dated 18.7.2019 passed by learned Tribunal below.

10. During proceedings of case, it transpired that the persons namely Rachna Jagta and others laid challenge to aforesaid order dated 11.9.2019 by way of CWP No. 6877 of 2021, which is also being decided alongwith these petitions. Since despite their having been declared successful in the selection process, initiated in the year 2018, pursuant to approval given by Government of Himachal Pradesh vide communication dated 3.5.2018, petitioners were not given appointment, as such, they have approached this court in the instant proceedings, primarily on following grounds:

(a) No action could be taken by the Government on the complaints made by the persons, who after having participated in the same selection process, were declared unsuccessful.
(b) Inquiry report submitted by Inquiry Officer namely Jogender Singh the then Joint Director was not final, rather he was directed to conduct preliminary Inquiry to ascertain veracity of allegations made in complaint. Since Inquiry was not final, no action could be taken on the same by the Government.
(c) Since it had come in the Inquiry that some of the candidates were relatives of the members of the Selection Committees and they were wrongly passed, entire selection process, whereby 248 candidates were declared successful, could not be cancelled, rather candidates, who were found to be relatives of members of the Selection Committees, could be weeded out.
(d) Before taking decision to cancel selection process, successful candidates were not afforded an opportunity to put forth their stand.

11. Mr. M.L. Sharma, learned senior counsel duly assisted by Mr. Aman Parth Sharma, Advocate, appearing for the petitioners in all the petitions, vehemently argued that memo dated 4.2.2019 and letter dated 5.2.2019

issued by respondents are not sustainable in the eye of law as such, same deserve to be quashed. Mr. Sharma, learned senior counsel argued that though Inquiry being preliminary in nature, could not be otherwise made basis to arrive at the final decision of cancellation but even if Inquiry report is perused in its entirety, it reveals that some of the candidates were found to be relatives of the members of the Selection Committees and in that situation, Department instead of canceling the entire selection process, ought to have weeded out the tainted candidates, who were relatives of the members of the Selection Committees. While making this court peruse Annexure R-4, Inquiry report, Mr. Sharma, learned senior counsel contended that since uniform decision was taken by all Zonal Selection Committees to get the written examination conducted on OMR sheets, without there being any serial numbers, such omission, if any, could not be made a basis to cancel the selection process, especially when candidate appearing in such process were not at fault and they could not be punished for omission, if any, on the part of the department. He further argued that the very action of the respondents in entertaining the complaints that too on behalf of unsuccessful candidates, is illegal and as such, consequence if any of the same, is of no relevance. He argued that it is well settled by now that the unsuccessful candidates have no right to challenge the procedure adopted by the Selection Committees, while conducting written examination or interview.

12. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while refuting the aforesaid submissions made by learned senior counsel for the petitioners and supporting the impugned acts of the respondents, strenuously argued that once factum with regard to illegalities and irregularities committed by the Selection Committees had come to the knowledge of the Government, it could not shut its eyes and rightly decided to cancel the entire process. While making this court peruse complaints lodged by some of the candidates, learned Additional Advocate General contended that serious allegations with

regard to favouritism and nepotism and procedural illegalities were made against the members of the Selection Committees, which otherwise during Inquiry were found to be correct and as such, respondents had no option but to cancel the entire selection process. While making this court peruse Inquiry report, Annexure R-4 given by Inquiry Officer named above, qua all the centres i.e. Shimla, Mandi, Udaipur, Kangra and Kullu, learned Additional Advocate General submitted that in all the selection processes, members of the Selection Committees helped their relatives and wards in the examination and apart from this, no procedure was followed, especially with regard to OMR sheets, which were printed/distributed without any serial numbers. He further submitted that as per Inquiry report, marking and evaluation was not as per procedure and some wrong answers were ticked right and vice versa, as a consequence of which entire merit was subverted. Mr. Bhatnagar, submitted that none of the members of the Selection Committees before becoming member, gave certificates that none of their relative is participating in the examination rather, they in a planned manner connived with each other and facilitated selection of their relatives, as a consequence of which merit was ignored and deserving candidates were not able to find place in the merit list. Lastly, learned Additional Advocate General submitted that after cancellation of selection process, fresh process was conducted and therein some of petitioners and other successful candidates stand selected as such, otherwise also present petition is not maintainable.

13. Mr. Rajesh Kumar and Mr. Adarsh K. Vashista, Advocates, while inviting attention of this court to CMPs No. 2471 of 2021 and CMP No. 13093 of 2020. made on behalf of the complainants, who were aggrieved by wrong procedure followed in selection process, submitted that applicants may be arrayed as party in the instant proceedings. In support thereof, both the learned counsel made submissions as were made by learned Additional Advocate General. Though, having taken note of law of the land that

unsuccessful candidates are estopped from challenging selection process, this court sees no occasion to accede to the request of the applicants, however, since learned counsel for the applicants adopt the stand and reply filed by the State, no prejudice would be caused to either of parties, if the applicants are permitted to intervene. Aforesaid applications are accordingly disposed of.

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

15. Having heard submissions made by learned senior counsel for the petitioners and learned Additional Advocate General representing the respondent-State, vis-à-vis reasoning assigned in orders dated 4.2.2019 and 5.2.2019, impugned herein, this court finds no merit in the present petitions. Learned senior counsel for the petitioners, while placing reliance upon judgments passed by Hon'ble Apex Court reported in (2015) 11 SCC 493, titled **Pradeep Kumar Rai** v. **Dinesh Kumar Pandey** and (2017)9 SCC 478 titled **Dr. Sarojakumari** v. **R. Helen Thilakom** vehemently argued that a candidate after participating in the selection process is estopped from challenging the said selection in the event of being unsuccessful candidates.

16. Though, having perused aforesaid judgment passed by Hon'ble Apex Court this court has no quarrel with the exposition of law laid down by Hon'ble Apex Court that an unsuccessful candidate cannot lay challenge to the selection process, after his being declared unsuccessful but, by now it is also well settled that a candidate after having been declared unsuccessful, can lay challenge to selection process, if the same is conducted in violation of statutory rules/Recruitment and Promotion Rules.

17. Otherwise also, judgments relied upon by learned senior counsel for the petitioners have no application in the case at hand, because, here unsuccessful candidates never approached this court in the instant proceedings, rather, they made complaints to the Hon’ble Prime Minister, Hon'ble Chief Minister and Hon'ble Chief Justice of the State, alleging

illegalities, irregularities, favouritism and nepotism in the selection process and as such, on the direction of the Executive, department deemed it necessary to constitute Inquiry. Inquiry officer after associating all the stakeholders, including complainants, members of the Selection Committees and perusing entire selection record, arrived at a conclusion that the selection process was not conducted as per Rules and the same was not transparent and fair. On the basis of Inquiry report, Government deemed it fit to cancel the entire selection process and accordingly issued memoranda dated 4.2.2019 and letter dated 5.2.2019, thereby canceling the entire process, which have been impugned herein.

18. No doubt, in the case at hand, unsuccessful candidates made complaints but once department after having perused contents of complaints, deemed it necessary to constitute Inquiry and in Inquiry allegations were found to be correct, decisions dated 4.2.2019 and 5.2.2019 taken by the Government canceling entire selection process cannot be quashed on the ground that the Inquiry was initiated at the behest of unsuccessful candidates.

19. There is yet another aspect of the matter that none of the petitioners, who was selected, even bothered to lay challenge to the action of the Government constituting Inquiry rather, they kept on sleeping till the time, Government while taking action on Inquiry report, decided to cancel the entire selection process. By the time, petitioners approached this court, much water had flown under the bridge.

20. Had the petitioners approached this court against the action of constituting Inquiry pursuant to complaint filed by unsuccessful candidates, things would have been different but definitely by applying judgments as taken note herein above, decision of the Government to cancel the selection process cannot be said to be wrong on the ground that the same was initiated on the complaints made by unsuccessful candidates.

21. Most importantly, some of the petitioners before approaching this court had filed an Original Application No. 517 of 2019 before erstwhile Himachal Pradesh Administrative Tribunal, challenging orders dated 4.2.2019 and 5.2.2019, whereby selection process was cancelled, but such application was disposed of with a direction to the applicants to file representation to the competent authority. Competent authority after having heard all the stake holders, especially the applicants in the Original Application, found findings returned by Inquiry officer to be correct and accordingly upheld the cancellation orders dated 4.2.2019 and 5.2.2019, vide order dated 11.9.2019 (Annexure R-1), passed by Director Technical Education. Aforesaid order dated 11.9.2019, was passed after approximately one year of submission of Inquiry Report but even then, same was not challenged initially in the instant proceedings, as has been taken note herein above, rather, after objection being raised by the respondent with regard to filing of two petitions by some of the petitioners, figuring at Sr. Nos. 48, 49 and 20, petitioners herein made an application seeking permission to withdraw the petition on behalf of the persons, who had gone to erstwhile Himachal Pradesh Administrative Tribunal prior to filing of present petitions. It is a matter of fact that after more than one year of passing of the order dated 11.9.2019, whereby representation having been filed by the some of the petitioners came to be rejected, some of the candidates filed separate writ petition i.e. CWP No. 6877 of 2021, laying therein challenge to said order dated 11.9.2019, but if the grounds raised therein are perused, they are verbatim same as have been taken in the instant petition.

22. Another submission made on behalf of the petitioners that in view of Inquiry report, there was no occasion for the Government to cancel the entire selection process, rather, the tainted candidates named therein could be weeded out, also deserves outright rejection being devoid of merit. No doubt, in the Inquiry Report, there is specific mention of few roll numbers in the

selection of two zones Shimla and Mandi, that, they were related to the members of the Selection Committees but if report is read in its entirety, it has been categorically observed therein that no procedure was followed and there was no uniformity in the selection process. Neither entire selection process was videographed nor 'no relation' certificate was procured by Chairmen of Selection Committees from the members of the Selection Committees, that they are not related to any of candidates appearing for the examination. Most importantly, all the OMR sheets provided to candidates were without serial number. Astonishingly all the sheets were photocopied and thereafter circulated amongst candidates without serial number and as such, Inquiry Officer found truth in the allegations of complainants that there may be possibility of changing answer sheets of some of the candidates, but since no record was available with regard to serial numbers, Inquiry Officer was handicapped in returning findings qua the same, but he has categorically stated in the report that many procedural irregularities were committed at the time of selection process. Interestingly, some of the members of the Selection Committees, while admitting factum with regard to their relation with candidates having participated in the selection process, very conveniently set up a case that they had brought this fact to the notice of Chairmen and while their candidates were being interviewed, they were excused and were not made part of selection process, however, such plea being totally absurd and untenable was rightly rejected by Inquiry Officer.

23. Mere fact that the OMR sheets were without any serial number and the photocopies of the same were circulated amongst the candidates, raises doubt with regard to transparency and fairness of the procedure adopted by Selection Committees for selection of candidates. Besides above, it stands duly established that some of the selected candidates were relatives of members of the Selection Committees and as such, possibility cannot be ruled out that such members helped them or tried to help them, in one way or other. Apart

from this Inquiry Report reveals that evaluation was not proper, right answers were ticked wrong and vice versa.

24. Mr. Sharma, learned senior counsel for the petitioners, while inviting attention to a judgment of Hon'ble Apex Court reported in case **Union of India** v. **Rajesh P.U. Puthuvalnikathu** (2003) 7 SCC 285, vehemently argued that only doubtful candidates were required to be weeded out and other candidates selected on their own merit could not be ousted. Having perused aforesaid judgment, this court though finds merit in the submission of learned senior counsel for the petitioners, that where it is found during Inquiry that some of candidates were helped or selected by wrong means, their selection can be quashed and remaining candidates who were part of same selection process but selected on their merit can be declared successful. However, in the case at hand, entire selection process had become doubtful on account of findings of Inquiry Officer wherein he has specifically observed that no procedure was followed while conducting the selection process.

25. Leaving everything aside, one example with regard to OMR sheet, without any serial number which were circulated to the candidate after being photocopied from original without serial number, is a glaring example of procedural illegalities and lack of professionalism. Apart from above, it stands established on record that many of the candidates participating in the selection process were relatives of members of the Selection Committees which fact they duly acknowledged during Inquiry. Inquiry Report reveals that no separate attendance register was available suggestive of fact that such candidate participated in selection process, which omission vitiated entire selection process, especially in view of allegations of some of candidates that some of the persons, who had not participated in the process, were declared successful. (Annexure R-5 and R-7)

26. Hon'ble Apex Court in **Union of India** v. **Rajesh P.U. Puthuvalnikathu** (supra) has held that despite the firm and positive information that except 31

of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go bye to contextual considerations throwing to winds the principle of proportionality in going farther than what was strictly and reasonably required to meet the situation. Hon'ble Apex Court in that case held the decision of canceling the entire selections, to be wholly unwarranted and unnecessary. Hon'ble Apex Court held in the judgment supra, as under:

> "6. On a careful consideration of the contentions on either side in the light of the materials brought on record, including the relevant portions of the Report said to have been submitted by the Special Committee constituted for the purpose of inquiring into the irregularities, if any, in the selection of candidates, filed on our directions – which Report itself seems to have been also produced for the perusal of the High Court, there appears to be no scope for any legitimate grievance against the decision rendered by the High Court. There seems to be no serious grievance of any malpractices as such in the process of written examination – either by the candidates or by those who actually conducted them. If the Board itself decided to dictate the questions in loud speaker in English and Hindi and none of the participants had any grievance in understanding them or answering them, there is no justification to surmise at a later stage that the time lapse in dictating them in different languages left any room or scope for the candidates to discuss among them the possible answers. The posting of Invigilators for every ten candidates would belie any such assumptions. Even that apart, the Special Committee constituted does not appear to have condemned that part of the selection process relating to conduct of written examination itself, except noticing only certain infirmities only in the matter of valuation of answer sheets with reference to correct answers and allotment of marks to answers of some of the questions. In addition thereto, it appears the Special Committee has extensively scrutinized and reviewed situation by reevaluating the answer sheets of all the 134

> successful as well as the 184 unsuccessful candidates and ultimately found that except 31 candidates found to have been declared successful though they were not really entitled to be so declared successful and selected for appointment. There was no infirmity whatsoever in the selection of the other successful candidates than the 31 identified by the Special Committee. In the light of the above and in the absence of any specific or categorical finding supported by any concrete and relevant material that widespread infirmities of all pervasive nature, which could be really said to have undermined the very process itself in its entirety or as a whole and it was impossible to weed out the beneficiaries of one or other of irregularities, or illegalities, if any, there was hardly any justification in law to deny appointment to the other selected candidates whose selections were not found to be, in any manner, vitiated for any one or other reasons. Applying an unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go bye to contextual considerations throwing to winds the principle of proportionality in going farther than what was strictly and reasonably required to meet the situation. In short, the Competent Authority completely misdirected itself in taking such an extreme and unreasonable decision of canceling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational."

27. Aforesaid judgment passed by Hon'ble Apex Court if read in its entirety, clearly suggests that the facts were altogether different and same may not have application to the facts of present case. In that case, Board itself decided to dictate the questions in loud speaker in English and Hindi and none of the participants had any grievance in understanding them or

answering them. Hon'ble Apex Court held in that case that there is no justification to surmise at a later stage that the time lapsed in dictating them in different languages left any room or scope for the candidates to discuss among them the possible answers. Especially, in the said case Special Committee constituted does not appear to have condemned that part of the selection process relating to conduct of written examination itself, except noticing only certain infirmities only in the matter of valuation of answer sheets with reference to correct answers and allotment of marks to answers of some of the questions. In addition thereto, it appears that the Special Committee extensively scrutinized and reviewed situation by reevaluating the answer sheets of all the 134 successful as well as the 184 unsuccessful candidates and ultimately found that 31 candidates found to have been declared successful, were not really entitled to be so declared successful and selected for appointment. There was no infirmity whatsoever in the selection of the other successful candidates than the 31 identified by the Special Committee.

28. However, in the case at hand, as has been discussed in detail, inquiry officer found entire selection process to be doubtful. Apart from procedural irregularities with regard to distribution of OMR sheets, neither there were serial numbers on OMR sheets nor attendance register was kept. Most importantly, 'certificates of no relationship' were not obtained from the members of the Selection Committees and some of the selected candidates were found to be the relatives of members of the Selection Committees.

29. Since in the case at hand, entire selection process had become doubtful on account of procedural illegalities, as reported by Inquiry Officer, there was no occasion left for the Department to weed out only those candidates, who were allegedly relatives of members of the Selection Committees rather, to ensure fair and transparent selection department rightly decided to cancel the

process and initiated fresh process, wherein petitioners and other eligible candidates participated.

30. Third submission of learned senior counsel for the petitioners, that no action could be taken on the basis of preliminary Inquiry, is also without any merit, and as such, is rejected. At the cost of repetition, it may be noticed that immediately after receipt of complaints, Department in its wisdom decided to constitute Inquiry and the Inquiry Officer after having associated all the stake-holders including complainants, members of the Selection Committees submitted his Inquiry report, on which subsequently Government decided to cancel the entire selection process.

31. Mr. Sharma, learned senior counsel for the petitioners, while inviting attention of this court to communication dated 24.4.2019, issued by Director Technical Education to Sunil Kumar, Principal Government Industrial Training Centre, vehemently argued that Shri Jogender Singh the then Joint Director was directed to conduct a preliminary Inquiry and as such, no decision to cancel the process could be taken on the basis of a preliminary Inquiry. Though having perused the aforesaid communication, this court finds that Director Technical Education, while sending communication to the Principal concerned, mentioned that in preliminary Inquiry conducted by Joint Director certain discrepancies/ shortcomings were pointed out but apart from above communication, there is no other document to show that said Inquiry Officer was directed to conduct a preliminary Inquiry. Even document appointing Jogender Singh Joint Director as an Inquiry Officer at initial stage, nowhere suggests that he was asked to conduct a preliminary Inquiry. Inquiry Report submitted by aforesaid Inquiry Officer, if perused in its entirety, nowhere suggests that he conducted a preliminary Inquiry rather, before submitting report, he enquired into all aspects of the matter especially with regard to various allegations leveled in the complaint. Even if it is presumed that report submitted by Inquiry Officer was preliminary one, it would not

make any difference, so far as decision of the Government to cancel the selection process is concerned, especially when Inquiry Officer in his report (Annexure R-4 annexed with compliance affidavit dated 17.3.2021 filed by Director Technical Education pursuant to order dated 3.3.2021 P.336 of paper book) categorically concluded as herein under

> **conclusion qua selection process in Industrial Training Institute Sundernagar:**
> Concluding Observations and Recommendations:
> 1. Evaluators have not evaluated the OMR sheets properly and as per instructions on the OMR sheets to the candidates and evaluators. OMR sheets evaluated by the evaluators have not been cross checked by the Selection Committee or Trade Experts while finalizing the results in the concerned trade. The merit list prepared and finalized is not correct.
>
> 2. NO RELATION CERTIFICATE has not been taken from the members, trade experts evaluators, invigilators and other associated staff before the commencement of Selection Process. Even the Chairman and Member Secretary has not recorded/given this certificate which is essentially required for smooth and impartial conduct of examination. Member and other staff associated with the Selection Process whose relatives appeared in Written Test and has been recommended for selection were allowed to continue their assigned duties by the Chairman Selection Committee/Member Secretary without the approval of competent authority whereas they should have been disassociated for the remaining selection process.
>
> 3. Photostat copies of OMR sheets have been used in the written test without serial nos. In the absence of serial no. on OMR sheets distributed to the candidates it can not be ascertained from the record which OMR sheet was given to a candidate. Hence, there is technical flaw in the procedure followed during conduct of written test.
> 4. In view of above, the entire selection process is not fullproof, hence may be annulled."

Qua Industrial Training Institute Shahpur
Concluding Observations and Recommendations:

A. The issue raised in the complaint no.1 against Sh. Sanjeev Kumar Lakhanpal, Principal, Govt. ITI, Shahpur are vague and not specific in nature. The complaint appears anonymous. Hence, specifle comments can not be offered.

B. On the basis of discussion and facts recorded above, the following observations recommendations are made on the issues raised under complaint no.2

1. No separate Answer Sheets or OMR sheets were provided to the candidates. Question paper given to the candidates during test has been used as Answer Sheet itself and there is no printed serial no. on Question Paper. Hence, there is technical flaw in the procedure followed during conduct of written test.

2. No separate attendance records have been prepared and maintained to ascertain how many candidates turned up for written test/interview during the conduct written tests/interviews.

3. NO RELATION CERTIFICATE has not been taken from the members, invigilators and

other associated staff before the commencement of Selection Process. Even the Chairman and Member Secretary has not recorded/given this certificate which is essentially required for smooth and impartial conduct of examination. 4. Keeping in view of these observations the entire selection process may be annulled."

Qua Industrial Training Institute Shimla
Concluding Observations and Recommendations:

1. On random checking of the answer sheets of the candidates whose roll nos. figure in the complaint it was found that answer sheets of Roll. Nos 04 & 09 was not checked correctly which casts aspersions on the entire selection process.

2. As narrated hereinbefore, close relatives of two of the officials associated with the selection process have been recommended for selection committee where as per the well settled norms these two officials ought to have disassociated from the selection process. This also raises doubts about the selection process. It appears that this lapse occurred since NO RELATION CERTIFICATE was not taken from the members of Selection Committee.

3. Photostat copies of OMR sheets have been used in the written test without serial nos. In the absence of serial no. on OMR sheets distributed to the candidates it cannot be ascertained from the record which OMR sheet was given to a candidate. Hence, there is technical flaw in the procedure followed during conduct of written test.
4. In view of above, the entire selection process is not fullproof, hence may be annulled."

Qua Industrial Training Institute Udaipur:
"In view of the above discussion and facts following observations are made:
1. No separate Answer Sheets or OMR sheets were provided to the candidates. Question paper given to the candidates during test has been used as Answer Sheet itself and there is no printed serial no. on Question Paper. Hence, there is technical flaw in the procedure followed during conduct of written test.
2. No separate attendance records have been prepared and maintained to ascertain how many candidates tumed up for written test/interview on 18.09.2018.
3. Local candidates from Lahual and Spiti could not participate in the written test/interview on 18.09.2018 due to the reason stated in above said representations.

4. Keeping in view of these observations the entire selection process may be annulled.

32. After having noticed aforesaid findings given by Inquiry Officer, probably respondent Department was left with no option but to cancel the entire selection process which had become doubtful and was actually not conducted in a transparent and fair manner.

33. Since these complaints of irregularities were not qua one zone, rather qua all the zones, covering entire State, no illegality can be said to have been committed by respondents, while ordering cancellation of entire selection process, and as such, same cannot be interfered with in the instant proceedings.

34. Leaving everything aside, after canceling the selection process initiated in 2018, the respondent Department had initiated and concluded fresh selection process, wherein alongwith fresh candidates, some of the petitioners have been also declared selected.

35. In view of the detailed discussion made supra and law taken note of, this court finds no merit in the present petitions, which are accordingly dismissed alongwith all pending applications.

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

Between:-

INDIRA KAPOOR WIFE OF SHRI VIKRAM KAPPOR,RESIDENT OF VILLAGE SOUTHAL, POST OFFICE RATHIAR,
TEHSIL AND DISTRICT CHAMBA, H.P.

APPLICANT/APPELLANT

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE WITH MR. SAT PRAKASH AND MR. PRANAV SHARMA,ADVOCATES)

AND

STATE OF H.P.

RESPONDENT

(BY MR. NARINDER GULERIA ADDITIONAL ADVOCATE GENERAL WITH MR. SUNNY DATWALIA,ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION
NO. 3176 OF 2022 IN CR. APPEAL NO. 245 OF 2021
DECIDED ON:20.10.2022

Code of Criminal Procedure, 1973 - Sections 389(1), 482 - **Indian Penal Code, 1860 -** Sections 420, 467, 468, 471 - **Prevention of Corruption Act**, **1988**- Section 13(2) - Misappropriation of government funds through forged documents and false entries in muster rolls – Application seeking a stay on the judgment of conviction and order of sentence – **Held**- Granting of stay on the judgment of conviction and order of sentence to safeguard the applicant's political career - Decision does not imply a reflection on the merits of the ongoing appeal. (Paras 31,32,33)

Cases referred:

K.C. Sareen v. CBI, Chandigarh, 2001 (3) RCR (Criminal) 718: JT 2001 (6) SC 59;
Lily Thomas v. Union of India, (2013) 7 SCC 653;
Lok Prahari v. Election Commission of India, (2018) 18 SCC 114;
Novjot Singh Sidhu vs. State of Punjab, (2007) 2 SCC 574;
Padam Singh v. State of U.P., (2000) 1 SCC 621;
Ravikant S. Patil vs Sarvabhouma S. Bagali (2007) 1 SCC 673;

Retti Deenabandu & others v. State of Andhra Pradesh, 1977 SCC (Crl.) 173;
Shyam Narain Pandey v. State of U.P. (2014) 8 SCC 909;

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

O R D E R

By way of instant application filed under S.389(1) read with S. 482 CrPC, prayer has been made on behalf of applicant to stay the judgment of conviction and order of sentence dated 7.8.2021 passed by learned Special Judge, Chamba Division Chamba (HP) in Corruption Case No. 7 of 2015, whereby learned Court below, while holding the applicant/appellant guilty of having committed offence punishable under following provisions of law, convicted and sentenced her as under:

Section	Imprisonment	Fine	Sentence in default of payment
420 IPC	Simple imprisonment for three years	Rs.10,000	Imprisonment for one month
467 IPC	Simple imprisonment for three years	Rs.10,000	Imprisonment for one month
468 IPC	Simple imprisonment for three years	Rs.10,000	Imprisonment for one month
471 IPC	Simple imprisonment for three years	Rs.10,000/-	Imprisonment for one month
13(2) of Prevention of Corruption Act	Simple imprisonment for one year	Rs.5,000	Imprisonment for one month

17. In terms of order dated 18.10.2022, respondent-State has filed reply in the open court, which is taken on record. Today, during proceedings of the case, a supplementary application to the instant application has been filed on behalf of the applicant, seeking therein permission to place on record

additional facts, which may be relevant for the adjudication of the case at hand. No reply is intended to be filed to the same by the respondent-State, as such, same is taken on record and Registry is directed to register the same.

18. Precisely the facts of the case, which may be relevant for the adjudication of the application at hand are that the applicant Indira Kapoor alongwith other accused Roshan Lal, Chikni and Radha Devi came to be booked and tried for commission of offence punishable under S. 420, 467, 468, 471 and 120-B IPC and S. 13(2) of the Prevention of Corruption Act on the allegations that accused No.1 Mohan Singh, who at the relevant time was BDC Member of Panchayat Samiti Mehla alongwith applicant Indira Kapoor, who was Zila Parishad Member of Ward Sach and Roshan Lal, Gram Panchayat Bharian Kothi, Tehsil and District Chamba, misappropriated and embezzled various funds provided by the Government for carrying out different public works in their respective areas.

19. Precisely the allegations against the applicant and other accused are that they in connivance with each other and labourers made wrong/false entries in muster roll with the intention to misappropriate the Government money. Matter came to light when complaint Ext. PW-16/A in CC No. 6/2015 was filed by Bhagat Ram PW-4, who alleged that when he obtained information under Right to Information Act, 2005 pertaining to Mehla Block for years 2007, 2008, 2010, 2011, it was revealed that 10-12 labour were shown marked at two different works on same date and time by applicant as well as other accused namely Mohan Singh and Roshan Lal and they had been paid wages by Roshan Lal in the capacity of Pradhan, Mohan Lal being BDC Member and applicant being Zila Parishad member. Complainant also alleged that during the period with effect from 1.4.2009 to 15.4.2009, 16.4.2009 to 30.4.2009, 5.8.2009 to 15.8.2009 and 16.8.2009 to 31.8.2009, accused Mohan Singh being BDC member cheated Block Development Officer Mehrla by dishonestly inducing him to make wrong payment of Rs. 10,150-/- on the

basis of false entries made in muster roll in the names of Nain Sukh son of Mangta, Roshan Lal son of Chanan, Nain Sukh son of Haria and Rajender Singh son of Jalam Singh. Complainant also alleged that during 1.3.2010 to 15.3.2010, applicant accused Inidra Kapoor being Zila Parishad Member Ward Sach also cheated the Block Development Officer Mehla by dishonestly inducing him to make wrong payment of Rs. 3300/- on the basis of false entries made in muster roll in names of Raj Kumar son of Dhania and Chararn Singh son of Dharmu of Rs.. 1650/- each. Complainant named above also alleged that accused Roshan Lal being Pradhan, Gram Panchayat Bharian Kothi also cheated Block Development Officer Mehla during period 1.3.2010 to 18.3.2010 by dishonestly inducing him to make wrong payment of Rs.1980 on the basis of false and fictitious entries made in muster roll in the name of Daulat Ram son of Phula. Apart from above, some more allegations came to be leveled by the complainant but same pertain to other accused namely Mohan Singh, Roshan Lal, Chikni and Radha Devi as such are not required to be taken note while considering prayer made in the instant petition.

20. Police, after conducting investigation, presented Challan in the court of learned Special Judge Chamba Division Chamba, Himachal Pradesh, who on the basis of evidence, be it ocular or documentary, held accused including applicant/accused Indira Kapoor guilty of having committed offences punishable under aforesaid provisions of law and convicted and sentenced them as per description given above.

21. Being aggrieved and dissatisfied with judgment of conviction and order of sentence recorded by learned Special Judge, Chamba, all the accused including applicant Indira Kapoor filed Criminal Appeals in this court, praying therein to set aside judgment of conviction and order of sentence recorded by learned court below. Cr. Appeal No. 245 of 2021, having been filed by the applicant, stands admitted on 26.8.2021. This court vide order dated

26.8.2021, passed in CrMP No. 1508 of 2021, suspended substantive sentence imposed by learned court below subject to applicant furnishing personal bonds of Rs. 25,000/- subject to satisfaction of learned trial Court within one month with the condition that applicant shall appear as and when directed to serve out sentence imposed, in case her appeal is dismissed. Though, aforesaid appeal is pending adjudication but applicant has approached this court in the instant application to stay the judgment of conviction and order of sentence recorded by learned court below as she is likely to get ticket from Bhartiya Janata Party to contest elections from Chamba (Sadar) constituency.

22. Reply to the application stands filed on behalf of the non-applicant/State, wherein prayer made on behalf of the applicant has been opposed on the ground that applicant has indulged in serious crime of corruption and as such, it may not be in the interests of justice to accede to her prayer for staying the judgment of conviction and order of sentence.

23. Mr. Narinder Guleria, learned Additional Advocate General representing the non-applicant/State argued that since applicant/appellant has been found guilty in the case of corruption, she continues to be considered as 'corrupt' till the time judgment of conviction and order of sentence recorded by learned court are is set aside by the superior court of law.

24. As has been taken note herein above, today during proceedings of the case, applicant has filed supplementary application seeking therein to bring on record additional facts. It has been stated in the aforesaid application that the applicant has been made candidate by Bhartiya Janata Party to contest elections from Chamba (Sadar) constituency, which are scheduled to be held on 12.11.2022. To substantiate aforesaid fact, learned senior counsel representing the applicant has made available copy of Press release issued by Central Office, Bhartiya Janata Party New Delhi, dated 19.10.2022, which is taken on record, perusal whereof reveals that the applicant has been made candidate by Bhartiya Janata Party to contest Himachal Pradesh Vidhan

Sabha from Chamba (Sadar) constituency scheduled to be held on 12.11.2022.

25. Precisely, the case of the applicant, as has been highlighted in the application and has been further canvassed by Mr. N.S. Chandel, learned senior counsel duly assisted by Mr. Sat Prakash and Mr. Pranav Sharma, Advocates, appearing for the applicant, is that the appeal having been filed by the applicant/appellant is likely to succeed in all probabilities and in case judgment of conviction and order of sentence are not stayed at this stage, irreparable loss and injury would be caused to the applicant, who in the event of findings of conviction standing against her, shall not be eligible to contest the elections. It has been further stated that after doing social work in area for a pretty good time, political party i.e. Bhartiya Janata Party has given ticket to applicant to contest from Chamba (Sadar) constituency but in case, conviction recorded by learned court below is not stayed, entire political career of the applicant shall be ruined. Apart from above, Mr. N.S. Chandel, Senior Advocate appearing for the applicant, while making this court peruse evidence led on record by prosecution to prove guilt if any of applicant, vehemently argued that no case much less case under aforesaid provisions of law is made out against the applicant and learned court below has misread entire evidence as a consequence of which, applicant has suffered prejudice and she has been wrongly convicted. While referring to statements of material prosecution witnesses, Mr. Chandel strenuously argued that the prosecution has not been able to prove that the applicant, who at the relevant time was Zila Parishad Member from Ward Sach, was not involved in marking presence of labourers or making payment thereafter, rather, attendance was being marked by Mate present on work site and payments were directly made by office of Block Development Officer to the labourers, on the basis of verification of work done by Junior Engineer concerned, who has not been made an accused. He further submitted that all the labourers, who were allegedly given undue benefits by

applicant, have categorically stated that they worked under applicant at relevant time and received payments directly in their accounts, but yet learned court below proceeded to hold applicant guilty of having committed offence punishable under aforesaid provisions of law. While fairly admitting that this court, while exercising power under S. 389 CrPC can stay the judgment of conviction and order of sentence in rarest of rare cases, Mr. Chandel argued that the case of the applicant also falls in the 'rarest of rare' cases because in the case at hand, applicant has got finest opportunity to shape her political career by contesting elections, that too from Bhartiya Janata Party and in case judgment of conviction and order of sentence recorded against her are allowed to come in her way, which are otherwise not sustainable in the eye of law, entire political career of applicant, who is otherwise innocent shall diminish.

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

27. Though there is no disagreement inter se learned counsel for the parties that this court while suspending sentence imposed by learned trial Court under S. 389 (2) CrPC has also power to stay the conviction recorded by learned trial Court in exceptional cases but yet this court deems it fit to take note of recent judgments of Hon'ble Apex Court wherein it has been held that judgment of conviction is to be stayed in exceptional circumstances, in 'rarest of rare' cases.

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

> "6. The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not

> stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

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

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

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

"Suspension of sentence pending the appeal; release of appellant on bail. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. (2) The power

conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto. (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-
(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.
(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced." 5 (1995) 2 SCC 513 Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1)of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code."

> 11 In Navjot Singh Sidhu v State of Punjab 6 a Bench of two learned judges of this Court held that a stay of the order of conviction by an appellate court is an exception, to be resorted to in a rare case, after the attention of the appellate court is drawn to the consequences which may ensue if the conviction is not stayed. The court held:
> "The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate

Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

12 The above position was reiterated by a Bench of three judges of this Court in Ravikant S Patil v Sarvabhouma S Bagali 7 , after adverting to the earlier decisions on the issue, viz. Rama Narang v Ramesh Narang (supra), State of Tamil Nadu v A. Jaganathan8, K.C. Sareen v CBI, Chandigarh9, B.R. Kapur v State of T.N. (supra) and State of Maharashtra v Gajanan.10 This Court concluded as follows:-

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

16. These decisions have settled the position on the effect of an order of an appellate court staying a conviction pending the appeal. Upon the stay of a conviction under Section 389 of the Cr.P.C., the disqualification under Section 8 will not operate. The decisions in Ravi Kant Patil and Lily Thomas conclude the issue. Since the decision in Rama Narang, it has been well-settled that the appellate court has the power, in an appropriate case, to stay the conviction under Section

389 besides suspending the sentence. The power to stay a conviction is by way of an exception. Before it is exercised, the appellate court must be made aware of the consequence which will ensue if the conviction were not to be stayed. Once the conviction has been stayed by the appellate court, the disqualification under sub-sections 1, 2 and 3 of Section 8 of the Representation of the People Act 1951 will not operate. Under Article 102(1)(e) and Article 191(1)(e), the disqualification operates by or under any law made by Parliament. Disqualification under the above provisions of Section 8 follows upon a conviction for one of the listed offences. 11 Id at page 673 Once the conviction has been stayed during the pendency of an appeal, the disqualification which operates as a consequence of the conviction cannot take or remain in effect. In view of the consistent statement of the legal position in Rama Narang and in decisions which followed, there is no merit in the submission that the power conferred on the appellate court under Section 389 does not include the power, in an appropriate case, to stay the conviction. Clearly, the appellate court does possess such a power. Moreover, it is untenable that the disqualification which ensues from a conviction will operate despite the appellate court having granted a stay of the conviction. The authority vested in the appellate court to stay a conviction ensures that a conviction on untenable or frivolous grounds does not operate to cause serious prejudice. As the decision in Lily Thomas has clarified, a stay of the conviction would relieve the individual from suffering the consequence inter alia of a disqualification relatable to the provisions of sub-sections 1, 2 and 3 of Section 8."

31. Hon'ble Apex Court in **Shyam Narain Pandey** v. **State of U.P. (**2014) 8 SCC 909, has held that since sentence can be suspended after recording reasons therefore no hard and fast rules/guidelines can be laid that what such exceptional circumstances are where stay can be granted.

32. Aforesaid exposition of law, taken into consideration herein above reveals that appellate court besides enjoying power to suspend the sentence has also the power to stay the conviction but in exceptional cases. Order granting stay of conviction is not the rule but an exception to be resorted in rarest of the rare cases, depending upon the facts of the case. Since power to stay conviction is by way of an exception, before it is exercised, appellate court must be made aware of the consequence, which will ensue if conviction is not

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

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

34. Precisely the allegations against the applicant herein are that while she was Zila Parishad Member from Ward Sach, she alongwith co-accused Mohan Singh, BDC member Mehla during 2008-2010 and co-accused Roshan Lal, Pradhan, Gram Panchayat Bharian Kohti, Tehsil and District Chamba, forged documents and made payments to numerous persons. It also came to be alleged against the applicant and other accused named above that all the accused while executing developmental works in their respective Wards/areas, connived with each other and labourers and misappropriated /embezzled public money. It has been alleged against the applicant and other accused that 10-12 labourers were shown to be marked present at two different works on one date and same time, by applicant and other accused and they have been paid wages by accused named in the FIR. In nutshell allegation against the accused is that she being Zila Parishad Member, Ward Sach cheated the Block Development Officer Mehlra by dishonestly inducing him to make payment of Rs. 3300/- on the basis of wrong entries in muster rolls in the names of Raj Kumar son of Dhania and Charan Singh son of Dharmu of Rs.

1650/- each. Since the above named laboruers Raj Kumar and Charan Singh were also paid wages by Roshan Lal, Pradhan, Gram Panchayat Bharian Kothi during the period with effect from 1.3.2010 to 18.3.2010, qua which aforesaid persons were already made payment by the applicant for having worked in her Ward, it has been alleged against the applicant and other accused that they in connivance with each other and labourers, usurped public funds as such, they are liable to be punished under appropriate provisions of law.

35. Judgment sought to be stayed in the instant proceedings reveals that the learned trial Court has placed heavy reliance upon statements made by three prosecution witnesses namely PW-19 Dole Ram, PW-21 Raj Kumar, PW-25 Charan Singh, who have been shown to have worked under applicant during the period with effect from 1.3.2010 to 15.3.2010 in the muster roll Exhibits PW-16/A and PW-16/B. Since aforesaid persons are also shown to have worked with accused Roshan Lal, Pradhan, Gram Panchayat Bharian Kothi during the period 1.3.2010 to 15.3.2010, attempt has been made by prosecution to prove that none of the labourers named in muster roll had actually worked on the spot, rather all the accused, who at that time were holding public offices of Pradhan, Gram Panchayat, BDC and Zila Parishad, connived with each other and forged the record, with a view to cheat and dishonestly induce Block Development Officer to make payments in favour of those labourers, who had actually not worked at the site in question.

36. Having minutely perused the statements made by all the aforesaid prosecution witnesses, this court finds force in the submission of Mr. N.S. Chandel, learned Senior Advocate appearing for accused that none of material prosecution witnesses have denied factum of their having worked with applicant as labourer during the period with effect from 1.3.2010 to 15.3.2010. Since all the prosecution witnesses resiled from their statements, they were declared hostile, however, learned trial Court, while holding applicant guilty of having committed offences in question, placed heavy

reliance upon cross-examination of these witnesses by Public Prosecutor and other Defence Counsel. But if the cross-examination conducted by Public Prosecutor and other defence counsel is perused in entirety juxtaposing each other, it is clear that they have not denied factum with regard to their having worked with applicant from 1.3.2010 to 15.3.2010, rather they stated that they worked with the applicant during aforesaid period and their presence was being marked by Mate concerned in the muster roll. Most importantly these witnesses admitted the factum of receipt of payment. Raj Kumar, in his cross-examination admitted that he received payment qua work done by him under applicant during the period with effect from 1.3.2010 to 15.3.2010 through bank.

37. Leaving everything aside, statement of Secretary Gram Panchayat PW-16 namely Beli Ram is very relevant. Bare perusal of statement made by this witness reveals that Zila Parishad Member had to do nothing with the preparation of muster roll rather same is prepared by Mate and work is supervised by Junior Engineer. His statement further reveals that the payment is made on the basis of muster roll after verification by the Junior Engineer of Gram Panchayat and wages directly go into the accounts of the labourers. This witness categorically stated in the cross-examination that no muster roll was issued in the name of applicant-Indira Kapoor and muster rolls are maintained by Mate, who marks attendance of the workers and Junior Engineer of Gram Panchayat verifies the muster roll. This witness categorically stated in cross-examination that Zila Parishad Member has no concern with the muster roll.

38. If the judgment of conviction recorded by learned court below is perused in its entirety, it clearly reveals that judgment of conviction recorded against applicant is based upon statements made by prosecution witnesses PW-19, PW-21 and PW-25 but the statements made by these witnesses as noted above, do not appear to be sufficient to conclude the guilt, if any, of the

applicant/appellant, who otherwise being aggrieved by judgment of conviction and order of sentence recorded by learned court below has approached this court by way of an appeal, conclusion whereof may take some considerable time.

39. Though this court, while staying the judgment of conviction and order of sentence is required to go through whole evidence without commenting upon its merit, but while carrying out such exercise, it requires to satisfy itself whether a strong case is made out against appellant or not? Prosecution is obliged to prove its case beyond all reasonable doubts and not on preponderance of probabilities?

40. Applicant has been granted party ticket by Bhartiya Janata Party to contest elections from Chamba (Sadar) constituency of Himachal Pradesh Vidhan Sabha but judgment of conviction recorded against her has rendered her to be disqualified to contest said elections as the imprisonment is of more than two years. Besides above, applicant would be also debarred from contesting elections on account of her being sentenced for more than two years in terms of Representation of Peoples Act, 1951, in case judgment of conviction is not stayed. Though the appeal stands filed in this court but since considerable time may be consumed in its final conclusion, prayer has been made by applicant to stay judgment of conviction recorded by learned Court below, so that she does not lose chance/opportunity to serve people of her area by contesting elections to Himachal Pradesh Vidhan Sabha from political party like Bhartiya Janata Party. Certainly in a democratic set up, restriction on exercise of such right can be considered hardship to the applicant, especially if she is able to show that conviction and sentence are not based upon cogent and convincing evidence and she has a fair chance to succeed in appeal against the conviction and sentence recorded by the trial court.

41. Though appeal is to be decided by this court on merit, but having taken note of aforesaid aspects of the matter, this court is of the view that the case

at hand comes under the category of 'exceptional' case and, in case conviction is not stayed, petitioner's political career would be ruined. For the reasons stated herein above, this Court finds that on account of conviction, petitioner has been rendered disqualified to be a Member of Legislative Assembly and, in case conviction is not stayed, she would not be able to contest the elections, which are otherwise bound to be held on 12.11.2022. Since conclusion of appeal may take some time and in the event of appeal being allowed and applicant being acquitted, she cannot be compensated for the loss, which she may suffer on account of her losing chance to contest elections to Himachal Pradesh Vidhan Sabha as Member of Legislative Assembly.

42. No doubt, power under S.389 CrPC is to be exercised sparingly and with circumspection so as to stay the conviction, yet it is equally true that principle of law is to be applied as per peculiar facts and circumstances of each case. There cannot be a straightjacket formula rather, each case is to be examined in its own peculiar facts and circumstances. In case, conviction of petitioner is not stayed, she will suffer the consequences, which cannot be compensated subsequently in any terms and are irreversible.

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

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

flowing from the conviction should not visit him and that the stigma which attaches to him/her because of the conviction should be' wiped out.

45. Reliance placed by learned Additional Advocate General on the judgment rendered by Hon'ble Apex Court in **K.C. Sareen** v. **CBI, Chandigarh**, 2001 (3) RCR (Criminal) 718: JT 2001 (6) SC 59, is misplaced in the given facts and circumstances of the instant case. No doubt, in the aforesaid judgment, Hon'ble Apex Court has held that when a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court but, after passing of judgment in K.C. Sareen (supra), Hon'ble Apex Court has rendered a number of judgments, wherein it has been held that judgment of conviction can be stayed in "exceptional" cases. Since, there is no hard and fast rule/guidelines as to what are those exceptional circumstances, Hon'ble Apex Court in Shyam Narain Pandey v. State of U.P. (2014) 8 SCC 909, has attempted to cull out certain circumstances, which can be termed to "exceptional" circumstances, as under:

> "5. It has been consistently held by this Court that unless there are exceptional circumstances, the appellate court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances.
>
> 6. It may be noticed that even for the suspension of the sentence, the court has to record the reasons in writing under Section 389(1) Cr.PC. Couple of provisos were added under Section 389(1) Cr.PC pursuant to the recommendations made by the Law Commission of India and observations of this Court in various

> judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate court is inclined to consider release of a convict of such offences, the public prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

46. Since in the case at hand, court after having scanned entire evidence relied upon by learned court below, while holding applicant guilty of offence punishable has already observed in earlier part of order that there is no sufficient evidence to connect accused with the offence alleged to have been committed by her, much less offence punishable under S. 13(2) of Prevention of Corruption Act, it would too harsh at this stage, to deny the prayer made on behalf of the applicant.

47. Accordingly, in view of the detailed discussion held supra and the law taken note above, present application is allowed. Judgment of conviction and order of sentence dated 7.8.2021 passed by learned Special Judge, Chamba Division Chamba (HP) in Corruption Case No. 7 of 2015 is stayed, till the final adjudication of the appeal.

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

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

Both the applications stand disposed of.

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

Between:-

1. SH. VINAY THAKUR, S/O SHRI SUNDER SINGH THAKUR,
AGED 40 YEARS,R/O VILLAGE AND POST OFFICE SEOH,
TEHSIL SARKAGHAT, DISTRICT MANDI, (H.P.)
PRESENTLY WORKIGN AS PROFESSOR IN GOVERNMENT PHARMACY COLLEGE KANGRA AT NOGROTA BAGWAN,
TEHSIL NAGROTA BAGWAN, DISTRICT KANGRA, (H.P.).

2. SHRI VIVEK SHARMA, S/O SHRI GIANI RAM SHARMA,
R/O VILLAGE NEHNAR, P.O. JUBBAL, DISTRICT SHIMLA.
PRESENTLY WORKING AS ASSOCIATE PROFESSOR,
IN GOVERNMENT PHARMACY COLLEGE ROHRU,
TEHSIL ROHRU, DISTRICT SHIMLA (H.P.)

PETITIONERS

(BY MR. ONKAR JAIRATH, ADVOCATE)
AND

1. STATE OF HIMACHAL PRADESH
THROUGH ADDITIONAL CHIEF SECRETARY (TECHNICAL EDUCATION)TO THE GOVERNMENT OF HIMACHAL PRADESH
SHIMLA-171002

2. THE DIRECTORATE OF TECHNICAL EDUCATION
VOCATIONAL AND INDUSTRIAL TRAINING,
HIMACHAL PRADESH, SUNDERNAGAR, DISTRICT MANDI (H.P.)

2. HIMACHAL PRADESH PUBLIC SERVICE COMMISSION
THROUGH ITS SECRETARY,
NIGAM VIHAR, SHIMLA-171002

RESPONDENTS

(MR. SUDHIR BHATNAGAR AND MR. NARINDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH MR. SUNNY DHATWALIA,
ASSISTANT ADVOCATE GENERAL, FOR R-1 & R-2)

(MR. VIKRANT THAKUR, ADVOCATE
FOR R-3)

CIVIL WRIT PETITION
NO. 5720 OF 2020
DECIDED ON:03.08.2022

Constitution of India, 1950 - Article 226 - **Recruitment and Promotion Rules-** Rule 7- Writ petition for quashing and setting aside of clause whereby the minimum educational qualification under Rule 7 of the Rules, is not in consonance with the Regulations issued by the Pharmacy Council of India and being illegal, discriminatory and ultra-vires to the provisions of the Constitution of India, besides being in conflict with All India Council of Technical Education norms- **Held-** Regulations issued by the statutory bodies like Pharmacy Council of India, AICTE or the NCTE are binding upon the State and all the subsequent actions of the State should be in conformity with such guidelines/regulations- Petition allowed with directions. (Para 24)

Cases referred:

Dr. Preeti Srivastava v. State of M.P. (1999) 7 SCC 120;

State of Tamil Nadu & another v. S.V. Bratheep (Minor) & others AIR 2004 SC 1861;

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

O R D E R

By way of instant petition filed under Art. 226 of the Constitution of India, petitioners have prayed for the following reliefs:

> "i) That the Hon'ble Court may be pleased to issue the Writ in the nature of Certiorari or any other appropriate writ order or direction quashing and setting aside the Impugned Clause-7 as contained in Himachal Pradesh Technical Education, Vocational and Industrial Training Department, Principal (B.Pharmacy) (Class-I Gazetted) Recruitment and Promotion Rules, 2008 (Annexure P-6) being illegal, discriminatory and ultra vires to the provisions of the Constitution of India, besides being in conflict with the Pharmacy Council of India, besides being in conflict

with the Pharmacy Council of India and All India Council of Technical Education norms.

ii) That this Hon'ble Court may be pleased to issue the writ in the nature of Mandamus or any other appropriate writ order or direction directing the Respondents to substitute essential experience as contained in Clause 7 of the Himachal Pradesh Technical Education, Vocational and Industrial Training Department, Principal (B.Pharmacy) (Class-I Gazetted) Recruitment and Promotion Rules, 2008 (Annexure P-6) with the experience as prescribed in Minimum Qualification for Teachers in Pharmacy Institutions Regulations, 2014 (Annexure P-7) i.e. 15 Years Experience in teaching out of which 5 years must be as Professor/HOD in a PCI approved /recognized Pharmacy College or with the experience as prescribed in Gazette of India Notification dated 01.03.2019 (Annexure P-8) i.e. minimum 15 years of experience in teaching/research/industry, out of which atleast 3 years shall be at the post equivalent to that of professor.

64. Petitioners herein, who are working as Professor and Associate Professor in Government Pharmacy College Nagrota Bagwan, District Kangra and Rohru, District Shimla respectively are aggrieved of the minimum educational qualification prescribed under Rule-7 of the Recruitment and Promotion Rules for the post of Principal (B.Pharmacy) (Class I) (Gazetted) in Pharmacy College in the Department of Technical Education, Vocational and Industrial Training, Himachal Pradesh (hereinafter, 'Rules'). Rule-7, whereof provides as under:

> "7. Minimum Educational and other qualifications required for direct recruits.
>
> ESSENTIAL QUALIFICATION: (i) QUALIFICATION AND EXPERIENCE FOR CANDIDATES FROM REACHING, Ph.D degree (with first Class Master's Degree in the appropriate branch of specialization in Pharmacy

and with 10 years experience of which at least 05 years experience at senior level comparable to that of an Professor would also be eligible.
(ii) DESIRABLE QUALIFICATION: (i) Administrative experience in a responsible position.
(ii) Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh."

65. As per Rule 10 of the Rules, post of Principal, in the College of Pharmacy is to be filled up 100% by way of promotion failing which by direct recruitment or on contract basis. Clause 10 of the Rules provides as under:

"10. *Method of recruitment, whether by direct recruitment or by promotion, deputation, transfer and the percentage of vacancies to be filled in by various methods:* 100% promotion failing which by direct recruitment or on contract basis."

66. Precisely the grouse of the petitioners is that the minimum educational qualification under Rule 7 of the Rules, is not in consonance with the Regulations issued by the Pharmacy Council of India vide Notification dated 11.11.2014 (Annexure P-7), whereby minimum educational qualification for appointment to the post of Director, Principal/ head of institution has been prescribed as follows:

Director/Principal /Head of Institution	First Class B.Pharm with Master's degree in Pharmacy (M. Pharm) in appropriate branch of specialization in Pharmacy or Pharm.D (Qualifications must be PCI recognized) With Ph.D degree in any of the Pharmacy subjects (Ph.d. Qualifications must be PCI recognized)	**Essential** 15 years experience in teaching or research out of which 5 years must be as Professor/ HoD in a PCI approved recognized pharmacy college. **Desirable** Administrative experience in a

		responsible position.

67. Since, Department of Pharmacy falls under Department of Technical Education, Vocational and Industrial Training, it is also governed by the Regulations notified by the All India Council for Teacher Education (AICTE), which vide Notification dated 1.3.1998 (annexure P-8) has prescribed following qualifications for direct recruitment to the post of Director/Principal:

> "5.2.(f) **Qualifications for Direct Recruitment of Principal/Director. (level-14, Entry Pay 14200/- with special allowance of Rs. 6750/- per month)**
>
> a. Ph.D. degree and First Class or equivalent at either Bachelor's or Master's level in the relevant branch.
> b. At least two successful Ph.D. guided as supervisor/Co-Supervisor and minimum 8 research publications in SCI journals/ UGC/ AICTE approved list of journals.
> c. Minimum 15 years of experience in teaching/research/ industry, out of which at least 3 years shall be at the post equivalent to that of Professor."

68. Learned counsel for the petitioners, vehemently argued that though the post of Principal in the Government College of Pharmacy is to be filled in accordance with the Recruitment and Promotion Rules framed by Department of Technical Education, Vocational and Industrial Training, Himachal Pradesh but the minimum educational qualification and other qualifications required for direct recruits as provided under Recruitment and Promotion Rules cannot be in violation of the Regulations framed by Pharmacy Council of India and All India Council for Teacher Education. He argued that the Pharmacy Council of India and All India Council for Teacher Education have prescribed qualifications and experience for appointment to the post of Director/Principal of Institution and the respondents while framing Recruitment and Promotion Rules are under obligation to provide qualifications and experience for the post concerned, as has been prescribed under Regulations notified by

Pharmacy Council of India and All India Council for Teacher Education. Mr. Jairath, argued that though respondent-State can add further qualifications to the qualifications provided under the Regulations notified by Pharmacy Council of India and AICTE but definitely the qualifications provided under the Recruitment and Promotion Rules cannot be less than the minimum standards set by Pharmacy Council of India and AICTE. In support of aforesaid submissions, Mr. Jairath, placed reliance upon judgment passed by Hon'ble Apex Court **Dr. Preeti Srivastava** v. **State of M.P.** (1999) 7 SCC 120.

69. While refuting the afore submissions made by Mr. Jairaht, learned Additional Advocate General submitted that there is no illegality or irregularity in the Recruitment and Promotion Rules. While inviting attention of this court to the reply filed by respondents Nos. 1 and 2, learned Additional Advocate General submitted that the regulating agencies i.e. Pharmacy Council of India and AICTE keep on changing norms with respect to educational qualifications and experience for the post of Director/Principal whereas, Recruitment and Promotion Rules for the said post, notified in 2008 could not be amended as per latest regulations of Pharmacy Council of India dated 11.11.2014 (Annexure P-7) or by AICTE vide Notification dated 11.3.2019 annexure R-3. He submitted that the Pharmacy Council of India vide letter dated 11.3.2020 (Annexure R-4), informed that the Pharmacy Act, 1948 shall only prevail with regard to recognition and/or approval of pharmacy courses/ pharmacy institutions/ intake capacity and degrees and diplomas in pharmacy, in light of judgment delivered by Hon'ble Apex Court in Transfer Petitions (Civil) Nos. 87-101 of 2014 8. He further submitted that the educational qualification /experience prescribed in Column No. 7 of Recruitment and Promotion Rules notified on 1.5.2008 are as per regulating agency guidelines prevailing at the time of Notification of said Rules. He further submitted that matter to include relax the conditions of experience in Column No.7 for the post of Director/Principal in Pharmacy Colleges as per Pharmacy Council of India

Notification dated 11.11.2014 was taken up with the Pharmacy Council of India but no response has been received. (Annexure R-9).

70. Mr. Vikrant Thakur, learned counsel for the respondent-Commission adopted aforesaid submissions made on behalf of respondent-State.

71. Having heard learned counsel for the parties and perused the material available on record, this court finds that the moot question which has fallen for determination before this court is, 'whether the respondent-State, while framing Recruitment and Promotion Rules for appointment to the post of Director/ Principal of Government College of Pharmacy could prescribe educational qualifications/experience lesser than that provided by statutory authorities like Pharmacy Council of India and AICTE or not?"

72. It is amply clear from the reply filed by the respondents that the Rules (Annexure P-6), were framed by the respondent-State on the basis of Regulations notified by Pharmacy Council of India and AICTE. It is not in dispute that the Regulations framed in the year 2008 by Pharmacy Council of India and AICTE were subsequently amended by way of Notification dated 11.11.2014, whereby essential qualifications/ and period of experience for recruitment to the post of Director/Principal in the Government Pharmacy Colleges came to be modified. However, respondents, made no efforts to amend the Recruitment and Promotion Rules to bring them in conformity with the latest Regulations notified by Pharmacy Council of India and the AICTE.

73. Though, Mr, Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to framing of Recruitment and Promotion Rules, 2008, on the basis of Regulations framed by Pharmacy Council of India and AICTE, prevalent at that time, contended that the communication dated 7.6.2021 was sent to Registrar-cum-Secretary, Pharmacy Council of India, requesting therein to relax the prescribed norms in order to avoid future complications but there is no document available on

record that such prayer of respondents was ever agreed to by Pharmacy Council of India. Otherwise also, such prayer could not be accepted.

74. In the case at hand, Recruitment and Promotion Rules framed by the respondent State for appointment to the post of Director /Principal in the year 2008, reveal that at that time, minimum essential qualification and experience for the candidates desirous of appointment as Director/Principal of institution was Ph.D degree (with first Class Master's Degree in the appropriate branch of specialization in Pharmacy and with 10 years experience out of which at least 05 years experience at senior level comparable to that of an Professor, would also be eligible however, such qualification prescribed by Pharmacy Council of India and AICTE was further modified by said bodies, while issuing fresh Regulations in 2014 and 2019, wherein aforesaid essential qualification as prescribed under Rule 7 of Rules, came to be amended as under:

Director/Principal /Head of Institution	First Class B.Pharm with Master's degree in Pharmacy (M. Pharm) in appropriate branch of specialization in Pharmacy or Pharm.D (Qualifications must be PCI recognized) With Ph.D degree in any of the Pharmacy subjects (Ph.d. Qualifications must be PCI recognized)	**Essential** 15 years experience in teaching or research out of which 5 years must be as Professor/ HoD in a PCI approved recognized pharmacy college. **Desirable** Administrative experience in a responsible position.

"

75. Apart from above, 10 years experience provided in earlier regulations came to be modified to 15 years experience in teaching or research

out of which 5 years must be as Professor/ HoD in a PCI approved recognized pharmacy college.

76. Now the question remains, “whether the respondents can be permitted to go ahead with the appointments to the post in question on the basis of un-amended Recruitment and Promotion Rules or not?’

77. Once it is not in dispute that the Recruitment and Promotion Rules for the post of Director/Principal notified by respondents in 2008, were made in consonance with Regulations framed by Pharmacy Council of India and AICTE, any amendment with regard to educational qualification and other standards by statutory bodies like Pharmacy Council of India and AICTE, ought to have been incorporated in the Recruitment and Promotion Rules by way of AN amendment.

78. However, in the case at hand though respondents are aware of the fact that the Department cannot prescribe qualifications lesser than as prescribed under the Regulations notified by Pharmacy Council of India and AICTE, yet it continued to make appointment to the post in question on the basis of un-amended rules.

79. Interestingly in the case at hand, respondents instead of taking appropriate steps for amendment of Recruitment and Promotion Rules sought permission of Pharmacy Council of India to relax the rules, which was never granted. Otherwise also, it is not understood on what basis Pharmacy Council of India or the AICTE could relax norms especially with regard to educational qualification and experience.

80. Hon'ble Apex Court in **Dr. Preeti Srivastava** (supra) has categorically held that in every case minimum standard laid down by Central Statute shall be complied with by the State, while making admissions. Hon'ble Apex Court held in judgment supra, as under:

> “39. The respondents have emphasised the observation that admission has to be made by those who are in control of the colleges.

> But, the question is, on what basis? Admissions must be made on a basis which is consistent with the standards laid down by a statute or regulation framed by the Central Government in the exercise of its powers under Entry 66, List I. At times, in some of the judgments, the words "eligibility" and "qualification" have been used interchangeably, and in some cases a distinction has been made between the two words ? "eligibility" connoting the minimum criteria for selection that may be laid down by the University Act or any Central Statute, while "qualifications" connoting the additional norms laid down by the colleges or by the State. In every case the minimum standards as laid down by the Central Statute or under it, have to be complied with by the State while making admissions. It may, in addition, lay down other additional norms for admission or regulate admissions in the exercise of its powers under Entry 25 List III in a manner not inconsistent with or in a manner which does not dilute the criteria so laid down."

81. In the case at hand, it is not in dispute that the respondents at the first instance made provision of minimum educational qualification strictly in consonance with PCI/AICTE norms and as such, it ought to have amended the Rules from time to time to bring the same in conformity with the Regulations notified by Pharmacy Council of India or the AICTE, which are statutory bodies constituted purposely with a view to regulate the minimum educational standards in appointment of the teachers and admission of students.

82. Hon'ble Apex Court in **State of Tamil Nadu and another** v. **S.V. Bratheep (Minor) and others** AIR 2004 SC 1861, has held as under:

> "....The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the qualifying examination in order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed

by the AICTE would allow admission only on the basis of the marks obtained in the qualifying examination the additional test made applicable is the common entrance test by the State Government. If we proceed to take the standard fixed by the AICTE to be the common entrance test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event, the streams proposed by the AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by the AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr. Preeti Srivastava's case. It is no doubt true as noticed by this Court in Adhiyaman's case that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges. It is not very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education."

83. It is quite apparent from aforesaid exposition of law laid down by Hon'ble Apex Court that the State Government cannot tinker with the minimum educational qualification prescribed by the statutory bodies like Pharmacy Council of India or the AICTE. It can only prescribe qualifications higher than the ones prescribed by PCI/AICTE but has no power to reduce the qualification prescribed by Pharmacy Council of India or the AICTE.

84. Similar view has been taken by a Division Bench of this Court in CWPOA No. 6251 of 2020 titled Vinod Kumar v. State of Himachal Pradesh and connected matters, decided on 26.11.2021, wherein scope of statutory body like National Council for Teacher Education (NCTE) for issuing regulations in the matter of education has been discussed. Division Bench of this Court held as under:

> "15. The issue as to legality, efficacy and prevalence of notification dated 28.6.2018 issued by NCTE is no more res-integra after the judgment passed by Hon'ble Supreme Court in Ram Sharan Maurya and others vs. State of U.P. and others, AIR 2021 SC 954. Hon'ble Supreme Court while dealing with the powers & jurisdiction of NCTE vis-a-vis Notification dated 28.06.2018 has been pleased to hold as under:
>
> > "38.4 It is thus clear that for maintaining standards of education in schools, the NCTE is now specifically empowered to determine the qualifications of persons for being recruited as teachers in schools or colleges. In addition to regulating standards in "teacher education system", the NCTE Act now deals with regulation and proper maintenance of norms and standards in respect of qualifications of persons to be recruited as teachers. By Notification dated 31.03.2010, the Central Government, in exercise of powers conferred under Section 23 of the RTE Act authorised the NCTE as an "Academic Authority" to lay down the minimum qualifications for a person to be eligible for appointment as a teacher.
> >
> > 40. The Notification dated 28.06.2018 issued by the NCTE was in exercise of power so conferred upon it by virtue of the Notification dated 31.03.2010. In terms of the Notification dated 28.06.2018, the qualification of 'Bachelor of Education' from any NCTE recognised institution shall now be a valid qualification for appointment as a teacher in classes I to V provided the person so appointed as a teacher mandatorily undergoes six months'

Bridge Course in elementary education within two years of such appointment.

41. Going by the Parliamentary intent in empowering NCTE under the provisions of the NCTE Act and specific authorization in favour of NCTE under said Notification dated 31.03.2010, the authority of NCTE is beyond any doubt. Though there is no specific regulation as contemplated under Section 32 read with Sections 12 and 12A of the NCTE Act, for the present purposes by virtue of the specific authorization under the Notification dated 31.03.2010, NCTE was entitled to lay down that those holding the qualification of 'Bachelor of Education' as detailed in said Notification are entitled to be appointed as teachers for classes I to V. Such prescription on part of the NCTE would be binding. It is for this reason that G.O. dated 01.12.2018 notifying ATRE-2019 clearly stated that the candidates possessing minimum qualifications specified in Notifications issued by the NCTE including one dated 28.06.2018 were entitled to participate in ATRE-2019.

43. The Notification dated 28.06.2018 being binding on the State Government, the statutory regime put in place by the State has to be read in conformity with said Notification. The eligibility or entitlement being already conferred by Notification dated 28.06.2018, the amendments to 1981 Rules were effected only to make the statutory regime consistent with the directives issued by the NCTE. The right or eligibility was not conferred by amendments effected to 1981 Rules for the first time and therefore the element of retrospectivity present in the concerned amendments has to be read in that perspective. The intent behind those amendments was not to create a right for the first time with retrospective effect but was only to effectuate the statutory regime in tune or accord with NCTE directives. Theoretically, even if such statutory regime was not made so consistent, the concerned candidates holding B.Ed. degrees could still be eligible and could not have been denied candidature for ATRE- 2019.

85. Thus, it is clear that the regulations issued by the statutory bodies like Pharmacy Council of India, AICTE or the NCTE are binding upon the State and all the subsequent actions of the State should be in conformity with such guidelines/regulations etc.

86. Consequently, in view of above, this court finds merit in the petition, which is accordingly allowed. Rules 7 of Annexure P-6 are quashed and set aside. Respondents are directed to take steps for amendment of Annexure P-6 to bring the same in conformity with the essential qualification/experience prescribed by Pharmacy Council of India and/or AICTE for appointment to the post of Director/Principal vide Notification dated 11.11.2014.

87. Since this Court vide instant order has quashed Rule 7 of Recruitment and Promotion Rules, this court hopes and trusts that the respondents, with a view to ensure speedy appointment to the post(s) in question, would do the needful in terms of this order, expeditiously, preferably within a period of six weeks.

88. The petition stands disposed of in the aforesaid terms, alongwith all pending applications.

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

Between:-

1. DR. SURESH CHANDER NEGI
SON OF SHRI UDHAM SINGH,
RESIDENT OF VILLAGE SHUGGAR, POST OFFICE BUNDLA,
TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS CHIEF SCIENTIST,
DEPARTMENT OF AGRONOMY,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

2. DR. YUDHVIR SINGH
SON OF SHRI RAM PRASAD,
RESIDENT OF HOUSE NO. 5,
HOUSING BOARD COLONY LOHNA,
TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS PROFESSOR,
DEPARTMENT OF VEGETABLE SCIENCE
AND FLORICULTURE,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA PALAMPUR,
DISTRICT KANGRA, H.P.

3. DR. PAWAN KUMAR PATHANIA
SON OF SHRI WAZIR SINGH,
RESIDENT OF HOUSE NO. 86,
H.P. HOUSING BOARD COLONY HOLTA
TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS
PRINCIPAL SCIENTIST,
DEPARTMENT OF AGRONOMY,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA
PALAMPUR, DISTRICT KANGRA, H.P.

4. DR. HARINDER KUMAR CHAUDHARY,
SON OF SHRI BISHAN DASS CHAUDHARY,
RESIDENT OF VILLAGE AND POST OFFICE MAHADEV,
TEHSIL SUNDER NAGAR, DISTRICT MANDI, H.P.
AT PRESENT WORKING AS
PROFESSOR & HEAD,
DEPARTMENT OF CROP IMPROVEMENT,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA
PALAMPUR, DISTRICT KANGRA, H.P.

5. DR. SANJAY KUMAR SHARMA
SON OF SHRI ANUP RAM,
RESIDENT OF VILLAGE AND POST OFFICE BANURI,
TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS
PROFESSOR (SOILS),
DEPARTMENT OF AGRONOMY,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

6. DR. SWARAN LATA
WIFE OF DR. J.K. SHARMA,
RESIDENT OF VIBHA COTTAGE, VILLAGE GARH, (BAGRU)
POST OFFICE MALKEHAR, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS
PROFESSOR (PLANT BREEDING),
DEPARTMENT OF CROP IMPROVEMENT,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

7. DR. RAJNI MODGIL
WIFE OF SHRI ASHOK KUAMR MODGIL,

RESIDENT OF HOUSE NO. 139,
H.P. HOUSING BOARD COLONY BINDRAVAN,
PALAMPUR, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS PROFESSOR,
DEPARTMENT OF FOOD SCIENCE NUTRITION
AND TECHNOLOGY,
COLLEGE OF AGRICULTURE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

8. DR. NEENA VYAS
WIFE OF SHRI SUSHIL AWASTHI,
RESIDENT OF VILLAGE GADIYARA,
POST OFFICE SALYANA, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS
PROFESSOR & HEAD,
DEPARTMENT OF FAMILY RESOURCE MAANGEMENT,
COLLEGE OF HOME SCIENCE,
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

9. DR. PANKAJ SOOD
SON OF SHRI ONKAR CHAND SOOD,
RESIDENT OF HOUSE NO. U-8, GURUDWARA ROAD,
PALAMPUR, TEHSIL PALAMPUR, DISTRICT KANGRA
H.P.
AT PRESENT WORKING AS
PROFESSOR & HEAD,
VETERINARY CLINICAL COMPLEX,
DR. G.C. NEGI,
COLLEGE OF VETERINARY AND ANIMAL SCIENCES,

CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

PETITIONERS

(BY MR. DILIP SHARMA, SENIOR ADVOCATE WITH
MR. VISHWA BHUSHAN, MR. MANISH SHARMA &
MR. C.D. NEGI, ADVOCATES)

AND

CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA,
HIMACHAL PRADESH
THROUGH ITS REGISTRAR

RESPONDENT

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

1. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 6197 OF 2020

Between:-

DR. ASHWANI KUMAR
SON OF SHRI SAT PAL,
RESIDENT OF HOUSE NO. M 34,
HOUSING BOARD COLONY HOLTA,
PALAMPUR, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.
AT PRESENT WORKING AS LIBRARIAN IN
CSK HIMACHAL PRADESH KRISHI VISHVAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA, H.P.

PETITIONER

(BY MR. DILIP SHARMA, SENIOR ADVOCATE WITH
MR. VISHWA BHUSHAN, MR. MANISH SHARMA &
MR. C.D. NEGI, ADVOCATES)

AND

CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR, DISTRICT KANGRA,
HIMACHAL PRADESH
THROUGH ITS REGISTRAR

RESPONDENT

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

2. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2883 OF 2019

Between:-

SURAT RAM THAKUR
S/O LATE SH. SHIV RAM THAKUR
R/O VILL. CHHIBRO, P.O. GHANAGURHATE,
TEHSIL ARKI, DISTT. SOLAN, (H.P.)

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

3. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2913 OF 2019

Between:-

KARTAR CHAND RANA
S/O LAET SH. AMAR SINGH RANA
R/O WARD NO. 1, SHASTRI NAGAR PALAMPUR,
P.O. & TEHSIL PALAMPUR,
DISTT. KANGRA, (H.P)

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

4. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2920 OF 2019

Between:-

PARKASH CHAND SHARMA
S/O LATE SH. KISHAN CHAND
R/O VILLAGE AIMA, P.O. & TEHSIL PALAMPUR,
DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

5. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2935 OF 2019

Between:-

ANJNA SOOD
S/O LATE SH. ROOP LAL SOOD
R/O VPO, NERWA, TEHSIL NERWA
DISTT. SHIMLA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

6. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2948 OF 2019

Between:-

JEEVAN SINGH
S/O SH. HARI SINGH
R/O VILL. & P.O. BULDHAR,
TEHSIL & DISTT. KANGRA (H.P). 176047

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE

WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

7. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2957 OF 2019

Between:-

BHAG SINGH (DECEASED) THROUGH LR'S
(I) SMT. PANO DEVI (WIFE) AGED ABOUT 66 YEARS
(II) BHUPINDER SINGH (SON) AGED ABOUT 40 YEARS
(III) MAYA DEVI (DAUGHTER) AGED ABOUT 42 YEARS
(IV) ASHA DEVI (DAUGHTER) AGED ABOUT 38 YEARS
ALL R/O VILL. MUSWAR, P.O. BARDI,
TEHSIL GHUMARWIN, DISTT. BILASPUR (H.P).

PETITIONERS

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

8. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2978 OF 2019

Between:-

DR. JEET SINGH THAKUR
S/O SH. SARB SINGH
R/O VILL. HAAR (BANDLA)
P.O. BANDLA TEA ESTATE,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR

DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

9. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2981 OF 2019

Between:-

DR. VIJAY KUMAR SHARMA
S/O SH. GANGA RAM,
R/O VILLAGE TIKKA AIMA,
P.O. & TEHSIL PALAMPUR,
DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,

CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

10. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3046 OF 2019

Between:-

VIPAN KUMAR GUPTA
S/O LATE SH. SOHAN LAL GUPTA
R/O HOUSE NO. 178, SECTOR 2B
ADARSH NAGAR,
PO MANDI GOBINDGARH
TEHSIL & DISTT. FATEHGARH SAHIB
(PUNJAB)-147 301.

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE

WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

11. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3056 OF 2019

Between:-

PARAS RAM
S/O LATE SH. NANKU RAM
R/O VILL. BHARMAT, P.O. BANURI
TEHSIL PALAMPUR, DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

12. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3077 OF 2019

Between:-

DR. DES RAJ
S/O LATE SH. KANHYA LAL
R/O 51, HOUSING BOARD COLONY, HOLTA
P.O. & TEHSIL PALAMPUR, DISTT. KANGRA (H.P).

PETITIONER

(BY MR. , ADVOCATE)
(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

13. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3080 OF 2019

Between:-

ROSHAN LAL PADDA
S/O LATE SH. AMAR SINGH
R/O VILL. & P.O. RAJPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

14. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3587 OF 2019

Between:-

ONKAR SINGH SHARMA
S/O LATE SH. KISHNU RAM SHARMA
R/O WARD NO. 1, VPO BANURI,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR

HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

15. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3637 OF 2019

Between:-

RENU KUMARI
D/O LATE SH. KARAM CHAND
R/O VILL. & P.O. MARANDA,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P).

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,

GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

16. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 3658 OF 2019

Between:-

PARKASH CHAND (DECEASED) THROUGH LR'S
I) SMT. ANITA SHARMA (WIFE) AGED ABOUT 58 YEARS
II) SMT. HARI DEVI (MOTHER) AGED ABOUT 93 YEARS
III) SUMIT UPADHYAY (SON) AGED ABOUT 32 YEARS
IV) SWATI SHARMA (DAUGHTER) AGED ABOUT 36 YEARS,
ALL R/O VILL. RODI, P.O. THAKURDWARA,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

PETITIONERS

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

17. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 4932 OF 2019

Between:-

DR. KRISHAN SWROOP SHARMA
S/O LATE SH. JAGAN NATH SHARMA,
R/O VILL. ANSOLI, P.O. MATAUR,
TEHSIL & DISTT. KANGRA (H.P).-176001

PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. NARESH KAUL, ADVOCATE)

AND

1. CHAUDHARY SARWAN KUMAR
HIMACHAL PRADESH KRISHI VISWAVIDYALAYA,
PALAMPUR
THROUGH ITS REGISTRAR
DISTRICT KANGRA,
HIMACHAL PRADESH

2. THE CHAIRMAN,
GRIEVANCES COMMITTEE,
CSKHPKV, PALAMPUR,
TEHSIL PALAMPUR, DISTT. KANGRA (H.P.)

RESPONDENTS

(BY MR. B.M. CHAUHAN, SENIOR ADVOCATE
WITH MS. ARUNA CHAUHAN AND
MR. MANMOHAN KATOCH,
ADVOCATES)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6113 OF 2020 & CONNECTED MATTERS

DECIDED ON: 02.09.2022

Constitution of India, 1950- Article 226- Petition filed against grievance with arbitrary and discriminatory action with regard to rejection of requests of petitioner to permit switching over to new pension scheme- **Held-** Employees falling in third category repeatedly requested respondent to be governed under 1997 Pension Scheme- in the event of non-exercise of option, were to be covered under the GPF-cum-Pension-Gratuity Scheme, 1997- Rejection quashed- Set- aside- Petition allowed. (Para 29)

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

O R D E R

All the petitions involve same and similar questions, as such, all these petitions were tagged together at different intervals and were being heard together. Now vide this common order, all the petitions are being disposed of. Petitioners have been serving the Chaudhary Sarwan Kumar Himachal Pradesh Krishi Viswavidyalaya (hereinafter, 'respondent-University') in different capacities and earlier approached this court by filing writ petitions, which were later on transferred to erstwhile Himachal Pradesh Administrative Tribunal and thereafter again to this Court, on abolition of the Himachal Pradesh Administrative Tribunal. Two of the petitions were firstly filed as Original Applications before erstwhile Himachal Pradesh Administrative Tribunal, which also were later on transferred to this Court and re-registered as Civil Writ Petition (Original Application) (CWPOA's), as detailed in the memo of parties However, for the sake of clarity, facts of CWPOA No. 6113 of 2020, titled Suresh Chander v. Chaudhary Sarwan Kumar Himachal Pradesh Krishi Viswavidyalaya are being discussed herein.

2. Pursuant to decision of the Board of Management (hereinafter, 'Board') vide item No. 12(33) in its 58th meeting held on 26.3.1996, respondent-University implemented Pension Scheme for its employees with effect from

1.1.1997, which decision was circulated vide Notification dated 1.1.1997 (Annexure A-24), which reads as under:

"NOTIFICATION

In pursuance of the decision of the Board of Management taken vide item No. 12(33) of its 58th meeting held on 26.3.1996 and the Pension Rules formulated by the Committee so constituted, the Vice-Chancellor, HPKV, Palampur, is pleased to implement the Pension Scheme for the employees of the Himachal Pradesh Krishi Vishvavidyalaya w.e.f. 1.1.1997. The salient features of the scheme are as under:-

The existing employees of the University have the right to opt for the Pension Scheme or to continue to be governed by the CPF Rules. In case they opt for the Pension Scheme, they have to forego the University contribution credited to their CPF accouns alongwith interest thereon. If however, they opt to continue to be governed by the CPF rules, they will continue to be governed by the existing CPF rules as amended from time to time.

In case an existing employee does not give any option within the prescribed period, the pension scheme would automatically be applicable to him.

The cases of employees who have retired from the University service during the period 1.1.1986 to the date of Notification of Pension Scheme, will be governed by rule 1.9 of the Pension Rules.

The existing employees/retired employees /families of the deceased employees are required to exercise option on the prescribed proforma (in qua-drupilcate) within a period of 4 months from the date of notification i.e. upto 30.4.1997. In case of staff posted in Tribal Area, the period of option shall be six months i.e. upto 30.6.1997.

The Pension Scheme would be applicable to all the fresh recruitees from the date of notification of the Pension Scheme..

Option once exercised shall be final. The Pension Rules and proforma for exercising option are enclosed."

3. Pursuant to the aforesaid Notification, all the petitioners opted to be governed by CPF Rules. Subsequently, the respondent-University on the request having been made by various employees, issued fresh Notification dated 25.7.2002 (Annexure A-26), thereby affording another opportunity to the

left out employees to switch over to the Pension Scheme. Notification dated 25.7.2002 reads as under:

> "NOTIFICATION
>
> On the recommendations of the Finance Committee vide Item No. 52(4) of its 52nd meeting held on 4.6.2002 the Board of Management vide Item No. 10 of its 75th meeting held on 28.6.2002 has been pleased to give an opportunity for 2nd option to the left out existing CSKHPKV employees to either retain CPF-cum-Gratuity Scheme or opt for GPF-cum-Gratuity Scheme. the said option shall be exercised within 3 months from the date of notification and shall be final. The other conditions shall remain the same as notified vide notification No. 1-128/88-HPKV(Accts)/01-81 dated 1.11.97 and this notification is in continuation thereof."

4. Pursuant to the aforesaid Notification, some of the employees exercised fresh option but the fact remains that the petitioners herein did not exercise any option in terms of the aforesaid Notification dated 25.7.2002, rather, they claimed that since Notification dated 25.7.2002 was issued in continuation of Notification dated 1.1.1997 and it was specifically mentioned in that Notification that the other condition(s) shall remain as notified vide Notification dated 1.1.1997, they were not required to exercise option and in the event of theirs having not exercised the option, they were to be automatically considered to have opted for the Pension Scheme. Petitioners also claimed that in the cases of the employees, who did not exercise the option within three months from the date of Notification dated 25.7.2002, Pension Rules (Annexure A-24) were to be made automatically applicable to them and, in this way, petitioners who did not exercise option pursuant to Notification dated 25.7.2002, within three months, were required to be shifted to Pension Rules/Scheme in terms of conditions contained in Notification dated 1.1.1997 (Annexure A-24) as well as Pension rules (Annexure A-25). However, the fact remains that the respondent-University did not accept the aforesaid plea of the petitioners and refused to accept their prayer to be

covered under the Pension Scheme/Rules, framed by the respondent-University. Petitioners, repeatedly approached the respondent-University to consider their case under the amended provisions of Notification dated 1.1.1997 and Pension Rules (Annexures A-24, A-25) but the fact remains that no action was taken upon their representations. Case of the petitioners was rejected on the ground that they had not exercised the option in the relevant year i.e. 2002. Petitioners herein repeatedly made representations, as have been placed on record vide Annexures A-27 to A-33. Respondent-University, vide two separate letters dated 14.2.2017 (Annexures A-34, A-35), after having considered the case of the petitioners, intimated that the Himachal Pradesh Government has desired to, first of all, strengthen the pension corpus and then matter of the petitioners be put up to the Finance Committee.

5. Subsequently the respondent-University vide letter dated 26.9.2012 and 12.11.2012 returned the representations filed by the petitioners with the observation that the petitioners had not given the alleged reasons for not exercising the option in the year 2002. (Annexures A36, A37 and A-38). Vide representation dated 30.1.2013 and 21.5.2013, petitioners mentioned that they were not informed about the Notification dated 25.7.2002 and as such they were unable to exercise the option (Annexures A-39, 34).

6. Finally, the respondent-University vide letters dated 23.8.2013, 27.8.2013 and 24.8.2013 (Annexures A-47, A-48 and A-49), rejected the case of the petitioners on the ground that they opted to remain under CPF Scheme during 1997 and during the year 2002, they remained silent.

7. In the meantime, respondent-University vide letter dated 27.8.2012 (Annexure A-51), circulated the decision of the Finance Committee, which was further approved by the Board that the matter was discussed at length by the Finance Committee and it observed that the University already allowed opportunity of exercising the option twice and then there were two categories of employees viz. (1), those who could not exercise option in terms of

Notification dated 25.7.2002 for one reason or the other and (2), those who opted to continue to be governed by the Contributory Provident Fund-cum-Gratuity Scheme and that there was no question of allowing another option to the second category of employees, whereas so far the first category is concerned, it decided that as there was provision under the Pension Scheme of the University to regulate the cases of the employees who could not exercise option, their cases may be considered as per relevant rule of the said pension scheme. Respondent-University through its Comptroller, further requested to process the cases of the employees, if any, as per recommendations of the Finance Committee, duly approved by the Board and send the same to it for consideration after verifying the original record and authenticating the case.

8. Vide letter dated 5.12.2011 (Annexure A-62), one Kamal Dev Sharma, who had opted to continue to be governed by the CPF Scheme 1997, requested that he could not avail the opportunity to exercise option as he was on study leave in the USA from February, 2002 to November, 2003 and as such, he be allowed to opt for GPF/Pension Scheme . Respondent-University entertained the aforesaid claim of aforesaid Kamal Dev Sharma and vide letter dated 8.5.2012 (Annexure A-64), accepted the claim of aforesaid person for Pension Scheme. Accordingly, it allotted GPF No. 2166 to him. (Relevant Annexures A-62 to A-69 and A-64).

9. Perusal of the representation dated 5.12.2011 submitted by aforesaid Kamal Dev Sharma and noting sheet (Annexure A-63), reveals that the aforesaid Kamal Dev Sharma had also opted for CPF Scheme vide option dated 24.4.1997 pursuant to Notification dated 1.1.1997. It is not in dispute that aforesaid Kamal Dev Sharma had not exercised the option pursuant to Notification dated 25.7.2002 but thereafter, after two years of issuance of aforesaid Notification, requested for shifting from CPF to GPF and his request was considered by the respondent-University. While considering the case of aforesaid Kamal Dev Sharma, respondent-University categorically mentioned

that there is provision under the Pension Scheme to regulate the cases of those employees, who could not exercise the option as per Notification dated 25.7.2002 and Pension Rules and, while considering the representations/claim of the present petitioners, respondent-University took a U-turn and rejected their cases on the ground that they allegedly kept silent in the year 2002 and cannot be considered as 'left out' category.

10. Being aggrieved and dissatisfied with the aforesaid arbitrary and discriminatory action of the respondent-University, whereby requests of the petitioners to permit them to switch over to the new Pension Scheme, came to be rejected, petitioners approached erstwhile Himachal Pradesh Administrative Tribunal and on abolition of the Tribunal, Original Applications filed by them were transferred to this Court and re-registered. Since the reliefs sought by the petitioners in all the petitions are same and similar, it would suffice to take note of the reliefs prayed for in CWPOA No. 6113 of 2020, which are thus:

> "(i) That the letter dated 23.8.2013 (Annexure/A-47), letter dated 23.8.2013 (Annexure/A-48), letter dated 24.8.2013 (Annexure/A-49), letter dated 21.11.2013 (Annexure/A-50), letter dated 30.7.2016 (Annexure/A-55) and letter dated 30.7.2016 (Annexure/A-56) being illegal, discriminatory, unconstitutional, contrary, arbitrary, unjustified, violative of Articles 14 and 16 of the Constitution of India and unsustainable in the eyes of law, may kindly be quashed.
>
> (ii) That the applicants may kindly be held entitled to switch over/shift from CPF-cum-Gratuity Scheme to GPF-cum-Pension and Gratuity Scheme on the analogy of Dr. Kamal Dev Sharma in accordance with the provisions and spirit of the Notification dated 1.1.1997 (Annexure/A-24), Notification dated 25.7.2002 (Annexure/A-26), Pension Rules (Annexure/A-25) and letter dated 27.8.2012 (Annexure/A-51) and the respondent University may accordingly be directed to switch over/shift the applicants from CPF-cum-Gratuity Scheme to GPF-cum-Pension and Gratuity Scheme alongwith all consequential benefits."

11. Pursuant to notices issued in the petitions, respondent-University has filed detailed reply(ies), wherein facts, as have been taken note herein above, are not disputed. In nutshell, the case of the respondent-University is that it had provided second opportunity to the left out existing employees, either to retain CPF-cum-Gratuity scheme or shift to GPF-cum-Gratuity Scheme but since the petitioners herein were not from the 'left out' category, they were rightly denied the opportunity to exercise second option. Besides above, the respondent-University has also stated in its reply that since the Notification dated 25.7.2002 was meant for the 'left out employees' and the petitioners had also opted for CPF Scheme in 1997 and option once exercised is final, the option earlier exercised by them cannot be treated as automatically changed to GPF Scheme. While admitting the factum with regard to the representations having been filed by Kamal Dev Sharma, praying therein to permit him to shift from CPF to GPF Scheme, the respondent-University has claimed in its reply that the second option was given vide Notification dated 25.7.2002, to the left out staff and at that time, Kamal Dev Sharma was in foreign country from February, 2002 to November 2002, as such, on his request, he was provided opportunity to exercise the option in terms of Notification dated 25.7.2002.

12. I have heard the Learned Counsel appearing for the parties and perused the record.

13. Having heard Learned Counsel appearing for the parties and perused the material available on record, this Court finds that vide Notification dated 1.1.1997 (Annexure A-24), pension scheme for the employees of the respondent-University was implemented. Perusal of the aforesaid scheme reveals that there were two categories of the employees viz. (1), those existing employees, who positively exercised the option to continue to be governed under the CPF Rules and, (2) those employees, who either positively opted for the Pension Scheme or who did not exercise option within the stipulated period, hence, category (2) of the employees was governed by Pension Scheme.

It is also not in dispute that vide Notification dated 25.7.2002, the respondent-University decided to afford second option to its left out existing employees either to retain the Contributory Provident Fund-cum-Gratuity Scheme or opt for General Provident Fund-cum-Gratuity Scheme. Aforesaid option was to be exercised within three months from the date of notification and was to be considered as final. Most importantly, in the aforesaid Notification, it stood recorded that other conditions shall remain the same as notified vide Notification dated 1.1.1997 (Annexure A-24). Even in the aforesaid Notification, while the aforesaid second option was granted, there were three types of employees viz. (1), those who positively opted to continue their Pension Scheme, (2), those who exercised option to continue to be governed under the General Provident Fund-cum-Gratuity Scheme, who failed to exercise option for Pension Scheme 1997 and (3), those who did not exercise option either way.

14. Material available on record reveals that the third category of the employees, those who did not exercise option either way, were requesting time and again for allowing them to be governed by Pension Scheme, 1997 and as such, matter came to be placed before Finance Committee of the respondent-University in its 90th meeting held on 28.3.2012. As per item No. 90(8) and 90 (11) (Annexure A-65), following decision came to be taken:

> **Item No. 90(8): To place before the Finance Committee an agenda item with regard to option to switch over into GPF-cum-Pension Scheme from CPF**
>
> This item was discussed at length along with supplementary item No. 90(11), the committee observed that the University has already allowed opportunity of option twice. Now, there are two categories of the employees (i) who could not exercise their option in pursuance to Notification No. 1-128/02-IPS-CSKHPKV(Pension)/55744-886 dated 25.07.2022 for one reason or the other like the case discussed under item 90(8) and (ii) who opted in writing to continue to be governed under existing General Provident Fund-cum-Gratuity Scheme. There is

no question for allowing another opportunity of option to the category of employees listed under (ii) above. Since there is provision in the pension scheme of the University to regulate the cases of the employees who could not exercise option, their cases may be considered as per relevant rule of the said pension scheme.

Item No. 90(11): To place before the Finance Committee the mater regarding offering of another opportunity of option to the subscribers of Contributory Provident Fund-cum-Gratuity Scheme to switch over to the GPF-cum-pension-Gratuity Scheme.
As per item No. 90(8)"

15. Similarly, noting sheet (Annexure A-66) also reflects the decision taken in 90th meeting of the Finance Committee, which reads as under:

"It is submitted that the Finance Committee in its 90th meeting held on 28.3.12 vide item No. 90(8) had made the following recommendations on the agenda item placed before it vide Item No. 98(11) for offering another opposite party of option to the subscribers of Contributory Provident Fund-cum-Gratuity Scheme to switch over to the GPF-cum-Pension-cum-Gratuity Scheme.:-

"the item was discussed at length along with supplementary item No. 90(11). The committee observed that the University has already allowed opportunity of option twice. Now there are two categories of the employees (i) who could not exercise their option in pursuance of Notification No. 1-128/02-IPS-CSKHPKV (Pension)/55744-88 dated 25.7.2002 for one reason or the other like the case discussed under item (90)(8) and (ii) who opted in writing to continue to be governed under the exiting General Provident Fund-cum-Gratuity Scheme. there is no question for allowing another opportunity of option to the category of employees listed under (ii) above. Since there is provision in the pension scheme of the University to regulate the cases of the employees who could not exercise option. Their cases may be considered as per relevant rule of the said pension scheme. (F'A')

Accordingly, the ibid recommendations of the FC was circulated among all the functionaries of the University (Flag B) to process the cases of the employees, if any, after verifying the record, whether these employees have opted for CPF or not in 2002 and send the same of

those employees who have not opted for CPF scheme or not exercised their option to the Comptroller.

The following employees who are CPF subscribers and earlier could not exercise their option from CPF to GPF for one or the other reason in pursuance of above Notification dated 25.7.02 has now requested to consider their cases as per category (i) of the above decision of the Finance Committee item No. 90(11). However, it is further added that below mentioned employees have submitted their option for retaining the CPF-cum-gratuity scheme in the year 1997 as per record available in this office. Further on the securtiny the service books of the concerned employees, it has been found that entry of the same regarding fist option during the year 1997 have been recorded, except employees at Sr. No. 2,3, 9, 10,1 1, 13, 14, 15, 16, 17, 18, 19, 23, 24 & 26, whereas no entry with regard to second option during the year 2002 appears to have been made.

Xxxx

On the receipt of consent/representation of the above employees, the concerned departments were requested to verify as to why these employees could not exercise their option in response to Notification dated 25.7.2002. The response of HoD in this regard could not yield any fruitful result. There are certain practical problems being aced in implementing the decision of Finance Committee/ Board of Management because most of the deptts/units have not maintained their record properly and it could not be ascertained from the record whether the option granted earlier during the year 2002 have been got noted from the left out employees or not.

Accordingly, as per discussion held between HPAUTA and the then Comptroller, it was decided that concerned departments may be requested to supply the service books of the employees who have requested to switch over from CPF to GPF. The service books received in this office have been checked and from the scrutiny fo the service record, it appears that no entry with regard to option for retaining the CPF-CMP-gratuity scheme has been made in the service books fo the individual concerned, at the time of second option in 2002.

It is further submitted that University has already granted permission in one of the case in favour of Dr. K.D. Sharma to switch over from CPF to GPF, who could not exercise option for pension scheme in 2002.

> It is therefore, proposed that we may process the cases of the service employees in light of FC/BOM decision as category (i) of the employees and as per decision already taken by the University in the case of Dr. K.D. Sharma. The cases of retired employees need not be re-opened as the decision of the FC/BOM with regard to retired employees it no clear."

16. Bare perusal of the aforesaid decision taken by the Finance Committee reveals that it held that the cases of those employees, who could not exercise their option pursuant to second option provided vide Notification dated 25.7.2002, shall be regulated as per 1997 Pension Scheme as there as a default clause in the Pension Scheme for such employee. In view of this, the aforesaid decision was duly approved by the Board in its 102nd meeting held on 3.4.2012, vide item No. 8.

17. Having carefully perused the aforesaid minutes of 90th meeting of the Finance Committee held on 28.3.2012, this Court finds substantial force in the submission of learned senior counsel appearing for the petitioners that the case of those employees, who had not exercised option pursuant to Notification dated 25.7.2002 are automatically covered under default clause contained in the pension scheme (Annexure A-22), where it is clearly stipulated that in case existing employee does not give option within the prescribed period, Pension Scheme shall be automatically applicable to him.

18. Aforesaid decision is further fortified with the reading of noting portion (Annexure A-63), which reads as under:

> "116- Further, as desired by the Hon'ble Vice-Chancellor at N/46 of File No. QSD-3-1/08-CSKHPKV(Funds), an agenda item with regard to option to switch over into GPF-cum-Pension scheme from CPF scheme was placed for approval.
>
> 117- Hence, as per item 90(11) of 90th meeting of the Finance Committee held on 28.03.2012, duly approved by the Board of Management, vide item No. 8 of the proceedings of 102nd meeting held on 03.04.2012, has been observed that, since there is provision in the

pension scheme of the University to regulate the cases of the employees who could not exercise option, their cases may be considered as per Notification No. 1-128/02-IPS-CSKHPKV(Pension)-55744-886 dated 25.07.2022.

118- Since Dr. Kamal Dev Sharma, Assoc. Prof. aid not give any option due to his being on study leave from Feb., 2002 to November, 2003, as such, he is automatically entitled for GPF-cum-Pension-Gratuity Scheme as per Notification No. 1-128/88-HPKV(Acctts.)-1-81 dated 01.01.1997 and as per N/117.

119- In view of the provision of Notification mentioned above, the Comptroller may kindly consider to allow to allot GPF account number by surrendering CPF University contribution to Pension Corpus Fund as per rules, please.

19. It is not in dispute that Dr. Kamal Dev Sharma, Associate Professor had also opted to remain under CPF scheme while exercising option in terms of Notification dated 1.1.1997 (Annexure A-22), as was done by the petitioners. It is also not in dispute that on account of his being abroad, he was unable to exercise the second option pursuant to Notification dated 25.7.2002 and as such, he represented to the respondent-University to grant him one opportunity to exercise option in terms of the aforesaid Notification. Respondent-University, having taken note of the explanation rendered on record by aforesaid Dr. Kamal Dev Sharma, as detailed herein above, placed the matter before Finance Committee in its meeting held on 28.3.2012, minutes whereof were duly approved by the Board in its 102nd meeting held on 3.4.2012, that since there is provision in the Pension Scheme of the University to regulate the cases of the employees, who could not exercise option, their cases may be considered as per Notification dated 25.7.2002.

20. Mr. B.M. Chauhan, learned Senior Advocate duly assisted by Ms. Aruna Chauhan, Advocate, while appearing for the respondent-University, vehemently argued that since the petitioners had already opted for CPF scheme in 1997, and option once exercised is final, they could not be treated

automatically covered by GPF scheme, however, his aforesaid plea deserves outright rejection being devoid of merit. While rejecting the claim of the petitioners, respondent-University proceeded on the assumption that the petitioners had opted for CPF scheme in 1997 and had not opted out of 1997 Scheme pursuant to Notification dated 25.7.2002, hence, they are bound by initial option as per CPF rules. However, aforesaid stand, if permitted to be taken, would be completely against the subsequent decisions taken by the Finance Committee on 28.3.2012, which was approved by the Board in its meeting held on 3.4.2012 (Annexure A-65), whereby while acceding to the request of Dr. Kamal Dev Sharma, it was stated that since he had not given option pursuant to Notification dated 25.7.2002, he was automatically entitled for GPF Scheme as per Notification dated 1.1.1997.

21. Since, it is not in dispute that Dr. Kamal Dev Sharma is a similarly situate person to that of the petitioners and he had also exercised the option in terms of Notification dated 1.1.1997 to remain under CPF Scheme. If it is so, petitioners could not be debarred by respondent-University to exercise second option in terms of Notification dated 25.7.2002 on the ground that they have already exercised the option to remain under CPF scheme in terms of Notification dated 1.1.1997 and since the respondent-University granted permission to aforesaid Kamal Dev Sharma, to switch over from CPF to GPF, who could not exercise option in the year 2002, case of the other employee, who did not exercise option in the year 2002 were also to be processed as category (1) of the employees, as per decision taken in the case of Kamal Dev Sharma.

22. The Board in its 102nd meeting held on 3.4.2012, while approving the Minutes of Meeting of the Finance Committee held on 28.3.2012 has already held that the cases of those employees/staff, who did not exercise the option pursuant to Notification dated 25.7.2002 are automatically covered under the default clause contained in the Pension Scheme, 1997, wherein it is clearly

stipulated that in case an existing employee does not give option within the stipulated period, pension scheme will be automatically applicable to him.

23. Since the respondent-University permitted Dr. Kamal Dev Sharma to exercise the second option in terms of Notification dated 25.7.2002 it is estopped from claiming that the petitioners could not exercise second option in terms of Notification dated 25.7.2002, because of their already having opted for CPF in terms of Notification dated 1.1.1997.

24. The employees, who did not exercise any option within the prescribed period were to be governed under new pension scheme. At the cost of repetition, it may be observed that in 1997 Scheme, there were two categories of employees, one those of existing employees, who positively exercised option to be opted out of CPF Rules and second, those employees, who either opted for continuation of scheme or who did not exercise any option within the prescribed period, hence, they were to be governed by pension scheme, meaning thereby, the employees who opted for CPF Rules, were covered by pension scheme.

25. Though learned senior counsel for the respondent-University vehemently argued that the petitioners herein cannot claim themselves to be 'left out category' to avail benefit of second Notification dated 25.7.2002 but, as has been observed herein above, 'left out category', if any, after implementation of 1997 Pension Scheme is of the employees, who at the time of promulgation of 1997 Scheme had decided to remain under CPF scheme, because, as per 1997 Pension Scheme, employees, who either positively exercised option or did not exercise option were to be covered by the pension scheme, but if it so, 'left out category' would be of employees, who at the relevant time, had opted for CPF scheme.

26. Otherwise also, material available on record clearly reveals that the employees falling in third category who had opted for CPF scheme were repeatedly requesting the respondent-University to be governed under 1997

Pension Scheme. Aforesaid interpretation with regard to left out category given by this court is further clarified from the fact that aforesaid Dr. Kamal Dev Sharma, who like the petitioners had also exercised the option in terms of 1997 Notification to remain under CPF scheme, but subsequently, in terms of Notification dated 25.7.2002, he was afforded an opportunity to exercise option on the line that at the time of issuance of aforesaid Scheme, he was not available in the country. Another argument advanced by learned senior counsel for the respondent-University that since the petitioners herein failed to exercise the option in terms of Notification dated 25.7.2002, they are estopped from making prayer to switch over from CPF to GPF is wholly untenable, because, bare perusal of Notification dated 25.7.2002 itself reveals that the same was issued in continuation of Notification dated 1.1.1997 and all the conditions contained in the Notification dated 1.1.1997 were to remain the same. If it is so, in the event of non-exercise of option by the employees, they were to be deemed to be governed under the Pension Scheme.

27. Learned senior counsel for the respondent-University relied upon following judgments to enure his argument that the employees have already opted to be governed by CPF Scheme:

(i) Union of India v. M.K. Sarkar, (2010) 2 SCC 59
(ii) Rajasthan Agriculture University v. State of Rajasthan, (2013) 12 SCC 610 and,
(iii) V. Kannappan v. Union of India, (2015) 2 SCC 623
(iv) Rajasthan Rajya Vidyut Vitran Nigam Ltd. v. Dwarka Prasad Koolwal, (2015) 12 SCC 51
(v) Pepsu RTC v. Amandeep Singh, (2017) 2 SCC 766

28. Judgments passed by Hon'ble Apex Court in the cases supra, as relied by learned senior counsel for the respondent-University, have no application in the present case. In the aforesaid judgments, it has been held that the option once exercised is final. However, in the case at hand, facts are altogether different, where respondent-University itself, after introduction of

Pension Scheme, 1997, issued another Notification dated 25.7.2002, calling upon its employees to exercise fresh option and in the subsequent Notification, it specifically came to be recorded that the other terms and conditions of Pension Scheme 1997, shall remain the same, as a consequence of which, the 'left out' category, which includes, the petitioners herein, as has been discussed herein above, in the event of non-exercise of option, were to be covered under the GPF-cum-Pension-Gratuity Scheme, 1997.

29. Consequently, in view of above, decision of the respondent-University in rejecting the claim of the petitioners for switching over from CPF to GPF-cum-Pension scheme, is quashed and set aside being contrary to the Finance Committee decision duly approved by the Board of the respondent-University. Petitioners are held entitled to be governed by the Pension Scheme as framed vide Annexure A-24 read with Pension scheme, Annexure A-25 from due dates, with all consequential benefits.

All the petitions stand disposed of in the afore terms alongwith all pending applications.

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

Between:-

SH. JEEVAN KHANNA
S/O LATE SH. BADRI NATH
RESIDETN OF 87, LOWER BAZAR,
SHIMLA

PETITIONER/NON-APPLICANT

BY MR. R.K. BAWA, SENIOR ADVOCATE WITH
MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

SH. KHEM CHAND THROUGH HIS LRS:

1. SH. ARUN KUMAR
   S/O LATE SH. KHEM CHAND,

2. SH. VARINDER KUMAR
   S/O LAET SH. KHEM CHAND,

3. SMT. PROMILA GUPTA
   W/O SH. AMARJEET GUPTA
   D/O LATE SH. KHEM CHAND,

4. SMT. RENU GOEL
   W/O SH. AJAY GOEL,
   S/O LATE SH. KHEM CHAND,
   ALL C/O 140, LOWER BAZAR, SHIMLA

.. RESPONDENTS/APPLICANTS

5. DR. ASHA TANEJA
   D/O LATE SH. BADRI NATH KHANNA,

6. ANITA KHANNA
   D/O LATE SH. BADRI NATH, KHANNA,
   BOTH C/O SHOP NO. 139, LOWER BAZAR, SHIMLA

PROFORMA RESPONDENTS

(BY MR. R.L. SOOD, SENIOR ADVOCATE WITH
MR. ARJUN LAL, ADVOCATE
FOR R-1 TO 4)

(NEMO FOR R-5 AND R-6)

CIVIL MISC. PETITION
NO. 10069 OF 2021 IN CIVIL REVISION NO. 29 OF 2021
DECIDED ON:15.09.2022

Code of Civil Procedure, 1908 - Section 151- **Urban Rent Control Act, 1987-** Section 14- Prayer of respondents/applicants/ landlords to issue directions to the petitioners/non-applicants/tenants to pay the use and occupation charges qua the demised premises occupied by them despite there being eviction order passed by competent court of law- **Held-** Non-applicants/petitioners have already rented out their shops for Rs.80,000/- per month and Rs. 4,50,000/- per month, use and occupation charges of demised premises at the rate of Rs.1.10 Lakh per month cannot be said to be on a higher side- Petition allowed with directions. (Para 40)

Cases referred:

Ama Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. (2005) 1 SCC 705;
Champeshwar Lall Sood & Anr V/s Sh. Gurpartap Singh & Ors, Latest HLJ 2017 (HP) 589;
Marshall Sons and Co.(I) Ltd. vs. Sahi Oretrans (P) Ltd. and another (1999) 2 SCC 325;
Martin & Harris Private Limited v. Rajendra Mehta, SCC OnLine SC 792;

This misc. petition coming on for orders this day, ***Hon'ble Mr. Justice Sandeep Sharma***, passed the following:

O R D E R

By way of instant application, filed under S. 151 CPC, prayer has been made on behalf of respondents Nos. 1 to 4/applicants/ landlords (hereinafter, 'respondents) to issue directions to the petitioners/non-applicants/tenants (hereinafter, 'petitioners') to pay the use and occupation charges qua the demised premises, which are being occupied by them despite there being eviction order passed by competent court of law.

2. Precisely, the facts of the case, as emerge from the record, are that the original landlord, late Khem Chand filed an eviction petition under S.14 of the Himachal Pradesh Urban Rent Control Act (hereinafter, 'Act') against the original tenant, late Badri Nath Khanna from the shop situate in building bearing municipal No. 139-140, in the Lower Bazaar, Shimla (hereinafter, 'demised premises'), on the ground of rebuilding and reconstruction. Tenant though opposed the aforesaid prayer made on behalf of the landlord on the ground that the building, wherein the demised premises are situate does not require reconstruction but learned Rent Controller, on the basis of pleadings as well as evidence led on record by the respective parties, dismissed the eviction petition, against which Rent Appeal No. 255/15 of 2005 was filed by the landlord, which was dismissed by the appellate authority vide judgment dated 7.9.2006. Being aggrieved with the aforesaid judgment, landlord filed Revision Petition No. 90 of 2006 before this Court. This court remanded the matter to learned Rent Controller with the direction to record findings on the issue whether Khem Chand could carry on the reconstruction without impleading Smt. Shakuntla as a party or without her permission and without there having been any partition proved to have been effected between the parties. This court further observed that the building in question was composite one and apart from Badri Nath Khanna, there are other tenants in the premises and the roof of the building was common. Though against said order passed by this Court, landlord filed an SLP before Hon'ble Apex Court but the same was also dismissed vide order dated 4.8.2012.

3. Learned Rent Controller, after rehearing the parties, allowed the petition vide order dated 17.1.2009 passed in Rent Case No. 23/2 of 1999/98 by drawing a conclusion that the petition of landlord is bona fide and the tenant is liable to be evicted from the demised premises on the ground of rebuilding and reconstruction. Since the original tenant Badri Nath Khanna died during the proceedings of the case before learned Rent Controller, appeal

against order passed by learned Rent Controller came to be filed by his legal heirs, who are petitioners herein.

4. Appellate authority vide judgment dated 11.4.2013 passed in Rent Appeal No. 13-S/13 (b) of 2009, modified the order dated 17.1.2009 to the extent that eviction of the tenant from the demised premises on the ground of rebuilding and reconstruction was to be carried out by the executing court only on production of a duly sanctioned plan by the landlord.

5. Aforesaid judgment passed by the Appellate Authority was though laid challenge by way of Civil Revision in this Court by the landlord, but the same was subsequently withdrawn.

6. The landlord filed an execution petition i.e. Case No. 338-10 of 19/11 before the learned Rent Controller, Court No.2, Shimla for execution of order dated 17.1.2009 passed by learned Rent Controller, Court No. 4, Shimla in Rent Case No. 23/2 of 1999/98, wherein the tenants filed objections under S.47 CPC, however, learned Rent Controller, vide order dated 20.7.2021, dismissed the objections and ordered for issuance of warrant of possession qua the demised premises. Against the aforesaid order, the tenants approached this Court by way of this Civil Revision No. 29 of 2021, which is pending adjudication before this Court.

7. Vide order dated 29.7.2021, this Court stayed the operation and execution of order dated 20.7.2021 passed by the learned executing Court. In the present revision petition, present application has been filed by respondents Nos. 1 to 4/legal heirs of the landlord Khem Chand, praying therein for issuance of directions to the petitioners to pay use and occupation charges. It has been averred in the application that both learned Courts below have concurrently ordered for eviction of the tenants from the demised premises on the ground of rebuilding and reconstruction but yet the tenants/non-applicants are desperate to delay the execution of eviction order with ulterior motive. It has been stated in the application that the landlords

are entitled to use and occupation charges at the market rate i.e. the rate at which the landlord could have let out the premises in question, and as such, use and occupation charges qua the demised premises are required to be fixed at the rate of Rs.500/- per square feet, total 220 square feet x Rs.500 = Rs.1,10,000/- per month from the date of eviction order i.e. 17.1.2009 till they continue to occupy the demised premises. With a view to prove the prevailing market rent in the vicinity of the demised premises, respondents Nos. 1 to 4 have averred in the application that this court fixed use and occupation charges qua portion of 250 square feet i.e. Shop No. 14, Middle Bazaar, Shimla @ Rs.220/- per square feet. It has been further stated in the application that the shop in Middle Bazaar was being used as tailoring shop by one single person, whereas, the shop in dispute i.e. Shop No. 139, Lower Bazaar, Shimla is being used for the purposes of running a successful and effluent cloth retailing store. It has been further submitted that the shop in question is situate in the middle/prime location of Shimla known as Lower Bazaar, which is thronged by thousands of local people and tourists from morning till night everyday. It has been stated in the application that the commercial value of a shop in Middle Bazaar Shimla is less than 50% of the value of a shop such as the one in the use and occupation of the tenants and proforma respondents and as such, landlords are entitled to use and occupation charges at the rate of Rs.500/- per square feet. Since the area of shop in question is stated to be 220 square feet, as such, monthly use and occupation charges of Rs. 1,10,000/- have been claimed by respondents Nos. 1 to 4, to be paid jointly and severally by the petitioners/tenants and proforma respondents Nos. 4 and 6 from the date of eviction order i.e. 17.1.2009 till the vacation of the demised premises. It is also averred in the application that the petitioners/tenants themselves are landlord of Shop No. 87, Lower Bazaar, Shimla which is of the same size as that of the demised premises, same has been rented out to Crazy Readymades for monthly rent of Rs. 1,50,000/-. It is

further averred that the tenants are landlords of another shop i.e. Shop No. 75, The Mall, Shimla, which has also been rented out to Van Heusen, on monthly rent of Rs.4,50,000/- per month, as such, they are liable to be directed to pay use and occupation charges at the rate of Rs.1,10,000/- per month from the date of eviction order dated 17.1.2009.

8. Mr. R.L. Sood, learned senior counsel duly assisted by Mr. Arjun Lal, Advocate, appearing for landlords/respondents Nos. 1 to 4, while inviting attention of this Court to the judgments passed by Hon'ble Apex Court in **Ama Ram Properties (P) Ltd.** v. **Federal Motors (P) Ltd.** (2005) 1 SCC 705 and judgment passed by a Co-ordinate Bench of this Court in **Champeshwar Lall Sood & Anr** V/s **Sh. Gurpartap Singh & Ors**, reported in Latest HLJ 2017 (HP) 589, argued that a tenant after his eviction, will not remain tenant and his occupation after eviction order will be of an 'unauthorized occupant', as such, such tenant is liable to pay use and occupation charges. Learned senior counsel also invited attention of this Court to order dated 23.8.2022 passed by this Court in CMP NO. 10164 of 2018 in Civil Revision No. 190 of 2018 titled Shambhoonath Sharma v. Randip Singh Parmar, wherein this Court, while placing reliance upon **Atma Ram** supra, held that tenant becomes an unauthorized occupant, after his being ordered to be evicted by the learned Rent Controller, as such, he/she becomes liable to pay the use and occupation charges till the time, tenants remain in unauthorized occupation of the premises.

9. Aforesaid submissions made on behalf of Mr. Sood, learned senior counsel for respondents Nos. 1 to 4/applicants are refuted by the tenants by way of reply, wherein though they have admitted the facts as taken note herein above, but claimed that the petitioners/tenants cannot be termed to be unauthorized occupants, because, they have not ceased to be tenants.

10. Mr. R.K. Bawa, learned senior counsel duly assisted by Mr. Ajay Kumar Sharma, Advocate, appearing for the petitioners/tenants, vehemently argued

that since the eviction order passed by learned Rent Controller stands modified to the extent that the tenants shall be evicted from the demised premises on the production of a duly sanctioned plan, they cannot be termed as 'unauthorized occupants' till the time, duly sanctioned plan of the building in question is produced. Mr. Bawa, learned senior counsel further argued that though in the execution petition, executing court has erroneously returned the finding that the plan of the building has been duly sanctioned but such finding being contrary to the findings recorded in judgment dated 11.4.2013 passed by the Appellate Authority, whereby order passed by learned Rent Controller came to be modified, is not binding and cannot be made basis to draw a conclusion that the tenants have become 'unauthorized occupants' after passing of eviction order against them, which was conditional.

11. Mr. Bawa, learned senior counsel representing the non-applicants/petitioners vehemently argued that bare perusal of S.24(5) of the Act, nowhere provides condition, if any, for depositing use and occupation charges for staying the execution of the eviction order. He further argued that the definition of 'tenant' as given in S.2(j) of the Act nowhere suggests that on passing of eviction order against tenant, his occupation becomes unauthorized and he would not be treated as 'tenant' under the Act. Mr. Bawa further argued that since civil revision having been filed by non-applicants/petitioners laying therein challenge to order passed by learned executing Court is pending adjudication, non-applicants/petitioners cannot be held to be in unauthorized occupation of the demised premises, which have been otherwise ordered to be evicted on the ground of rebuilding and reconstruction. While inviting attention of this Court to judgment of Hon'ble Apex Court in **Atma Ram** supra, Mr. Bawa attempted to carve out a case that in the said judgment, Hon'ble Apex Court has considered definition of 'tenant' as provided in Delhi Rent Control Act and Madhya Pradesh Rent Control Act, wherein it is provided that the tenant against whom eviction order is passed, will not remain tenant

under landlord and his occupation will become unauthorized. He submitted that the definition of 'tenant' as given in S.2(j) of the Himachal Pradesh Urban Rent Control Act, 1987, nowhere provides that a person, against whom eviction order is passed, will not remain tenant under the landlord and his occupation becomes unauthorized with the passing of eviction order. Lastly, Mr. Bawa contended that otherwise also, use and occupation charges being claimed by the applicants/respondents Nos. 1 to 4 at the rate of Rs.17.1.2009 Lakh are on higher side, especially when rent qua similar shops in the same vicinity is on lower side, as has been stated in the reply.

12. I have heard the learned counsel for the parties and perused the pleadings adduced on record by the respective parties.

13. Before ascertaining the correctness of the rival submissions made by Learned Counsel appearing for the parties vis-à-vis prayer made in the instant application, it may be apt to take note of the fact that this Court having taken note of specific averments contained in the application with regard to ownership of the non-applicants/petitioners qua Shops Nos. 87 and 75, Shimla, directed the non-applicants to place on record lease deed if any, arrived inter se them and the Van Heusen and Crazy Readymades qua aforesaid shops, within a period of two weeks.

14. Pursuant to aforesaid direction, tenants placed on record a lease and licence agreement entered inter se Jeevan Khanna, one fo the non-applicants/tenants and Mr. Biplav Gupta, qua Shop No. 87, Lower Bazaar, Shimla, wherein it came to be agreed inter se aforesaid parties that the licencee Biplav Gupta will pay Rs. 80,000/- per month. Tenants also placed placed on record tax invoice to demonstrate that Shop No. 75 has been rented out to Aditya Birla Fashion Retail Ltd. on monthly rent of Rs. 2,25,000/-.

15. Vice CMP No. 6575 of 2021, whereby aforesaid documents came to be placed on record, tenants also placed on record lease and licence agreement dated 20.8.2021 entered inter se them and Biplav Gupta, proprietor Crazy

Readymades to demonstrate that licence fee, which was earlier being paid at the rate of Rs.80,000/- per month has been reduced to Rs.67,800/- +18% GST.

16. First and the foremost question, which needs decision in the present application is whether this court has the jurisdiction in the present proceedings to issue a direction to the tenants to pay the use and occupation charges, qua the demised premises, during the pendency of the revision petition, whereby order dated 20.7.2021 passed by learned executing Court dismissing the objections under S.47 CPC filed by the petitioners have been laid challenge in the main civil revision.

17. Careful perusal of the judgment rendered by the Hon'ble Apex Court in **Atma Ram** (supra) would reveal that following questions arose for its consideration:

> "(i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) upto what point of time the tenant is liable to pay rent at the contractual rate and when does he become liable to pay to the landlord compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent?"

18. In the aforesaid judgment, Hon'ble Apex Court specifically referred to provisions of Order 41 Rule 5 CPC, and held that the appellate court does have the jurisdiction to put the applicant on such reasonable terms, as would, in its opinion, reasonably compensate the decree-holder for the loss occasioned on account of delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. The conclusions were summed up by the Hon'ble Apex Court in the following terms:

> "To sum up, our conclusions are:-

> (1) while passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;
> (2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;
> (3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

19. In case the judgment rendered by the Hon'ble Apex Court in Atma Ram Properties (supra) is read in its entirety, it is clearly elicited that the rationale, for directing the tenant to pay use and occupation charges, is that there was a need to deter the tenant from perpetuating the life of litigation and thereby depriving the landlord of the fruits of litigation, even if successful.

20. The main argument of Mr. Bawa, learned counsel representing the tenant, is that the aforesaid observations came to be made by Hon'ble Apex Court in Atma Ram (supra) in view of specific definition of ‘tenant’ contained in Delhi Urban Rent Control Act, as such, much emphasis can not be laid on the same, while deciding the case at hand, which is governed by the Himachal

Pradesh Urban Rent Control Act. Mr. Bawa, further contended that, in case of the Delhi Act, 'tenant' does not include a person against whom, an order/decree of eviction has been passed as provided under S.2(1)(ii) thereof, whereas, under Section 2(j) of Himachal Pradesh Urban Rent Control Act, 'tenant' means a person, by whom or on whose account, rent is payable for a building or rented land and includes a tenant in continued possession after termination of tenancy in his favour. Mr. Bawa further contended that the aforesaid definition of 'tenant' clearly suggests that the tenancy of a tenant does not terminate after termination of tenancy. 'Tenant" in the Himachal Pradesh Urban Rent Control Act is defined as under:

> "Section 2. Definitions
> ..
> ..
> (j) "tenant" means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after termination of the tenancy and in the event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing with him at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and Explanation-II to this clause, but does not include a person placed in occupation of a building of rented land by its tenant, except with the written consent of the landlord, or a person to whom the collection of rent or fees in a public market, cart-stand or slaughter house or of rents for shops has been farmed out or leased by a municipal corporation or a municipal committee or a notified area committee or a cantonment board';"

21. Hence, this court is not persuaded to agree with the aforesaid contention of Mr. Bawa, because careful perusal of definition of 'tenant', as given in Himachal Pradesh Urban Rent Control Act, suggests that it does not include a person, continuing in possession after order of ejectment is passed against him/her. Otherwise also, very object of payment of

damages/compensation, as has been stipulated by the Hon'ble Apex Court in Atma Ram Properties (supra), is to deter a tenant from perpetuating the life of litigation, as such, once this is the object, argument having been advanced by Mr. Bawa, that since observations/findings came to be made by Hon'ble Apex Court in Atma Ram Properties (supra) in terms of S.38(3) of Delhi Urban Rent Control Act, ratio of the same can not be applied in the case at hand, cannot be accepted because in the aforesaid judgment, Hon'ble Apex Court has clearly held that the rationale for providing compensation for use and occupation charges in favour of the landlords, is to deter the tenant from perpetuating life of litigation.

22. Otherwise also, in the aforesaid judgment, Hon'ble Apex Court has candidly held that the tenant having suffered decree /order of eviction, may continue his fight before the superior forum but, on the termination of proceedings and the decree or order of eviction first passed having been terminated, tenancy stands terminated from the date of decree passed by lower forum.

23. Hon'ble Apex Court in **Martin & Harris Private Limited** v. **Rajendra Mehta,** reported in SCC OnLine SC 792, while following judgment rendered in **Atma Ram** supra, has held as under:

> "12. Now, reverting on the issue of determination of the amount of mesne profits @ Rs.2,50,000/ per month is concerned, the guidance may be taken from the judgment of Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. and Another – (1999) 2 SCC 325, in which this Court held that once a decree for possession has been passed and the execution is delayed depriving the decree holder to reap the fruits, it is necessary for the Appellate Court to pass appropriate orders fixing reasonable mesne profits which may be equivalent to the market rent required to be paid by a person who is holding over the property. In the case of Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. – (2005) 1 SCC 705, this Court held that Appellate Court does have jurisdiction to put reasonable terms and conditions as would in its opinion reasonable to compensate the decree holder for loss occasioned by

delay in execution of the decree while granting the stay. The Court relying upon the provisions of the Delhi Rent Control Act, observed that on passing the decree for eviction by a competent Court, the tenant is liable to pay mesne profit or compensation for use and occupation of the premises at the same rate at which the landlord would have able to let out the premises in present and earn the profit if the tenant would have vacated the premises. The Court has explained that because of pendency of the appeal, which may be in continuation of suit, the doctrine of merger does not have effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a later date.

13. Thus, after passing the decree of eviction the tenancy terminates and from the said date the landlord is entitled for mesne profits or compensation depriving him from the use of the premises. The view taken in the case of Atma Ram (supra) has been reaffirmed in the case of State of Maharashtra vs. Super Max International Pvt. Ltd. and others (2009) 9 SCC 772 by three Judges Bench of this Court. Therefore, looking to the fact that the decree of eviction passed by Trial Court on 03.03.2016 has been confirmed in appeal; against which second appeal is pending, however, after stay on being asked the direction to pay mesne profits or compensation issued by the High Court is in consonance to the law laid down by this Court, which is just equitable and reasonable.

14. The basis of determination of the amount of mesne profit, in our view, depends on the facts and circumstances of each case considering place where the property is situated i.e. village or city or metropolitan city, location, nature of premises i.e. commercial or residential are and the rate of rent precedent on which premises can be let out are the guiding factor in the facts of individual case. In the case at hand, the High Court in the impugned order observed that the tenanted property is located on the main road of New Colony near Panch Batti which is a commercial area in the heart of Jaipur City. The said finding has been arrived considering the voluminous documentary record dispelling the plea taken by the Appellants. However, the Court in the facts and circumstances found it reasonable to determine Rs.2,50,000/ per month as mesne profit. As per the discussion made hereinabove so far as the area of the tenanted premises and the location of the property is concerned, the findings of fact have been recorded by the High Court, in our considered opinion, those findings are based on the material brought on record which are neither perverse nor illegal. The amount of mesne profit as fixed @ Rs.2,50,000/ is also just and proper looking at

the span of time i.e. 10 years from the date of fixing of the standard rent and six year from the date of passing of the decree of eviction. Therefore, the amount of mesne profit has rightly been decided by the High Court while passing the order impugned.

15. In view of the foregoing discussion, in our considered opinion, the order fixing the mesne profit and the order passed on the review petition, filed by the Appellants, are just and proper which do not warrant any interference. Therefore, both the appeals are dismissed."

24. Taking cue from judgment **in Atma Ram** supra, A coordinate Bench of this court in Sh. **Champeshwar Lall Sood & Anr** V/s **Sh. Gurpartap Singh & Ors**, reported in Latest HLJ 2017 (HP) 589, has held as under:

"13. It would be evidently clear from the aforesaid exposition of law that the courts after passing of an order of eviction can always put the occupant of the premises to terms including payment of mesne profit. The very purpose of awarding mesne profit or use and occupation charges is to put a check on the diabolical plans of the tenant who has been ordered to be evicted and ensure that he does not squat on the premises by paying a meager rent. At the same time even the landlord is also compensated to receive higher rent than the contractual rent.

14. In Atma Ram Properties Pvt. Ltd. (supra), it has been clearly laid down that the tenant with the passing of the decree of eviction is liable to pay mesne profits or compensation for use and occupation charges of the premises at the same rate on which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises.

15. Likewise, in Marshals Sons and Co.(I) Ltd. vs. Sahi Oretrans (P) Ltd. (supra), it was categorically held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that 'reasonable' mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

16. At the same time, it was also held that while fixing the amount, subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

17. What is 'reasonable' is difficult to define and this expression being a relative term is required to be considered vis- à-vis, the fact situation

obtaining in a particular case. A three Hon'ble Judge Bench of Hon'ble Supreme Court in Rena Drego (Mrs) vs. Lalchand Soni and others (1998) 3 SCC 341, considered the expression 'reasonable' in the following terms:-

[9] It is difficult to give an exact definition of the word 'reasonable'. It is often said that "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space." The author of 'Words and Phrases" (Permanent Edition) has quoted from In re Nice and Schreiber, 123 F, 987, 999 to give a plausible meaning for the said word. He says "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined." It is not meant to be expedient or convenient but certainly something more than that. While interpreting the word 'reasonable' in Section 13 of the Act, the Bombay High Court has suggested in Krishchand Moorjimal v. Bai Kalavati, AIR 1973 Bombay 46, "that the word 'reasonable' cannot mean convenient or luxurious, though it may not necessarily exclude the idea of convenience and comfort." However, the expression reasonable can be taken as providing an angle which is conformable or agreeable to reasons, having regard to the facts of the particular controversy. [10] In Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar, (1987) 4 SCC 497 : (AIR 1987 SC 2316), this Court has stated that "the word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know." This has been reiterated by Sabyasachi Mukherjee, J. (as his Lordship then was) in Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) P. Ltd., (1989) 1 SCC 532 : (AIR 1989 SC 973).

18. The expression reasonable again came up for consideration before the Hon'ble Supreme Court in Union of India vs. Shiv Shankar Kesari, (2007) 7 SCC 798. It was held as under:-

> "[8] The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states

> that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See: Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another (1987) 4 SCC 497. and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd. and another [(1989) 1 SCC 532]. [9] It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice & Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that. [10] The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See: Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd. (2003) 6 SCC 315)."

19. Even otherwise the expression 'reasonable' would only mean "rational according to the dictates of reason and not excessive or immoderate". An act is said to be reasonable when it is conformable or agreeable to reason, having regard to the facts of the particular controversy. In other words 'reasonable' would mean what is just, fair and equitable in contradiction to anything whimsical, capricious etc. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which

he thinks, as has been held by Hon'ble Supreme Court in Veerayee Ammal vs. Seeni Ammal (2002) 1 SCC 134.

20. Therefore, the term 'reasonable', as has been used by the Hon'ble Supreme Court and this Court is required to be interpreted in a manner so as to ensure that the landlord is reasonably compensated for the loss occurred by the delay in execution of the decree by grant of stay order. The rent has to be determined on case to case basis depending upon the cogent material placed on record by the parties and would therefore, normally be dependent upon the occupation, trade or business etc. of the tenant and would further not be dependent solely on the capacity to pay or actual earning of the tenant, who has suffered an order of eviction.

21. The fixation of mesne profits and use and occupation charges are to be assessed on the basis of the evidence led by the parties as to the prima facie market value existing at the time of admission of the appeal after the eviction order, which has been exclusively bestowed on the landlord so that he would be able to reasonably compensate for loss caused by delay in execution of the decree by grant of stay order. The Court while doing so is not to be guided by the factors that the parties at one point of time while creating the tenancy had agreed at a meager amount of rent, it would depend upon the material produced before the Court which under no circumstances can be ignored even though thereafter the rent so fixed may work out to be multiple times to the one which was fixed at the time of creation of the tenancy.

22. Noticeably, even the tenant had not disputed the agreement entered between one of the landlord with Bata India Ltd., before the appellate authority wherein the rent fixed works out to Rs. 295.56 paise per sq. feet and with the increase contemplated in the agreement, the same on the date of admission of the appeal was @ Rs. 325/- per sq. feet.

23. The agreement reveals that the rentals therein have been fixed for two premises i.e. 42, the Mall, Shimla and 14/1, Middle Bazaar, Shimla. From the photographs appended alongwith the petition filed by the landlord being Civil Revision Petition No. 212 of 2016, which have not even being disputed by the tenant, the premise No. 42 is admittedly located on the prime location i.e. Mall Road, Shimla, whereas the premise No. 14/1 is sandwiched between the premises let out to the tenant and premise No. 42 is approachable only through the narrow

lane of about three feet. Therefore, obviously, the rental of these properties would be presumed to be worked out after taking into consideration the comparative advantage and disadvantages of both the premises. 24. So far as the premises which are in possession of the tenant are concerned, the same admittedly are situated on the main Middle Bazaar, at the heart of Shimla town which over the years have now been come to be reckoned as 'Middle Mall' and is one of the important hub of business activity and has great commercial potential though less than that of the premises located on the Mall Road.

25. Therefore, the fixation of the monthly rental of Rs.12,000/- per month by the learned first appellate Court, even after concluding that the premises in question are in heart of the city is obviously erroneous because such rental is based upon the alleged earning of the tenant instead of the same being based upon the prima facie market rent that the landlord would have been able to let out on vacation by the tenant at the time of the admission of the appeal after eviction order. Moreover, once the Court has before it a lease deed of the premises which pertains to a part of the same building then it will not normally be wise, safe or prudent to rely upon any other document like rent deed of the so called adjoining premises in the vicinity to work out the prima facie market rent."

25. Hon'ble Apex Court, in **Marshall Sons and Co.(I) Ltd.** vs. **Sahi Oretrans (P) Ltd. and another** (1999) 2 SCC 325 has categorically held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent are paid by a person, who is holding over the property. In the aforesaid judgment, Hon'ble Apex Court has further held that, while fixing rent, court would exercise restraint and would not fix any excessive, fanciful or punitive amount. Hon'ble Apex Court, in Rena Drego (Mrs) vs. Lalchand Soni and others (1998) 3 SCC 341, while interpreting the expression, 'reasonable' observed that it is difficult to give an exact definition of the word 'reasonable', however, expression, 'reasonable' can be taken as

providing an angle which is conformable or agreeable to reasons, having regard to the facts of the particular controversy. Subsequently, Hon'ble Apex Court in Union of India vs. Shiv Shankar Kesari, (2007) 7 SCC 798, while interpreting the expression, 'reasonable' ruled that the word 'reasonable' has, in law, prima facie, meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. Hon'ble Apex Court further held that it may be unreasonable to give an exact definition of the word 'reasonable' and expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined. Word/expression, 'reasonable' signifies "in accordance with reason", therefore, coordinate Bench of this court, while taking note of the various judgments passed by Hon'ble Apex Court, while pronouncing judgment in Champeshwar Lall Sood (supra) rightly held that the term, 'reasonable' as has been used by Hon'ble Apex Court and this court is required to be interpreted in the manner, so as to ensure that the landlord is reasonably compensated for the loss occurred by delay in execution of decree on account of stay order. Rent is to be determined on 'case to case' basis, depending upon cogent material placed on record by the parties.

26. It is quite apparent from the aforesaid exposition that a tenant cannot claim himself/herself to be tenant qua the premises in question after passing of eviction order and courts after passing of eviction order can always put the tenant of premises to terms of mesne profits. Since it is not in dispute that the appellate authority has held non-applicants/petitioners liable to be evicted from the demised premises on the ground of rebuilding and reconstruction, subject to production of a duly sanction plan of the building, the non-applicants/petitioners cannot be permitted to claim themselves to be tenants, as has been held in Atma Ram supra that the tenancy terminates with the passing of eviction order. Once, it is not in dispute that the tenants have been

ordered to be evicted, yet they continue to be in possession of the demised premises, they are liable to pay the use and occupation charges qua the premises in question.

27. Though Mr. R.K. BAWABawa, learned senior counsel made an attempt to carve out a case that the eviction order passed by the learned Rent Controller/appellate authority is conditional one and till the time, sanctioned plan is produced by the landlords, tenancy of the non-applicants/petitioners cannot be said to have terminated, however, this Court finds no force in the aforesaid submission of Mr. Bawa, learned senior counsel. Tenancy stands terminated with the passing of eviction order but order of eviction can be executed by learned executing Court on the production of the sanctioned plan.

28. While considering prayer made on behalf of the landlord for issuance of direction to pay the use and occupation charges, this court is only to see whether the tenancy of the tenants stands terminated on account of passing of eviction order and in these proceedings, it is not to be seen by this Court how the said order is to be executed, which shall be decided by learned executing Court.

29. In Atma Ram supra as well as other judgments, it has been repeatedly held by Hon'ble Apex Court and this court that the tenancy terminates with the passing of eviction order. Herein the case at hand, eviction order already stands passed by learned Rent Controller, which has been further upheld by the appellate authority, however, execution of the eviction order passed by learned Rent Controller has been made subject to production of sanctioned plan/map.

30. Though, this Court is not required to go into the question of production of map/plan in the instant proceedings, but even otherwise, order dated 20.7.2021, impugned in these proceedings, reveals that the learned executing Court after being satisfied that sanctioned plan exists in favour of the landlord, has already issued warrant of possession in favour of the landlords.

31. In the civil revision, wherein present application has been filed, eviction order passed by learned Rent Controller, which has been further upheld by the Appellate Authority has not been laid challenge, rather, order passed by learned executing Court, thereby issuing warrant of possession has been laid challenge on the ground that there is no valid sanctioned/approved map in favour of the landlords, as such, till the time, same is produced, non-applicants/petitioners cannot be evicted.

32. Since, there is no dispute qua passing of eviction order by competent Court of law, which has attained finality, this court sees no impediment in accepting the prayer made in the instant application for paying use and occupation charges by the non-applicants/petitioners.

33. Orders passed by the Co-ordinate Bench of this Court in **Champeshwar Lall Sood** supra as well as this Court in **Shambhoonath** supra, if read in their entirety, clearly suggest that the use and occupation charges should commensurate with the amount which landlord would have fetched, had the tenant vacated the premises.

34. In the case at hand, respondents Nos. 1 to 4 have claimed the rent at the rate of Rs.500/- per square feet of the shop in question. Respondents Nos. 1 to 4 have successfully proved on record that the shop situate in Middle Bazaar, which is having lesser commercial value than the shop situate in Lower Bazaar, is fetching rent of Rs.250/- square feet, whereas, shop in question is situate in the middle of Lower Bazaar itself, which is main shopping centre for the residents of entire Shimla as well as other neighbouring Districts. This court can take judicial note of the fact that the Lower Bazaar is thronged by thousands of people daily and as such, shop situate in such location has great commercial value.

35. Interestingly, in the case at hand, non-applicants/petitioners besides having possession of demised premises also own two shops i.e. Shop No. 87, Lower Bazaar and Shop No. 75, The Mall, Shimla, which they have let out to

some other persons on handsome rent. Non-applicants/petitioners despite having two shops are attempting hard to unauthorizedly occupy the shop of respondents Nos. 1 to 4, that too on very meager rent. As per material available on record, Shop No. 87 situate in Lower Bazaar owned by non-applicants/petitioners Jeevan Khanna, has been rented to Crazy Readymades for Rs. 80,000/- and similarly, aforesaid non-applicants/tenants have rented out shop at Mall, Shimla for a consideration of Rs. 4,50,000/- per month. Though, it has been claimed on behalf of the non-applicants/petitioners that they receive only Rs.2,25,000/- per month qua the aforesaid shop and remaining rent is paid directly to other co-owners i.e. Sarthak Khanna, but the fact remains that the aforesaid Shop owned and possessed by the non-applicants/petitioners has been rented by them for monthly rent of Rs.4,50,000/-.

36. Though, the non-applicants/petitioners have placed on record certain documents procured by them from Municipal Corporation, Shimla, to demonstrate that rent qua shops situate in the vicinity of the demised premises is quite less, but this Court having taken note of the fact that the non-applicants/petitioners despite having two shops in their names, have rented out the same to other parties, that too on the handsome rent, as has been taken note herein above, documents of Municipal Corporation, Shimla, with respect to rent being paid qua other shops in the vicinity are of no relevance.

37. Having taken note of the fact that a Co-ordinate Bench of this Court in **Champeshwar Lall Sood** supra fixed rent of the shop in Middle Bazaar, which is less commercial than Lower Bazaar, where the shop in question is situate, at Rs. 250/- per square feet per month, this Court deems it fit to accept the prayer made on behalf of the respondents Nos 1 to 4 to fix use and occupation charges of the demised premises at Rs. 500/- per square feet.

38. Though, the non-applicants/petitioners have claimed the area of demised premises to be less than 220 square feet, but having perused the plan of Shop No. 139, which came to be placed/exhibited on record and stands annexed as Annexure R-1/B, this court finds that area of shop in question is 220 square feet and as such, use and occupation charges are to be assessed accordingly by taking into consideration various aspects i.e. location, potential and area etc. of building. Location, potential, area etc. which are prime factors for fixation of use and occupation charges are not in dispute.

39. In the case at hand, it is not in dispute that the demised premises are situate at a prima location having great business potential. It is not the case of the non-applicants/petitioners that the condition of the building is so bad that it cannot be put to any use, rather, during the pendency of the rent petition before learned Rent Controller, non-applicants/petitioners tried to prove that the building is safe and there is no requirement of rebuilding and reconstruction. Since non-applicants/petitioners have already rented out their shops for Rs.80,000/- per month and Rs. 4,50,000/- per month, use and occupation charges of demised premises at the rate of Rs.1.10 Lakh per month cannot be said to be on higher side.

40. Consequently, in view of the detailed discussion made herein above, this court finds merit in the present application and accordingly the same is allowed and non-applicants/petitioners are directed to pay the use and occupation charges qua the demised premises at the rate of Rs.1.10 Lakh per month from the date of passing of the eviction order dated 17.1.2009 passed by learned Rent Controller. Arrears of use and occupation charges with effect from 17.1.2009 till the date of passing of this order, shall be deposited by the non-applicants/petitioners within a period of two months from today, whereas, the current use and occupation charges shall be paid by the non-applicants/petitioners to the applicant/respondent by 10th of every month

from next month i.e. October, 2022. It is clarified that in case of omission on the part of non-applicants/petitioners to comply with this order, interim order dated 29.7.2021, whereby interim protection has been granted to the non-applicants/petitioners, shall stand vacated and respondents Nos.1 to 4 shall be at liberty to get the order of learned Rent Controller executed in accordance with law. However, in case, non-applicants/petitioners comply with the instant order, order dated 29.7.2021, shall be made absolute.

Application stands disposed of in the afore terms.

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

Between:-

1. SH. SHAMBHOONATH SHARMA
SON OF SH. BALI RAM,

PETITIONER/RESPONDENT NO. 1

2. SH SUNIL DUTT
SON SH SHAMBHU NATH
BOTH OF FLAT NO. 37,
THE MALL, SHIMLA-1.

.. PETITIONER/RESPONDENT

(BY MR. ASHOK SOOD, SENIOR ADVOCATE
WITH MR. KHEM RAJ, ADVOCATE

AND

SH RANDIP SINGH PARMAR
SON OF SH PARAMJEET SINGH,
RESIDENT OF MONASTERY,
OPPOSITE INDIRA GANDHI MEDICAL COLLEGE,
SHIMLA (HP)-1

APPLICANT/RESPONDENT/LANDLORD

(BY MR. NEERAJ GUPTA, SENIOR ADVOCATE
WITH MR. SUNIL MOHAN GOEL, ADVOCATE)

CIVIL MISC. PETITION NO. 10154 OF 2018 IN
CIVIL REVISION NO. 190 OF 2018
DECIDED ON: 23.08.2022

Code of Civil Procedure, 1908 - Section 151- **Urban Rent Control Act, 1987-** Section 14- Prayer on behalf of applicant/respondent is to issue directions to the non-applicant/petitioner No. 1 to pay the use and occupation charges qua the demised premises, which are being occupied by him despite there being eviction order passed by competent court of law- **Held-** It stands duly proved on record that the shops in the vicinity of the demised premises are at present fetching more than Rs. 2.00 Lakh per month with the further condition of increase after every three years- Application allowed with directions. (Para 40)

Cases referred:
Ama Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. (2005) 1 SCC 705;
Champeshwar Lall Sood & Anr V/s Sh. Gurpartap Singh & Ors, Latest HLJ 2017 (HP) 589;
Marshall Sons and Co.(I) Ltd. vs. Sahi Oretrans (P) Ltd. and another (1999) 2 SCC 325;
Martin & Harris Private Limited v. Rajendra Mehta, SCC OnLine SC 792;

This misc. petition coming on for orders this day, ***Hon'ble Mr. Justice Sandeep Sharma***, delivered the following:

O R D E R

By way of instant application, filed under S. 151 CPC, prayer has been made on behalf of applicant/respondent to issue directions to the non-applicant/petitioner No. 1 to pay the use and occupation charges qua the demised premises, which are being occupied by him despite there being eviction order passed by competent court of law.

41. For having bird's eye view of the matter, facts shorn of unnecessary details are that one late Smt. Chander Kanta, mother of the applicant/respondent Randeep Singh Parmar, filed a rent petition under S.14 of the Urban Rent Control Act, 1987 (hereinafter, 'Act'), seeking eviction of the non-applicants/petitioners from Shop No. 33 measuring 290 square feet, The Mall, Shimla, Himachal Pradesh (hereinafter, 'demised premises'). Since said Smt. Chander Kanta expired during the pendency of the eviction petition, applicant/respondent namely Shri Randeep Singh Parmar came to be brought on record as petitioner in the eviction proceedings. Respondent sought eviction of the non-applicants/petitioners from the demised premises on the ground that presently the demised premises is under the sub tenant and Shambhoo Nath is residing out of Shimla and has ceased to occupy the demised premises continuously for 12 months prior to filing petition. Petitioner claimed that the demised premises were let out to Shambhu Nath in 1955 on monthly rent of Rs.1800 inclusive of taxes but now he has sub let the demised premise to

respondent No.2 Sunil Dutt, who has made extensive construction, alterations and additions to the demised premises. Besides above, applicant/respondent also claimed that petitioner No.1 after commencement of the Act has ceased to occupy the demised premises for continuous 12 months prior to filing of the eviction petition without there being any reasonable or sufficient cause and as such he is liable to be evicted.

42. While refuting the aforesaid contentions raised on behalf of applicant/respondent, non-applicants/petitioners claimed in the reply that the petition is actuated with malafide intention to oust them from the demised premises and to increase the rent. On merit, non-applicants/petitioners admitted that late Chander Kanta was the landlady of the demised premises and respondent No.1 Shambhu Nath was tenant over demised premises and the demised premises are non-residential i.e. shop. While specifically refuting that petitioner No.1 has sublet the demised premises to petitioner No.2, Sunil Dutt, they also denied that petitioner No.2 being sub tenant has made extensive construction, alterations and additions to the demised premises.

43. Learned Rent Controller taking note of the aforesaid pleadings adduced on record by parties to the *lis* framed issues and thereafter vide order dated 28.2.2017, while partly allowing the eviction petition, held that petitioner No.1 has ceased to occupy the demised premises for 12 months without any sufficient reasons and grounds. Learned Rent Controller below also held that petitioner No.1 has sublet the demised premises to petitioner No.2 without the knowledge and consent of the applicant/respondent and as such, petitioners are liable to be evicted from the demised premises. Learned Rent Controller below directed the petitioners to hand over the vacant possession of the demised premises to the applicant/respondent, within a period of two months, however dismissed the petition for eviction of the petitioners on the ground of arrears of rent.

44. Being aggrieved and dissatisfied with the aforesaid eviction order, petitioners filed an appeal under S. 24(1) of the Act before Appellate Authority, Shimla, i.e. Rent Appeal No. 22-S/14 of 2017, however, the same was dismissed vide judgment dated 24.4.2018, as a consequence of which, eviction order passed by learned Rent Controller, on the ground of ceased to occupy, came to be upheld. Petitioners now have laid challenge to the judgment dated 24.4.2018 passed by the appellate authority by way of civil revision filed under S.24(5) of the Act in this Court. Vide order dated 29.11.2018, operation and execution of impugned order passed by learned Rent Controller was stayed by this Court.

45. In the pending civil revision, respondent filed instant application seeking direction to petitioner No.1 to pay the use and occupation charges qua the demised premises. Applicant/respondent averred in the application that though both the learned courts below. have concurrently ordered for eviction of the non-applicant/petitioner No.1 from the demised premises on the ground of ceased to occupy, but yet petitioners are desperate to delay the execution of eviction order with ulterior motives. It is claimed that qua the shop No. 33 situate at Mall Road, the rent payable by the non-applicant/petitioner No.1 till the date of passing of order dated 28.2.2017 was less than Rs. 2,000/- per month but now since status of non-applicant/petitioner No.1 after 2.2.2018 is that of unauthorized occupants, they are liable to pay use and occupation charges at prevalent market rate with effect from 1.3.2017 till the date petitioner No.1 occupies the demised premises as unauthorized occupant. With a view to prove the market rent in the vicinity of the demised premises, applicant/respondent placed on record lease dated 4.9.2014 executed between landlord and tenant in respect of shop No. 37 measuring 420 square feet. As per this lease deed rent for the aforesaid shop was fixed Rs. 2,10,000/- for first three years from 14.9.2014 to 13.9.2017 and presently the same is Rs.2,41,500/- per month. Applicant/respondent also averred in the

application that shop No. 37 is just three shops away from the shop in question, as such, in terms of lease deed, present rent of demised premises is Rs. 575/- per square feet. Apart from above, applicant/respondent also placed on record license deed dated 12.4.2018 qua shop No. 76, measuring 296 square feet, perusal whereof reveals that said shop No. 76, The Mall, Shimla has been leased for 9 years for Rs. 2 lakh for first three years, for Rs. 2,30,000 for next three year and Rs.2,60,000 for the last three years.

46. It may be apt to take note of the fact that during the pendency of the revision petition petitioner No.1 Shabhoo Nath expired on 7.8.2019 and vide order dated 19.11.2021 passed in CMP(M) No. 1805 of 2019, petitioner No.2 has been brought on record as his legal representative and now there is only one petitioner i.e. Sunil Dutt, but for the sake clarity, parties are being referred to in this order, as per their original status in the revision petition.

47. Placing reliance upon aforesaid lease deeds, applicant/respondent claimed that on account of unauthorized occupation of the non-applicants/petitioners, applicant/respondent is being put to loss of Rs. 2.00 Lakh per month and as such, non-applicant/petitioner No.1 is liable to pay use and occupation charges of Rs. 2.00 Lakh from the date he occupied the demised premises unauthorizedly.

48. Aforesaid prayer made on behalf of applicant/respondent came to be refuted by way of reply to the application, wherein non-applicants/petitioners claimed that since occupation of tenant has not become unauthorized within the meaning of the Act, after passing of impugned eviction order, present application is not maintainable and as such, deserves to be dismissed. Besides above, it has been further averred that the definition of 'tenant' as provided under S. 2(j) in the Act nowhere provides that on passing of eviction order, possession of tenant qua demised premises will become unauthorized rather as per definition of tenant, "tenant" means any person by whom or on whose account rent is payable for a residential or non-residential building or rented

land and includes a tenant continuing in possession after termination of the tenancy.

49. While refuting the claim of applicant/respondent that he is entitled to use and occupation charges at the rate of Rs. 2.00 Lakh per month, non-applicants/petitioners have averred in the reply that use and occupation charges of demised premises is not more than Rs. 15,000/- per month. With a view to substantiate aforesaid claim, non-applicants/petitioners have placed reliance upon order dated 11.3.2015 passed by this Court, whereby use and occupation charges of shop No. 20, The Mall Shimla has been assessed at Rs. 8,000/- per month. Besides above, non-applicant/petitioner also placed reliance upon orders dated 17.9.2014 passed by this Court in Civil Revision No. 61 of 2014, wherein use and occupation charges came to be fixed at Rs. 9,015 qua shop No. 20, The Mall, Shimla.

50. Though the non-applicant/petitioner No.1 has not been able to dispute the claim of the applicant/respondent with regard to licence/lease deeds, Annexures A-1 and A-2 qua Shop Nos. 37 and 76, The Mall, Shimla, but has stated that applicant/respondent No.1 being 90 years old person is not having financial capacity to pay the rent as is being claimed at the rate of Rs.2.00 Lakh per month. It has been further stated that rent of Rs. 575/- per square feet is neither legal nor proper keeping in view location, area and width of frontage of demised premises in occupation of non-applicant/petitioner No.1 and there is no question of comparison of the demised premises with the shops as stated above.

51. Mr. Ashok Sood, learned senior counsel representing the non-applicant/petitioner vehemently argued that bare perusal of S.24(5) of the Act nowhere provides, condition if any for depositing use and occupation charges for staying the execution of the eviction order. He further stated that otherwise also, non-applicants/petitioners cannot be held to be unauthorized occupants of demised premises especially in view of the plea taken by

applicant/respondent that the non-applicant/petitioner No.1 has sublet the premises in favour of non-applicant/petitioner No.2, He further argued that the definition of 'tenant' as given in S.2(j) of the Act nowhere suggests that on passing of eviction order against tenant, his occupation becomes unauthorized and he would not be treated as 'tenant' under the Act. Mr. Sood further argued that since civil revision having been filed by non-applicants/petitioners laying therein challenge to order passed by learned Rent Controller and judgment passed by appellate authority is pending adjudication, non-applicants/petitioners cannot be held to be in unauthorized occupation of the demised premises, which have been otherwise ordered to be evicted on the ground of ceased to occupy. While inviting attention of this Court to judgment of Hon'ble Apex Court in **Ama Ram Properties (P) Ltd.** v. **Federal Motors (P) Ltd.** (2005) 1 SCC 705, Mr. Sood attempted to carve out a case that in the said judgment, Hon'ble Apex Court has considered definition of 'tenant' as provided in Delhi Rent Control Act and Madhya Pradesh Rent Control Act wherein it is provided that tenant against whom eviction order is passed will not remain tenant under landlord and his occupation will become unauthorized. He submitted that definition of 'tenant' as given in S.2(j) of the Himachal Pradesh Urban Rent Control Act, 1987, nowhere provides that a person against whom eviction order is passed will not remain tenant under the landlord and his occupation becomes unauthorized with the passing of eviction order. Lastly, Mr. Sood contended that otherwise also, use and occupation charges being claimed by the applicant/respondent at the rate of Rs.2.00 Lakh are on higher side, especially when rent qua similar shops in the same vicinity is on lower side, as has been stated in the reply.

52. Mr. Neeraj Gupta, learned senior counsel duly assisted by Mr. Sunil Mohan Goel, Advocate argued that since the non-applicant/petitioner No.1 has ceased to be tenant of demised premises with the passing of impugned order by learned Rent Controller, which has been upheld by appellate

authority and still he is/they are holding possession of property non-applicant/petitioner No.1 is liable to pay the use and occupation charges at the rate of Rs. 2.00 Lakh per month from 1.3.2017 i.e. date of passing of the eviction order. While placing heavy reliance upon the judgment passed by Hon'ble Apex Court in **Atma Ram** supra and judgment of Coordinate Bench of this Court, in **Champeshwar Lall Sood & Anr** V/s **Sh. Gurpartap Singh & Ors**, reported in Latest HLJ 2017 (HP) 589, Mr. Gupta, learned senior counsel argued that Hon'ble Apex Court having taken note of the fact that landlord-tenant litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises, has held the tenants liable to pay damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent.

53. While refuting the submissions made by Mr. Sood, learned senior counsel for the non-applicant/petitioner that in Atma Ram supra, Hon'ble Apex Court specifically dealt with definition of 'tenant' as provided under the Delhi Act, Mr. Gupta argued that though before Hon'ble Apex Court, Delhi Rent Control Act was in question but findings with regard to liability to pay use and occupation charges by a person, who has ceased to be tenant on account of passing of eviction order are binding and relevant for considering prayer made on behalf of the landlords for payment of use and occupation charges, by the person who has ceased to be tenant on account of passing of eviction order in eviction proceedings under Urban Rent Control Act. Lastly, Mr. Gupta, while making this court peruse lease deeds placed on record with regard to rent being charged by landlords of the shops in the vicinity of the demised premises, strenuously argued that since the shop of the applicant/respondent on in the heart of the Mall Road, he has rightly claimed use and occupation charges at the rate of Rs.2.00 Lakh per month.

54. I have heard the learned counsel for the parties and perused the pleadings adduced on record by the respective parties.

55. Since it has been claimed by the non-applicants/petitioners that they have not ceased to be tenants, after passing of eviction order and as such, are not liable to pay use and occupation charges during the pendency of the civil revision before this court, the first and the foremost question which needs to be decided in the application is, "whether this Court has jurisdiction to direct the tenant to pay use and occupation charges qua the demised premises during the pendency of the revision and whether the non-applicants/petitioners are entitled to claim themselves to be tenants qua demised premises after passing of eviction order by the learned Rent Controller or not?

56. Careful perusal of the judgment rendered by the Hon'ble Apex Court in **Atma Ram** (supra) would reveal that following questions arose for its consideration:

> "(i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) upto what point of time the tenant is liable to pay rent at the contractual rate and when does he become liable to pay to the landlord compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent?"

57. In the aforesaid judgment, Hon'ble Apex Court specifically referred to provisions of Order 41 Rule 5 CPC, and held that the appellate court does have the jurisdiction to put the applicant on such reasonable terms, as would, in its opinion, reasonably compensate the decree-holder for the loss occasioned on account of delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. The conclusions were summed up by the Hon'ble Apex Court in the following terms:

> "To sum up, our conclusions are:-
> (1) while passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;
> (2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;
> (3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

58. In case the judgment rendered by the Hon'ble Apex Court in Atma Ram Properties (supra) is read in its entirety, it is clearly elicited that the rationale, for directing the tenant to pay use and occupation charges, is that there was a need to deter the tenant from perpetuating the life of litigation and thereby depriving the landlord of the fruits of litigation, even if successful.

59. The main argument of Mr. Ashok Sood, learned counsel representing the tenant, is that the aforesaid observations came to be made by Hon'ble Apex Court in Atma Ram (supra) in view of specific definition of 'tenant' contained in Delhi Urban Rent Control Act, as such, much emphasis can not

be laid on the same, while deciding the case at hand, which is governed by the Himachal Pradesh Urban Rent Control Act. Mr. Sood, further contended that, in case of the Delhi Act, 'tenant' does not include a person against whom, an order/decree of eviction has been passed as provided under S.2(1)(ii) thereof, whereas, under Section 2(j) of Himachal Pradesh Urban Rent Control Act, 'tenant' means a person, by whom or on whose account, rent is payable for a building or rented land and includes a tenant in continued possession after termination of tenancy in his favour. Mr. Sood further contended that the aforesaid definition of 'tenant' clearly suggests that the tenancy of a tenant does not terminate after termination of tenancy. 'Tenant" in the Himachal Pradesh Urban Rent Control Act is defined as under:

> "Section 2. Definitions
> ..
> ..
> (j) "tenant" means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after termination of the tenancy and in the event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing with him at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and Explanation-II to this clause, but does not include a person placed in occupation of a building of rented land by its tenant, except with the written consent of the landlord, or a person to whom the collection of rent or fees in a public market, cart-stand or slaughter house or of rents for shops has been farmed out or leased by a municipal corporation or a municipal committee or a notified area committee or a cantonment board';"

60. Hence, this court is not persuaded to agree with the aforesaid contention of Mr. Sood, because careful perusal of definition of 'tenant', as given in Himachal Pradesh Urban Rent Control Act, suggests that it does not include a person, continuing in possession after order of ejectment is passed

against him/her. Otherwise also, very object of payment of damages/compensation, as has been stipulated by the Hon'ble Apex Court in Atma Ram Properties (supra), is to deter a tenant from perpetuating the life of litigation, as such, once this is the object, argument having been advanced by Mr. Sood that since observations/findings came to be made by Hon'ble Apex Court in Atma Ram Properties (supra) in terms of S.38(3) of Delhi Urban Rent Control Act, ratio of the same can not be applied in the case at hand, cannot be accepted because in the aforesaid judgment, Hon'ble Apex Court has clearly held that the rationale for providing compensation for use and occupation charges in favour of the landlords, is to deter the tenant from perpetuating life of litigation.

61. Otherwise also, in the aforesaid judgment, Hon'ble Apex Court has candidly held that the tenant having suffered decree /order of eviction, may continue his fight before the superior forum but, on the termination of proceedings and the decree or order of eviction first passed having been terminated, tenancy stands terminated from the date of decree passed by lower forum.

62. Hon'ble Apex Court in **Martin & Harris Private Limited** v. **Rajendra Mehta,** reported in SCC OnLine SC 792, while following judgment rendered in **Atma Ram** supra, has held as under:

> "12. Now, reverting on the issue of determination of the amount of mesne profits @ Rs.2,50,000/ per month is concerned, the guidance may be taken from the judgment of Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. and Another – (1999) 2 SCC 325, in which this Court held that once a decree for possession has been passed and the execution is delayed depriving the decree holder to reap the fruits, it is necessary for the Appellate Court to pass appropriate orders fixing reasonable mesne profits which may be equivalent to the market rent required to be paid by a person who is holding over the property. In the case of Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. – (2005) 1 SCC 705, this Court held that Appellate Court does have jurisdiction to put reasonable terms and conditions as would in its opinion

reasonable to compensate the decree holder for loss occasioned by delay in execution of the decree while granting the stay. The Court relying upon the provisions of the Delhi Rent Control Act, observed that on passing the decree for eviction by a competent Court, the tenant is liable to pay mesne profit or compensation for use and occupation of the premises at the same rate at which the landlord would have able to let out the premises in present and earn the profit if the tenant would have vacated the premises. The Court has explained that because of pendency of the appeal, which may be in continuation of suit, the doctrine of merger does not have effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a later date.

13. Thus, after passing the decree of eviction the tenancy terminates and from the said date the landlord is entitled for mesne profits or compensation depriving him from the use of the premises. The view taken in the case of Atma Ram (supra) has been reaffirmed in the case of State of Maharashtra vs. Super Max International Pvt. Ltd. and others (2009) 9 SCC 772 by three Judges Bench of this Court. Therefore, looking to the fact that the decree of eviction passed by Trial Court on 03.03.2016 has been confirmed in appeal; against which second appeal is pending, however, after stay on being asked the direction to pay mesne profits or compensation issued by the High Court is in consonance to the law laid down by this Court, which is just equitable and reasonable.

14. The basis of determination of the amount of mesne profit, in our view, depends on the facts and circumstances of each case considering place where the property is situated i.e. village or city or metropolitan city, location, nature of premises i.e. commercial or residential are and the rate of rent precedent on which premises can be let out are the guiding factor in the facts of individual case. In the case at hand, the High Court in the impugned order observed that the tenanted property is located on the main road of New Colony near Panch Batti which is a commercial area in the heart of Jaipur City. The said finding has been arrived considering the voluminous documentary record dispelling the plea taken by the Appellants. However, the Court in the facts and circumstances found it reasonable to determine Rs.2,50,000/ per month as mesne profit. As per the discussion made hereinabove so far as the area of the tenanted premises and the location of the property is concerned, the findings of fact have been recorded by the High Court, in our considered opinion, those findings are based on the material brought on record which are neither perverse nor illegal. The amount of

mesne profit as fixed @ Rs.2,50,000/ is also just and proper looking at the span of time i.e. 10 years from the date of fixing of the standard rent and six year from the date of passing of the decree of eviction. Therefore, the amount of mesne profit has rightly been decided by the High Court while passing the order impugned.

15. In view of the foregoing discussion, in our considered opinion, the order fixing the mesne profit and the order passed on the review petition, filed by the Appellants, are just and proper which do not warrant any interference. Therefore, both the appeals are dismissed."

63. Taking cue from judgment **in Atma Ram** supra, A coordinate Bench of this court in Sh. **Champeshwar Lall Sood & Anr** V/s **Sh. Gurpartap Singh & Ors**, reported in Latest HLJ 2017 (HP) 589, has held as under:

"13. It would be evidently clear from the aforesaid exposition of law that the courts after passing of an order of eviction can always put the occupant of the premises to terms including payment of mesne profit. The very purpose of awarding mesne profit or use and occupation charges is to put a check on the diabolical plans of the tenant who has been ordered to be evicted and ensure that he does not squat on the premises by paying a meager rent. At the same time even the landlord is also compensated to receive higher rent than the contractual rent.

14. In Atma Ram Properties Pvt. Ltd. (supra), it has been clearly laid down that the tenant with the passing of the decree of eviction is liable to pay mesne profits or compensation for use and occupation charges of the premises at the same rate on which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises.

15. Likewise, in Marshals Sons and Co.(I) Ltd. vs. Sahi Oretrans (P) Ltd. (supra), it was categorically held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that 'reasonable' mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

16. At the same time, it was also held that while fixing the amount, subject to payment of which the execution of the order/decree is

stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

17. What is 'reasonable' is difficult to define and this expression being a relative term is required to be considered vis- à-vis, the fact situation obtaining in a particular case. A three Hon'ble Judge Bench of Hon'ble Supreme Court in Rena Drego (Mrs) vs. Lalchand Soni and others (1998) 3 SCC 341, considered the expression 'reasonable' in the following terms:-

[9] It is difficult to give an exact definition of the word 'reasonable'. It is often said that "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space." The author of 'Words and Phrases" (Permanent Edition) has quoted from In re Nice and Schreiber, 123 F, 987, 999 to give a plausible meaning for the said word. He says "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined." It is not meant to be expedient or convenient but certainly something more than that. While interpreting the word 'reasonable' in Section 13 of the Act, the Bombay High Court has suggested in Krishchand Moorjimal v. Bai Kalavati, AIR 1973 Bombay 46, "that the word 'reasonable' cannot mean convenient or luxurious, though it may not necessarily exclude the idea of convenience and comfort." However, the expression reasonable can be taken as providing an angle which is conformable or agreeable to reasons, having regard to the facts of the particular controversy. [10] In Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar, (1987) 4 SCC 497 : (AIR 1987 SC 2316), this Court has stated that "the word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know." This has been reiterated by Sabyasachi Mukherjee, J. (as his Lordship then was) in Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) P. Ltd., (1989) 1 SCC 532 : (AIR 1989 SC 973).

18. The expression reasonable again came up for consideration before the Hon'ble Supreme Court in Union of India vs. Shiv Shankar Kesari, (2007) 7 SCC 798. It was held as under:-

> "[8] The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See: Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another (1987) 4 SCC 497. and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd. and another [(1989) 1 SCC 532]. [9] It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and Phrases' (Permanent Edition) has quoted from in re Nice & Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that. [10] The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See: Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd. (2003) 6 SCC 315)."

19. Even otherwise the expression 'reasonable' would only mean "rational according to the dictates of reason and not excessive or immoderate". An act is said to be reasonable when it is conformable or agreeable to reason, having regard to the facts of the particular controversy. In other words 'reasonable' would mean what is just, fair and equitable in contradiction to anything whimsical, capricious etc. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called

upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks, as has been held by Hon'ble Supreme Court in Veerayee Ammal vs. Seeni Ammal (2002) 1 SCC 134.

20. Therefore, the term 'reasonable', as has been used by the Hon'ble Supreme Court and this Court is required to be interpreted in a manner so as to ensure that the landlord is reasonably compensated for the loss occurred by the delay in execution of the decree by grant of stay order. The rent has to be determined on case to case basis depending upon the cogent material placed on record by the parties and would therefore, normally be dependent upon the occupation, trade or business etc. of the tenant and would further not be dependent solely on the capacity to pay or actual earning of the tenant, who has suffered an order of eviction.

21. The fixation of mesne profits and use and occupation charges are to be assessed on the basis of the evidence led by the parties as to the prima facie market value existing at the time of admission of the appeal after the eviction order, which has been exclusively bestowed on the landlord so that he would be able to reasonably compensate for loss caused by delay in execution of the decree by grant of stay order. The Court while doing so is not to be guided by the factors that the parties at one point of time while creating the tenancy had agreed at a meager amount of rent, it would depend upon the material produced before the Court which under no circumstances can be ignored even though thereafter the rent so fixed may work out to be multiple times to the one which was fixed at the time of creation of the tenancy.

22. Noticeably, even the tenant had not disputed the agreement entered between one of the landlord with Bata India Ltd., before the appellate authority wherein the rent fixed works out to Rs. 295.56 paise per sq. feet and with the increase contemplated in the agreement, the same on the date of admission of the appeal was @ Rs. 325/- per sq. feet.

23. The agreement reveals that the rentals therein have been fixed for two premises i.e. 42, the Mall, Shimla and 14/1, Middle Bazaar, Shimla. From the photographs appended alongwith the petition filed by the landlord being Civil Revision Petition No. 212 of 2016, which have

not even being disputed by the tenant, the premise No. 42 is admittedly located on the prime location i.e. Mall Road, Shimla, whereas the premise No. 14/1 is sandwiched between the premises let out to the tenant and premise No. 42 is approachable only through the narrow lane of about three feet. Therefore, obviously, the rental of these properties would be presumed to be worked out after taking into consideration the comparative advantage and disadvantages of both the premises. 24. So far as the premises which are in possession of the tenant are concerned, the same admittedly are situated on the main Middle Bazaar, at the heart of Shimla town which over the years have now been come to be reckoned as 'Middle Mall' and is one of the important hub of business activity and has great commercial potential though less than that of the premises located on the Mall Road.

25. Therefore, the fixation of the monthly rental of Rs.12,000/- per month by the learned first appellate Court, even after concluding that the premises in question are in heart of the city is obviously erroneous because such rental is based upon the alleged earning of the tenant instead of the same being based upon the prima facie market rent that the landlord would have been able to let out on vacation by the tenant at the time of the admission of the appeal after eviction order. Moreover, once the Court has before it a lease deed of the premises which pertains to a part of the same building then it will not normally be wise, safe or prudent to rely upon any other document like rent deed of the so called adjoining premises in the vicinity to work out the prima facie market rent."

64. Hon'ble Apex Court, in **Marshall Sons and Co.(I) Ltd.** vs. **Sahi Oretrans (P) Ltd. and another** (1999) 2 SCC 325 has categorically held that that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent are paid by a person, who is holding over the property. In the aforesaid judgment, Hon'ble Apex Court has further held that, while fixing rent, court would exercise restraint and would not fix any excessive, fanciful or punitive amount. Hon'ble Apex Court, in Rena Drego

(Mrs) vs. Lalchand Soni and others (1998) 3 SCC 341, while interpreting the expression, ‘reasonable’ observed that it is difficult to give an exact definition of the word 'reasonable', however, expression, ‘reasonable’ can be taken as providing an angle which is conformable or agreeable to reasons, having regard to the facts of the particular controversy. Subsequently, Hon'ble Apex Court in Union of India vs. Shiv Shankar Kesari, (2007) 7 SCC 798, while interpreting the expression, ‘reasonable’ ruled that the word ‘reasonable’ has, in law, prima facie, meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. Hon'ble Apex Court further held that it may be unreasonable to give an exact definition of the word ‘reasonable’ and expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined. Word/expression, ‘reasonable’ signifies “in accordance with reason”, therefore, coordinate Bench of this court, while taking note of the various judgments passed by Hon'ble Apex Court, while pronouncing judgment in Champeshwar Lall Sood (supra) rightly held that the term, ‘reasonable’ as has been used by Hon'ble Apex Court and this court is required to be interpreted in the manner, so as to ensure that the landlord is reasonably compensated for the loss occurred by delay in execution of decree on account of stay order. Rent is to be determined on ‘case to case’ basis, depending upon cogent material placed on record by the parties.

65. Careful perusal of exposition of law laid down by Hon'ble Apex Court and this Court clearly reveals that tenant cannot claim himself/herself to be tenant qua the premises in question after passing of eviction order and courts after passing of eviction order can always put the tenant of premises to terms of mesne profits. Though Mr. Sood learned senior counsel for the non-applicants/petitioners argued that finding returned by Hon'ble Apex Court in Atma Ram supra is with regard to definition of ‘tenant’ as provided under

Delhi Rent Control Act but if judgment of Hon'ble Apex Court in Atma Ram supra is read in its entirety, it clearly talks about tenants who despite having been ordered to be evicted leave no stone unturned to defeat the rightful claim of the landlord by filling appeals, revisions etc. In the aforesaid judgment.

66. Since it is not in dispute that learned Rent Controller has held non-applicants/petitioners liable to be evicted from demised premises on the ground of ceased to occupy and such order has been further upheld by appellate authority, non-applicants/petitioners cannot be permitted to claim themselves to be tenants because as has been held in Atma Ram supra, tenancy terminates with the passing of eviction order. Once, tenancy is terminated and yet tenant continues to be in possession of demised premises, he is liable to pay use and occupation charges/mesne profits qua the premises in question.

67. As per aforesaid law taken into consideration applicant/respondent is well within his right to claim use and occupation charges qua the demised premises from the date of passing of eviction order till the non-applicants/petitioners (tenant) continue to retain the possession of the demised premises in the capacity of unauthorized occupants. Since the tenancy of non-applicants/petitioners has terminated with the passing of the eviction order and the civil revision having been filed by the non-applicants/petitioners laying therein challenge to judgment passed by appellate authority upholding the eviction order passed by the learned Rent Controller, is pending adjudication, the question further needs to be determined in the instant proceedings is, “whether use and occupation charges being claimed at the rate of Rs.2.00 Lakh per month are reasonable or on higher side?”

68. If the judgment passed by a Co-ordinate Bench of this Court in Champeshwar Lall Sood supra, is read in its entirety, it clearly suggests that

the use and occupation charges should commensurate with the amount which landlord would have fetched, had the tenant vacated the premises.

69. In the case at hand, it has been specifically claimed by the applicant/respondent that market rate in the vicinity of shop in question is at the rate of Rs.2,41,500/- per month to Rs. 2,60,000/- per month, as is evident from lease deeds, Annexures A-1 and A-2. Since lease deeds placed on record by applicant/respondent have not been disputed by the non-applicants/petitioners, this court has no reason to discard the same. Non-applicants/petitioners have nowhere disputed the lease deeds placed on record, but have claimed that he is unable to pay the claimed amount of use and occupation charges being an old person.

70. Though non-applicants/petitioners have claimed that the demised premises are not in the vicinity of Shop Nos. 37 and 76, the Mall Road, Shimla, but such plea being factually incorrect deserves outright rejection. This court can take judicial note of the fact that demised premises i.e. Shop No. 33 is in the heart of the Mall Road and if such premises are leased/rented in the open market to some multi-national /big brands as have been leased out by landowners of the properties in the vicinity, he would have fetched much more price as is being offered by the non-applicants/petitioners.

71. Lease deeds Annexures A-1 and A-2, clearly reveal that Shop Nos. 37 and 76, the Mall, Shimla have been leased/rented at the rate of more than Rs.2.00 Lakh per month and as per lease deed, amount shall be further enhanced after specific period of two/three years.

72. Interestingly, in the case at hand, record of learned courts below reveals that the applicant/respondent executed agreement dated 18.3.2008 (page 255) qua the demised premises with third party holding that demised premises can be rented out for minimum, of Rs. 1.50 Lakh per month. Though aforesaid document has been disputed by Mr. Sood, learned senior counsel for

the non-applicants/petitioners but execution of same stands proved by one Anil Kumar, as RPW-1/J at page No. 418 of record of learned Rent Controller.

73. Since non-applicants/petitioners were themselves contemplating to rent out the demised premises in favour of third party at the rate of Rs. 1.50 Lakh per month, they cannot be permitted at this stage to claim that market rent of demised premises at this time is not more than Rs. 15,000/- per month, rather, use and occupation charges being claimed by the applicant/respondent at the rate of Rs.2.00 Lakh per month appear to be just and reasonable.

74. The Shops qua which this Court vide order dated 11.3.2015 and 17.9.2014 passed in CR No. 16 of 2015 and CR No. 68 of 2014 has fixed market rate of Rs. 8,000/- and Rs. 9015/- per month cannot be equated with the demised premises i.e. shop of the applicant/respondent which is in the heart of the city, having a great commercial potential, just opposite to Gaiety Theatre and the Municipal Corporation building. Shops Nos. 37 and 76 situate on Mall Road, Shimla, qua which use and occupation charges at the rate of Rs. 2.00 Lakh per month are being received by respective landlords are the ones which can be compared to the demised premises i.e. Shop No. 33.

75. Though, the non-applicants/petitioners have claimed the area of demised premises to be 276.10 square feet but eviction order passed by learned Rent Controller clearly reveals that area of demised premises is 290 square feet (see para 72 of the order dated 28.2.2017 of learned Rent Controller).

76. This court, vide judgment dated passed in Civil Revision No. 165 of 2018 titled **Raman Jain**. v. **Raj Kumar Mehta**, upheld the judgment of appellate authority fixing use and occupation charges of Rs. 1,60,000/- for one month qua the shop, which is on extreme side of Mall Road, towards this Court i.e. M/s Raman Jewelers, whereas, as has been taken note, demised

premises is in the middle of Mall Road, just opposite to Municipal Corporation building and the Police Reporting room, having great commercial potential.

77. Market Rent and use and occupation charges are to be assessed by a Court by doing fair assessment by taking into consideration various aspects i.e. location, potential and area etc. of building. Location, potential, area etc. which are prime factors for fixation of use and occupation charges are not in dispute.

78. In the case at hand, it is not in dispute that the demised premises are situate at a prima location having great business potential. There is no averment that the condition of the building is so bad that it cannot be put to any use, rather, as has been taken note herein above, during the pendency of the rent proceedings before learned Rent Controller, non-applicants/petitioners themselves were trying to rent out the demised premises to third party at the rate of Rs.1.50 Lakh per month and as such by no stretch of imagination, it can be claimed that use and occupation charges, if fixed at Rs.2.00 Lakh per month shall be on higher side. It stands duly proved on record that the shops in the vicinity of the demised premises are at present fetching more than Rs. 2.00 Lakh per month with the further condition of increase after every three years.

79. Consequently, in view of the detailed discussion made herein above, this court finds merit in the present application and accordingly the same is allowed and non-applicant/petitioner, who is legal representative of deceased petitioner No.1, the original tenant, is directed to pay the use and occupation charges qua the demised premises at the rate of Rs.2.00 Lakh per month from the date of passing of the eviction order dated 28.2.2017 passed by learned Rent Controller. Arrears of use and occupation charges with effect from 28.2.2017 till the date of passing of this order, shall be deposited by the non-applicant/petitioner within a period of two months from today, whereas, the current use and occupation charges shall be paid by the non-

applicant/petitioner to the applicant/respondent by 10th of every month from next month i.e. September, 2022. It is clarified that in case of omission on the part of non-applicant/petitioner to comply with this order, interim order dated 29.11.2018 whereby interim protection has been granted to the non-applicants/petitioners, shall stand vacated and applicant/respondent shall be at liberty to get the order of learned Rent Controller executed in accordance with law. However, in case, non-applicant/petitioner complies with the instant order, order dated 29.11.2018, shall be made absolute.

Application stands disposed of in the afore terms.

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

Between:-
SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

…PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

…RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2193 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 346 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

…PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

…RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2199 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 347 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

…PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

…RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2194 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 348 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

...PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

...RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2198 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 349 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

...PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

…RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2201 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 350 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

…PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

…RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION NO. 2200 OF 2022 in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 351 of 2021

Between:-

SUBHASH CHAND, S/O SH. ROSHAN LAL, R/O VPIO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

...PETITIONER

(BY SH. BHUVNESH SHARMA AND SH. RAMAKANT SHARMA, ADVOCATES.)

AND

SARLA DEVI W/O SUBHASH CHAND R/O VPO LADRAUR TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., PRESENTLY RESIDING IN RENTED HOUSE VILLAGE BHARARI, P.O. BHARARI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

...RESPONDENTS

(BY SH. ABHIMANYU RATHOUR AND MS.POONAM GEHLOT, ADVOCATES.)

CIVIL MISCELLANEOUS PETITION
NO. 2195 OF 2022
in CIVIL MISC. PETITION MAIN (ORIGINAL) No. 345 of 2021
Decided on: 27.09.2022

Constitution of India, 1950- Article 227- Protection of Women from Domestic Violence Act, 2005- Section 12- Application by respondent/applicant for release of maintenance amount-Petition filed against the release of the maintenance amount in favour of the respondent/applicant as per prayer in applications filed- **Held- No** reasons to disallow the prayer of the respondent to release the amount in her favour- Applications for release of maintenance amount allowed- Registry directed to release amount- Petition dismissed. (Paras 15, 16, 17)

Cases referred:
Indra Sarma Vs. V.K.V. Sarma, (2013) 15 SCC 755;
Rajesh Vs. Neha and another, (2021) 2 SCC 324;

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

O R D E R

All these applications, for involvement of common question of fact and law, are being decided together by this common order.

2. Respondent/applicant, claiming her right under the provisions of Protection of Women from Domestic Violence Act, 2005 (for short the "DV Act"), had preferred a complaint under Section 12 of the said Act against the petitioner, which was allowed by Judicial Magistrate on 17.2.2011 by awarding maintenance @ `1250/- per month from the date of passing of order with further direction to the petitioner to not to indulge in any act causing mental or physical abuse to the respondent. The complaint was allowed with the following findings:-

> *"17. Thus, from the overall perusal of the evidence, it is seen that the complainant/applicant came to reside with the accused/respondent after the death of respondent's first wife. As per the voter identity card Ext. CW-2/B, Sarla Devi the complainant/applicant is shown to be the wife of Subhash Chand (accused/respondent) and similar fact is mentioned in voter list Mark A and Ext. C-1 i.e. copy of Family Register. It has been alleged by both CW-2 and CW-3 that the complainant/applicant was married to the accused/respondent in a Temple. Though, RW-4 i.e. the Priest of Santosi Mata Temple at Ladrour stated that no marriage takes place in the Temple but still from the perusal of the statements of CW-2 and CW-3, it can be seen that some kind of ceremony must have been performed in the Temple though same was not in accordance with Hindu customs and rights. Further respondent as RW-1 has not denied the fact that the*

complainant/applicant used to reside with him, though, he has stated that nature of the relationship was not that of husband and wife, but the applicant was employed by him to take care of his children. The accused/respondent as RW-1 has also stated that he had employed the complainant/applicant in the year 1999 to take care of his young children, who were about 4-5 years of age at the time of the death of his first wife. The accused/respondent in his cross-examination has identified himself and his son in Ext. CW-2/C. From the bare perusal of photograph Ext. CW-2/C, it is seen that the children are not 4-5 years old, but around 8-9 years old. Thus, the claim of the accused/respondent that the complainant/applicant left him after one month is falsified as from the bare perusal of the photograph it seems that the complainant/applicant must have reside with him for about 3-4 years (because of age of children). Further, the accused/respondent has even added the fact that he had taken the complainant/applicant to Indira Gandhi Medical College and remained with her in Indira Gandhi Medical College from 02.05.2000 till 12.05.2000. It has not been explained by the accused/respondent that why he was with the complainant/applicant for 10 days in Indira Gandhi Medical College, Shimla, if the complainant/applicant had left his house and so called job after one month. Thus, averments of the accused/respondent again get falsified. Though, RW-3 Sh. Subhash Chand has stated in his examination-in-chief that the complainant/applicant was kept by the accused/respondent to take care of his children, but in cross-examination he has admitted the fact that the complainant/applicant had complained against the accused/respondent and they have effected a compromise between them. He further admitted the fact that for one year Smt. Sarla Devi, complainant/applicant resided at Patta with the accused/respondent and after that they had shifted to Ladrour. Thus, RW-3 again pointed towards the fact that complainant/applicant resided with the accused/respondent for more than one month and even was taken by the accused/respondent alongwith him to Ladrour, when he shifted from Patta to Ladrour. Further, RW-3 has also admitted the fact

that in the discharge slip, Smt. Sarla Devi has been mentioned to be his wife. Thu, the facts before the court at that the complainant/applicant resided with the accused/respondent for a considerable period of time. The accused/respondent even took her to Indira Gandhi Medical College, Shimla for her treatment and in the discharge slip she is recorded as a wife of the accused/respondent. In her voter identity slip she is recorded as a wife of the accused/respondent. In her voter identity card as well as voter list she is shown to be the wife of accused/respondent. The accused/respondent has not been able to produce any record to show that he had kept the complainant/applicant as servant and not as a wife. Though, complainant/applicant has not been able to prove that the marriage between her and respondent happened as per the Hindu customs and rights, but she has been able to prove that her relationship with the accused/respondent was in the nature of marriage. Thus, she was in the domestic relationship with the accused/respondent."

3. Respondent Sarla Devi preferred a Criminal Appeal No. 17 of 2011 whereas petitioner Subash Chand preferred Criminal Appeal No. 18 of 2011 before Sessions Judge. Appeal filed by respondent Sarla Devi was allowed and appeal filed by petitioner Subash Chand was dismissed vide common order dated 4.4.2012, enhancing maintenance amount to `2500/- per month with further direction to petitioner to provide alternative accommodation to the respondent or to pay `1500/- per month as rent to her.

4. Petitioner assailed the aforesaid order by filing Revision Petition in the High Court, which was dismissed. Special Leave Petition instituted by the petitioner before the Supreme Court was also dismissed.

5. For non-payment of maintenance amount, respondent preferred applications before the Magistrate for recovery of maintenance allowance and to take action for breach of protection order, which were allowed by Additional Chief Judicial Magistrate, Court No. 1, Hamirpur, H.P. vide order dated

24.11.2021. The said orders were assailed by the petitioner by filing petitions under Section 227 of the Constitution of India.

6. During pendency of these petitions, impugned orders were stayed subject to deposit of `25,000/- in each petition in the Registry of this Court.

7. Petitions preferred by petitioner were dismissed as not maintainable, vide order dated 30.8.2022, with liberty to the petitioner to avail appropriate remedy available to him.

8. These applications have been filed on behalf of respondent for release of `25,000/- each in every case in her favour towards amount payable to her by the petitioner.

9. Release of amount has been opposed by petitioner by relying upon judgment dated 24.12.2021 passed by Principal Judge Family Court, Hamirpur in Civil Suit No. 38 of 2016, RBT No. 10 of 2020, titled Subhash Chand Vs. Sarla Devi, whereby suit filed by petitioner for declaration that respondent is not his legally wedded wife, has been decreed with permanent prohibitory injunction, restraining the respondent from claiming any benefit out of alleged non-existent marriage with the petitioner.

10. Order of grant of maintenance and payment of rent or providing shelter has been passed by the Magistrate under the DV Act, holding that respondent has not been able to prove her marriage with the petiotner as per Hindu customs and rites, but she has been able to prove her relationship with the petitioner in the nature of marriage, amounting to “domestic relationship” between them. The said findings have attained finality after dismissal of Special Leave Petition preferred by the petitioner, against the said order, in the Supreme Court. The said order is in force.

11. No doubt, petitioner has a decree of declaration in his favour that respondent is not his legally wedded wife, whereby she has been

restrained from claiming any benefits by claiming herself legally wedded wife of the petitioner on the basis of non-existent marriage.

12. Learned counsel for the petitioner, to substantiate plea that respondent is not entitled for relief under DV Act, has referred pronouncement of the Supreme Court in ***Indra Sarma Vs. V.K.V. Sarma, (2013) 15 SCC 755,*** whereas learned counsel for the respondent, for claiming right of maintenance under DV Act and pressing their prayer for release of amount in favour of respondent, has referred ***Rajesh Vs. Neha and another, (2021) 2 SCC 324***.

13. In the judgments referred by learned counsel for the parties, the issue regarding entitlement of wife for maintenance under DV Act has been adjudicated. These judgments are not relevant in present case for deciding present applications, as in present case findings returned by the Magistrate that respondent was in 'domestic relationship with petitioner' remained undisturbed up till the Supreme Court. So far as declaratory and prohibitory decree dated 24.12.2021 is concerned, the same puts bar on the respondent to claim any right as 'legally wedded wife of the petitioner', whereas maintenance under DV Act by the Magistrate, has not been awarded holding the respondent a 'legally wedded wife of petitioner', but with findings that she was in 'domestic relationship with the petitioner'.

14. Untill or unless the findings on the basis of which maintenance has been awarded under DV Act are set-aside or become inoperative on account of any order/decree passed by a competent Court, respondent has a right to claim amount in terms of order passed in her favour under the DV Act, as judgment and decree dated 24.12.2021 does not create any legal impediment to the respondent to claim amount in compliance of order passed in her favour under DV Act on account of established 'domestic relationship'.

15. In view of aforesaid discussion, I do not find any reasons to disallow the prayer of the respondent to release the amount in her favour, for passing of judgment and decree dated 24.12.2021.

16. Accordingly, applications are allowed and Registry is directed to release the amount, deposited in these cases by the petitioner, in favour of respondent alongwith up to date interest, if any accrued thereon by remitting the same in her bank account mentioned in para 3 of the application(s), copy of front page of pass book has also been annexed with these applications.

17. Needless to say this amount shall be accounted for towards liability of the petitioner to pay maintenance to the respondent.

The applications stand disposed of.

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

Between:

1. SHRI PAWAN SHARMA, 60 YEARS, SON]
2. SHRI ARUN KUMAR SHARMA, 63
YEARS, SON] OF SHRI JAGAN NATH

BOTH RESIDENTS OF KAILA NIWAS, ENGINE GHAR, SANJAULI, TEHSIL AND DISTRICT SHMLA (HP)-171006.

....PETITIONERS.

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE, WITH MR. AJIT PAL SINGH JASWAL, ADVOCATE)

AND

1. SHRI SANJAY KUMAR SHARMA SON OF SHRI KRISHAN DUTT SHARMA, 112/5, SUBZI MANDI SHIMLA, TEHSIL AND DISTRICT SHIMLA (HP) 171001.

....RESPONDENT.

SHRI SANJAY KUMAR SON OF SHRI JAGAN NATH (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:
(a) SMT. POONAM SHARMA, WIDOW]
(b) MISS. SHRISHTI SHARMA, DAUGHTER]
(c) MISS. SHRUTI SHARMA, DAUGHTER] OF LATE SHRI SANJAY KUMAR
112, GROUND FLOOR, SUBZI MANDI, SHIMLA TEHSIL AND DISTRICT SHIMLA (HP)-171001.

..... PROFORMA RESPONDENTS.

(BY MR. SUMIT SOOD, ADVOCATE, FOR RESPONDENT NO.1)
(RESPONDENTS NO.2 (a) to 2 (c) EX PARTE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 470 of 2020
Reserved on: 07.04.2022
Decided on: 06.07.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 1 Rule 10- **HP Urban Rent Control Act, 1987-** Aggrieved by the order of Rent Controller dismissing the application filed by the present petitioners, filed under Order 1, Rule 10 of the Civil Procedure Code, for impleading them as party respondents in the case- **Held-** Filing of the application at the belated stage was just an attempt to delay the adjudication of the rent petition- Findings returned by the learned Rent Controller are neither perverse nor contrary to the record- No merit- Petition dismissed. (Para 12)

This petition coming on for orders this day, the Court passed the following: **J U D G M E N T**

By way of this petition, filed under Article 227 of the Constitution of India, the petitioners have prayed for the following reliefs:-

> " *It is, therefore, prayed that the petition may be accepted and impugned Order dated 07.09.2020 passed by learned Rent Controller Shimla in Rent Petition No.147/2 of 2014 may be ordered to be set aside and consequently application being CNR No.HPSH 120023882019 (Registration No.1217/2019 under Order 22, Rule 4 read with Section 151 of the Code of Civil Procedure may be dismissed and application being CNR No. HPSH 12003491208 (Registration No.9004891/2018) under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure may be allowed with costs throughout.*"

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

The contesting respondent, Sanjay Kumar Sharma has filed an eviction petition on 20.11.2014, seeking eviction of one Shri Sanjay Kumar, son of Shri Jagan Nath (since dead) from shop No.112, situated on ground

floor, Sabji Mandi, Shimla, H.P. The eviction of the tenant was sought on the ground of bonafide requirement of personal use and occupation to open a retail shop. The eviction petition was contested, *inter alia*, on the ground that the same was bad for non-joinder of necessary parties and that the premises were tenanted to Kirpa Ram Jagan Nath, 6, Sabji Mandi, Shimla, H.P. as the landlord of the premises Shri Devinder Prakash had inducted said proprietorship concern as tenant. Respondent Sanjay Kumar took the stand that the tenanted premises was rented out to M/s Kirpa Ram Jagan Nath, which firm was running a gym from the demised premises.

3. In the rejoinder, petitioner/ landlord reasserted that it was respondent Sanjay Kumar who was running a local style gym in the rented premises, whereas the firm M/s Kirpa Ram Jagan Nath was doing wholesale business of vegetable and fruits in another building of one Shri Sanjay Bhagra and as per the record of Municipal Corporation, it was Sanjay Kumar who was recorded as tenant of the demised premises, whereas proprietor of the firm M/s Kirpa Ram Jagan Nath was Ashok Sharma. It was further the contention of the landlord that he had suffered an eviction order qua shop No.115/1 in Sabji Mandi, Shimla, H.P. and therefore, the demised premises were bonafidely required by him for his personal use to set up his business.

4. The issues in the matter stood framed on 29.11.2016, in which one of the issues framed is that whether the petition is bad for non-joinder of necessary parties or not with onus upon the respondent. The evidence of the landlord was concluded on 24.07.2018. Thereafter, the case was listed for recording the evidence of the respondents on 30.08.2018, when respondents moved an application under Order 8, Rule 1-A (3) of the Code of Civil Procedure to place on record certain statements of account. On 07.12.2018, present petitioners filed an application under Order 1, Rule 10 of the Civil Procedure Code for impleading them as respondents in the case on the ground that the demised premises were rented out by one Shri Devinder

Prakash in the year 1995 to M/s Kirpa Ram Jagan Nath through its proprietor and as initially the father of the present petitioners as well as respondent Sanjay Kumar, namely, Shri Jagan Nath was the proprietor of the said concern, therefore, after his death the proprietorship concern was being continued by all his sons including one Shri Ashok Sharma, who was dead. According to the present petitioners, the eviction petition was filed by the landlord in-connivance with Sanjay Kumar and they were not aware about the pendency of the eviction petition, but as soon as they came to know of the same in the first week of December, 2018, they filed the application for being impleading them as party respondents. The application was contested by the landlord, *inter alia*, on the ground that the filing of the application was abuse of the process of law and was filed by the applicants in-connivance with respondent Sanjay Kumar which was evident from the fact that the application was filed after four opportunities stood granted to the respondents to lead evidence. It was further the stand of the landlord that neither M/s Kirpa Ram Jagan Nath nor the father of the applicants was inducted as tenant in the demised premises. As per them, one of the applicants, Arun Sharma was working in H.P. State Co-operative Bank, whereas the other applicant, Pawan Kumar was settled in separate business and has nothing to do with the demise premises.

5. During the pendency of these proceedings, respondent Sanjay Kumar died. Accordingly, an application under Order 22, Rule 4 of the Civil Procedure Code was filed by the landlord to bring on record his legal representatives i.e. his wife and children. By way of the order under challenge, learned Rent Controller dismissed the application filed by the present petitioners, filed under Order 1, Rule 10 of the Civil Procedure Code, for impleading them as party respondents in the case and allowed the application filed under Order 22, Rule 4 read with Rule 9 of the Civil Procedure Code to

bring on record the wife and children of deceased Sanjay Kumar as respondent in the eviction petition.

6. Feeling aggrieved, the petitioners have filed the present proceedings.

7. Learned Senior Counsel appearing for the petitioners has argued that the impugned order is not sustainable in the eyes of law for the reason that learned Rent Controller erred in not appreciating that it was M/s Kirpa Ram Jagan Nath, a sole proprietorship firm which was the tenant in the premises in question and as the petitioners herein were the sons of Shri Jagan Nath who was actually carrying out the business from the demised premises and further as after the death of Shri Jagan Nath, business activities were being conducted from the demised premises by all the sons of Shri Jagan Nath including the present petitioners, therefore, non-impleadment of theirs as party respondents was not sustainable in the eyes of law. Learned Senior Counsel further submitted that the impugned order is otherwise also not sustainable as the same stood passed without any due application of mind and the findings returned by the learned Rent Controller were in excess of his jurisdiction as the same were likely to prejudice the issue of non-joinder of necessary parties framed on merit as also with regard to the maintainability of the eviction proceedings. Accordingly, a prayer has been made for setting aside of the impugned order and for allowing the application filed under Order 1, Rule 10 of the Civil Procedure Code. No other point was urged.

8. On the other hand, learned counsel for the respondents/ landlord has submitted that there was no infirmity in the order impugned, for the reason that the application filed under Order 1, Rule 10 of the Civil Procedure Code was nothing but an abuse of the process of law. Learned counsel submitted that the landlord had closed his evidence on 24.07.2018 and thereafter, despite four opportunities having been granted to respondent Sanjay Kumar to lead evidence, the same was lead and other brothers of his

who had no connection with the demised premises, moved the application filed under 1, Rule 10 of the Civil Procedure Code for being impleading as the respondent. He further submitted that the contention of the petitioners that the firm, M/s Kirpa Ram Jagan Nath was tenant of the property and Sanjay Kumar was not a tenant in his individual capacity, was totally incorrect and unsubstantiated. Learned counsel submitted that respondent Sanjay Kumar (since deceased) had also taken a similar stand in his reply and accordingly an issue was framed in this regard and therefore also, as this was an issue which has to be decided by the learned Rent Controller, the filing of the application was nothing, but a delay tactic to prolong the adjudication of the rent petition. Learned counsel also submitted that the findings returned by the learned Rent Controller while dismissing the application, called for no interference, for the reason that it was rightly observed by the learned Rent Controller that nothing was placed on record by the present petitioners to demonstrate that they were members or partners of M/s Kirpa Ram Jagan Nath or that they were in any manner carrying out any business activity from the demised premises. Learned counsel submitted that in terms of the record of the Municipal Corporation, Shimla, the demised premises were in possession of deceased Sanjay Kumar as tenant and therefore also the impugned order called for no interference, in terms whereof after the death of Sanjay Kumar, his legal representatives already stood substituted as the respondents.

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

10. It is a matter of record and not in dispute that an issue has been framed by the learned Rent Controller with regard to the fact as to whether the rent petition is bad for non-joinder of necessary parties or not? Because this issue was framed on the objection which was taken in this regard by the

respondent therein before the learned Rent Controller, but natural the onus is upon the respondent before the learned Rent Controller to prove this issue. It is also a matter of record and not disputed during the course of arguments that application under Order 1, Rule 10 of the Civil Procedure Code by the present petitioners was filed after four opportunities were granted to the respondent to lead evidence. The eviction proceedings were filed in the month of November, 2014, whereas the application under Order 1, Rule 10 of the Civil Procedure Code for impleadment of the present petitioners as respondents in the eviction petition was filed in the month of December, 2018. There is no cogent explanation given in the application as to what took the applicants four years to move an application for their impleadment as party respondents. Their contention that they were not aware of the proceedings cannot be accepted for the reason that if their version that the demised premises was in their possession and they were carrying out the business of the proprietorship firm in their capacity as the successor-in-interest of Late Shri Jagan Nath alongwith his other sons is to be believed, then the Court cannot believe that original respondent Sanjay Kumar did not apprise them about the filing of the eviction petition and they came to know about the same in terms mentioned in the application. The allegation of connivance between the landlord and respondent Sanjay Kumar is just bald and without any substantiation of the same with any material on record.

11. In this background, when one peruses the order passed by the learned Rent Controller, one finds no infirmity therein. Learned Rent Controller while dismissing the application for impleadment, held that though admittedly the respondent in his original reply had submitted that the petition was bad for non-joinder of necessary parties on the ground that tenancy was created in the name of M/s Kirpa Ram Jagan Nath, a proprietorship concern, however, the address of the firm was mentioned as 6, Sabji Mandi, Shimla, whereas the address of the demised premises was shop No.112, Ground Floor,

Sabji Mandi, Shimla. Learned Rent Controller also held that the official record of Municipal Corporation demonstrated that the demised premises were recorded in possession of respondent Sanjay Kumar (since deceased) on annual rent of Rs.2,400/- and the name of the owner of the premises was recorded as Devinder Prakash. Learned Rent Controller also held that it was apparent from the pleadings that the gym in the demised premises was being run by Late Sanjay Kumar, whereas M/s Kirpa Ram Jagan Nath was in the business of fruit and vegetable Commission Agent. Learned Rent Controller also held that the allegations that the eviction petition was a result of connivance between the landlord and Sanjay Kumar, was not reflected from the record and there was nothing to suggest that the deceased respondent acted in-connivance with the landlord. Learned Rent Controller also held that the filing of the application at the stage when respondents had already availed four opportunities to lead evidence, demonstrated that the same was filed by the applicant with the intent to delay the adjudication of the petition, whereas the respondent originally impleaded was seriously contesting the petition. Learned Rent Controller also held that it was not the stand of the present petitioners that they were tenants to the exclusion of deceased respondent, but their specific stand was that the shop was in tenancy of a firm and they alongwith the deceased respondent were members of the firm and if their version was to be accepted as it was, then also as one of the members of the firm was a party respondent, therefore also the impleadment of the applicants was not necessary.

12. These findings returned by the learned Rent Controller in the considered view of this Court are neither perverse nor contrary to the record as same are borne out from the record. This Court is also of the considered view that the filing of the application at the belated stage was just an attempt to delay the adjudication of the rent petition, more so in the light of the fact that in view of the stand taken by the original respondent, there already was

an issue framed as to whether the rent petition was bad for non-joinder of necessary parties or not?

13. Therefore, as the Court does not finds any merit in the present petition, the same is accordingly, dismissed, so also the pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Between:-

SHRI DEV RAJ DUGGAL, SON OF SHRI HARI RAM DUGGAL, MODERN WOOL HOUSE, GROUND FLOOR, 80, LOWER BAZAR, SHIMLA HP

....PETITIONER

(BY MR. BIMAL GUPTA, SR. ADVOCATE WITH MR. GURINDER SINGH PARMAR AND MR. VARUN THAKUR, ADVOCATES)

AND

SHRI HARISH KUMAR SON OF SHRI BHUPINDERJIT KASHYAP, RESIDENT OF 80-81, LOWER BAZAAR, SHIMLA HP

...RESPONDENT

(BY MR.BHUPINDERJIT KASHYAP AND MR. VIPIN BHATIA, ADVOCATES)

CIVIL REVISION
NO. 69 OF 2022
Decided on:14.10.2022

HP Urban Rent Control Act, 1987- Section 24(5), 14- Petition against the order passed by the Appellate Authority-II dismissing the application filed by the tenant/petitioner stating that the petitioner had ample opportunities to prove his contention- **Held-** Application not maintainable- Abuse of process of law- Petition dismissed. (Paras 36, 37)

Cases referred:

Akhileshwar Kumar and others v. Mustaqim and others, (2003) 1 SCC 462;
Deena Nath v. Pooran Lal, (2001) 5 SCC 705;
Dwarkaprasad v. Niranjan and another, (2003) 4 SCC 549;
Jagat Ram Chauhan v. Smt. Avinash Partap and another Latest HLJ 2014(HP) 420;
Jagat Ram Chauhan v. Smt. Avinash Partap and another, Latest HLJ 2014 (HP) 420;
Joginder Pal v. Naval Kishore Behal, (2002) 5 SCC 397;
Kailash Chand and another v. Dharam Dass, (2005) 5 SCC 375;
M.L. Prabhakar v. Rajiv Singal, (2001) 2 SCC 355;
Meenal Eknath Kashirsagar (Mrs) v. Traders & Agencies and another, (1996) 5 SCC 344;
Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, (1999) 6 SCC 222;
Ragavendra Kumar v. Firm Prem Machinery & Co., (2000) 1 SCC 679;

Sidhalingamma and another v. Mamtha Shenoy, (2001) 8 SCC 561; Savitri Sahay v. Sachidanand Prasad, (2002) 8 SCC 765;

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

O R D E R

Petitioner has approached this Court against order dated 25.3.2022, passed by the Appellate Authority-II, Shimla in Appeal No.2-S/13(b) of 2021, whereby order dated 7.8.2020, passed by Rent Controller-III, Shimla in an application preferred in Rent Petition No. 170-A of 2019/17 has been affirmed.

2. Parties herein shall be referred, for convenience, as per their status before the Rent Controller i.e. as 'landlord' and 'tenant' respectively.

3. Landlord has filed main petition for eviction of tenant from the shop premises rented to the tenant, on the basis of bonafide requirement of landlord for setting up a business by his wife in the said shop premises being most suitable shop for that.

4. In reply to rent petition, preliminary objection has been taken that landlord has also let out a shop in the same building to a new tenant within five years of filing of petition and landlord has received vacant possession of substantial area on first floor of building after its vacation by a tenant and handed over possession thereof to another party, i.e. to an existing tenant, to allow him to have a larger area under tenancy and entire second floor of building in question is lying vacant and is in occupation of the landlord and, therefore, maintainability of rent petition has been questioned.

5. Reply to eviction petition was filed in June, 2017.

6. After filing of rejoinder, issues were framed on 20.7.2017 and case was fixed for evidence of landlord on 31.8.2017. On 31.8.2017, witnesses

were not present. On that day, an application was preferred by tenant under Order 7 Rule 11 CPC read with Section 151 CPC.

7. In application under Order 7 Rule 11 CPC, by referring grounds already taken in reply regarding renting out of a portion of premises within five years to someone, vacation of premises by another tenant and handing over possession thereof to already existing tenant and also availability of vacant hall in the second floor, it was also contended that landlord was occupying another residential and commercial premises within urban limits of area and has rented out two premises for non-residential and commercial purposes in the same building within five years and, therefore, eviction petition deserves to be rejected under Order 7 Rule 11 CPC.

8. Reply to application under Order 7 Rule 11 CPC was filed on 12.9.2017. Thereafter, time to file rejoinder was taken twice and ultimately on 30.11.2017 the application was directed to be taken into consideration, but on 19.12.2017 for non-availability of original counsel for tenant it was adjourned and, thereafter, either for request on behalf of landlord or tenant, it was adjourned, but finally it was dismissed on 20.6.2017.

9. Being aggrieved by aforesaid order dated 20.6.2017, tenant approached the High Court by filing CMPMO No. 290 of 2018, titled Dev Raj Duggal vs. Harish Kumar. The same was dismissed on 12.9.2019 by a Coordinate Bench of this Court on the grounds that in the H.P. Urban Rent Control Act, 1987 (the Rent Act), the Rent Controller has no explicit jurisdiction vested in it to apply mandate of Order 7 Rule 11 CPC upon a rent petition; there is no specific contemplation in CPC for making the aforesaid provision applicable in a rent petition; for want of explicit applicability of aforesaid provisions, Rent Controller is incapacitated to adjudicate rent petition like a Civil Suit and, thus, the application was held to be mis-constituted and beyond the ambit of specific legislation, i.e. Rent Act, governing and appertaining the trial of eviction petition by Rent Controller. It

was further observed that Rule 12 of H.P. Urban Rent Rules 1990 (Rent Rules) provided specific areas wherein principles of CPC shall be guided principles for adjudicating the application under Rent Act but not provisions of CPC and it does not contemplate applicability of CPC in toto to the eviction petition and, thus, it was concluded that except explicit applicability of CPC in restricted manner specifically enumerated under the Act and Rules, mandates specific exclusion of CPC in the trial of eviction petition. Apart from this, the plea of tenant was also rejected on merit by returning findings that grounds taken in application were also not sufficient grounds to conclude that rent petition, did not, at an incipient stage disclose any valid accruable cause(s) of action or it infracts the consonant therewith provisions of Rent Act and it was observed that after adducing the evidence on issue, the Rent Controller has to return findings thereon and, therefore, it was observed that it would be premature at that stage to conclude that the ground taken in application is merit-worthy warranting dismissal of rent petition at initial stage.

10. After dismissal of aforesaid petition, rent petition was resumed before the Rent Controller and was listed for evidence of petitioner on 30.1.2020 on which date another application under Order 14(3)(a)(i) of H.P. Urban Rent Control Act was preferred by tenant on the same grounds on which application under Order 7 Rule 11 CPC was filed earlier, however, adding two more paras giving information with respect to filing of earlier application as well as CMPMO No. 290 of 2018 preferred by tenant and dismissal thereof. The only difference in this application was that it was filed by citing Section 14(3)(a)(i) of Rent Act instead of Order 7 Rule 11 CPC.

11. This application was dismissed by Rent Controller vide order dated 7.8.2020. The said order was assailed by tenant by filing Rent Appeal No.2-S/13(b) of 2021 which was dismissed by Appellate Authority with observation that tenant would have ample opportunity to prove his contention as made in application during the proceedings of main petition by observing

that question raised by tenant is a question of law and fact which is to be determined after leading evidence by both parties and, therefore, it cannot be determined at that stage as being sought by tenant by filing the application particularly when rent petition is pending for landlord's evidence and thus application was held to be not maintainable at that stage.

12. Learned arguing counsel for tenant has submitted that landlord can seek eviction of tenant under Rent Act on any of grounds or more than one as enumerated in Section 14 of Rent Act but in present case ground on which eviction is sought is neither available to landlord nor mentioned in the Act. He has referred provisions of Section 14(3)(d) which provides a ground for eviction of tenant if premises is required for use as an office or a consulting room by son of landlord who intends to practice as a lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner including a practitioner of Ayurvedic Unani or Homeopathic System of Medicine or for the residence of his son who is married. He has further submitted that in rent petition, premises has been sought to be evicted for bonafide requirement of wife and there is no provision available in Rent Act for eviction for setting up a business for wife and, therefore, rent petition is neither competent nor maintainable but is an abuse to the process of law. He has also reiterated other grounds taken in reply to rent petition as well as in applications filed before the Rent Controller under Order 7 Rule 11 CPC and under Section 14(3) (a)(i) of the Act.

13. It has also been argued that when rent petition on the face of it is not maintainable then there is no reason for continuing the same causing wastage of time of Court by continuing trial.

14. Learned counsel for the landlord has submitted that there is no provision under the Rent Act to file, maintain and adjudicate such application as has been filed by tenant and further that on identical grounds application was dismissed and against the said dismissal, CMPMO No. 290 of 2018 was

preferred by tenant which was dismissed by holding that mandate of Order 7 Rule 11 of Civil Procedure Code is not applicable in the rent petition and applicability of provisions of CPC are deemed to have been specifically excluded except those which have been specifically mentioned in Rule 12 of Rent Rules which provides applicability of CPC in rent petition at particular stage which means that all provisions of CPC are not to be followed by Rent Controller in disposing of a petition under Rent Act. Further that issues raised in the application were already framed for adjudication in main petition which are to be decided on the basis of evidence led by parties, and, therefore, it has been contended that application filed by tenant under Section 14(3)(a)(i) of Rent Act is barred by res-judicata and further that there is no provision of filing and adjudicating such application under Section 14 of the Rent Act.

15. On behalf of landlord, it has been further submitted that in para 18(a)(i) of rent petition landlord has specifically stated that shop premises in occupation of tenant is most suitable for the landlord and landlord has not vacated 'such non-residential premises' without sufficient cause within five years of filing of petition and plea taken in this para and in reply thereto is to be adjudicated by Rent Controller on the basis of evidence to be led by parties and, therefore, it would be pre-mature to decide these issues in an application like the application filed in present case as the landlord has every right to explain his plea in evidence. It has been further contended that plea of tenant that premises is required by wife of landlord to set up a business is not a valid ground for eviction of tenant is not sustainable, for explanation of 'family' as given in Explanation-2 of Section 14(3)(a) of Rent Act also includes wife in it. It has been further submitted that in any case this issue is not to be decided in an application that too without leading evidence, at this stage, being not permissible in the procedure prescribed under the Rent Act and Rent Rules for disposing of an application.

16. Learned counsel for landlord, to substantiate maintainability of eviction petition, for setting up a business for wife, has referred pronouncements of the Supreme Court in ***Joginder Pal v. Naval Kishore Behal,*** **(2002) 5 SCC 397;** and ***Kailash Chand and another v. Dharam Dass,*** **(2005) 5 SCC 375,** as well as judgments of this High Court, based on that, in ***Jagat Ram Chauhan v. Smt. Avinash Partap and another,*** **Latest HLJ 2014 (HP) 420** and judgment dated 18.7.2019, passed in **Civil Revision No.41 of 2019,** tilted as ***Mandeep Singh v. Gian Chand.***

17. It has been contended on behalf of landlord that tenant is 88 years old, having two shops in his possession, whose wife has expired and two daughters are living and earning their livelihood separately but the tenant in order to harass the landlord is filing such applications and taking adjournments for lingering on the matter.

18. Unless specifically excluded, provisions and principles of procedure contained in the Civil Procedure Code shall be applicable in civil proceedings. Exclusion of provisions of CPC may be implied as well as explicit.

19. I have gone through the record and have considered the submissions made by learned counsel for parties.

20. Rent Act is a special enactment framed and made applicable to all urban areas of Himachal Pradesh. Rent Rules provide procedure for conducting the proceedings by Rent Controller under this Act. Civil Procedure Code is a general enactment prescribing procedure in civil litigations. No doubt proceedings under the Rent Act are also civil in nature but such proceedings are governed and regulated by Rent Act and Rules made thereunder.

21. Rent Control Act is a complete Code in itself dealing with filing, adjudication and disposal of rent petitions under it. It provides determination of fair rent, revision of fair rent in certain cases, increase in fair rent,

complaint against cutting off or withholding essential supply or services, eviction of tenants, recovery of immediate possession of premises, also recovery of possession for limited period and deposit of rent by tenant with the Controller as provided under Sections 4, 5, 6, 11, 14, 15, 17 and 21 of the Act.

22. Section 24 provides an appeal against order passed by Rent Controller and Section 24(5) empowers the High Court to entertain revision petition, on application of any aggrieved party or on its own motion or calling and examining the record related to any order or proceedings taken under the Rent Act.

23. In Rent Rules, Rule 3 prescribes that application under Sections 4, 5, 6, 11, 14 and 15 shall be made in Form “A”, Rule 4 provides procedure for permission and recovery of possession under Section 17 of the Act by filing an application in Form “B” and Rule 8 provides filing of an application under Section 21 for deposit/payment of rent with Rent Controller in Form “D”. The manner, in which an application is to be made and procedure to be followed by Controller in disposing of such application, has been provided in Rule 5 and Rule 12. Rule 14 provides procedure for filing appeal whereas Rule 15 provides manner in which application for revision is to be made under Section 24 of the Act.

24. Scheme of Rent Act and Rent Rules not only impliedly but explicitly prohibits the applicability of all provisions of Civil Procedure Code, except those mentioned in the Act and Rules itself, during adjudication of application(s) under the Rent Act. It also specifies the causes and issues regarding which applications can be filed under the Rent Act. Therefore, as already held by Coordinate Bench of this Court in CMPMO No. 290 of 2018 neither provisions under Order 7 Rule 11 CPC nor similar prayer otherwise is permissible to be made during adjudication of rent petition.

25. What cannot be done directly can also not be permitted to be done indirectly. Rule 12 explicitly provides the procedure to be followed by

Rent Controller in disposing of an application under the Rent Act. Rule 12(2) provides that the Controller shall give a reasonable opportunity to parties to state their case. Further that he shall record the evidence of parties and witnesses examined on either side, and while doing so, and also in fixing the date for hearing of parties and their witnesses, in adjourning the proceedings and dismissing the applications for default or for other sufficient reason, the Controller shall be guided by principles of procedure as laid down in CPC, meaning thereby that during adjudication of an application under the Rent Act, applicability of CPC is limited to the extent as provided under Rule 12(2) of Rent Rules. Applications which are permissible to be filed under the Rent Act have been enumerated in Sections 4 to 6, 11, 14, 15, 17, 21 and procedure and performa, i.e. Forms "A", "B" and "D", for filing them have also been provided in and with Rules i.e. Rules 3, 4, and 8. Procedure for filing appeal and revision has also been prescribed under Rules. Therefore, intention of Legislation is very clear that CPC or its principles have not been made applicable in entirety to the proceedings under the Rent Act and special Act has been enacted for disposing of applications made therein as expeditiously as possible without adhering to cumbersome and lengthy procedure provided under CPC for adjudication of a regular suit. Had the intention of Legislation to make all provision of CPC applicable, there would not have been any necessity to mention applicability of CPC, its certain provisions and principles contained therein with special reference as provided in Sections 16(9), Section 25 and Section 26 of Rent Act as well as Rule 5 and Rule 12 of Rent Rules.

26. Rent Act and Rules provide limited application of provisions of CPC or principles contained therein. Explanation in Section 9 provides that expression "legal representative" has the same meaning as assigned to it in the Code of Civil Procedure with further qualification that it includes also, in the case of joint family property the joint family of which the deceased was a member. Section 16(9) provides that Rent Controller may exercise the power of

review in accordance with provisions of Order XLVI of CPC where no application for revision has been made to the High Court. Section 25 empowers the Rent Controller to summon and enforce the attendance of witnesses and to compel the production of evidence as the Court is empowered under CPC; Section 66 provides that orders passed under the Rent Act by Controller or Appellate Authority shall be executable by Controller as a decree of Civil Suit and for this purpose, Controller shall have all powers of Civil Court. Rule 5 provides the manner in which applications are to be made under the Rent Act providing that every such application shall be signed and verified in the manner prescribed under Rules 14 and 15 of Order 6 of CPC. Rule 12 speaks about applicability of principles of procedure as laid down in CPC with respect to recording the evidence of parties, examination of witnesses of either side, fixing the dates for hearing of parties and their witnesses, adjourning the proceedings and dismissing the applications for default or for other sufficient reasons. There is no other provision either in Rent Act or Rent Rules making applicability of the provisions of CPC or principles contained therein as a whole in proceedings under Rent Act. Even Rules 14 and 15 provide a procedure for filing appeal and revision under Section 24 of Rent Act independently without referring procedure prescribed in CPC.

27. Section 14, especially Section 14(3)(i), of Rent Act does not provide filing of an application like present one during pendency of rent petition for rejection of petition as provided in CPC under Order 7 Rule 11 CPC, rather, Rent Act or Rent Rules nowhere provide filing of such application. Had it been the case of invoking wrong provisions, invoke for filing applications, this Court would have considered and decided it on merits without going into the issue of filing of application by mentioning wrong provisions as for doing substantial justice, if application would have otherwise maintainable, it would have been considered and adjudicated on merits of issues raised therein, but no such application is permissible under Rent Act,

therefore, this application was liable to be dismissed and thus present petition arising out of dismissal of such application by Rent Controller as well as Appellate Authority, is also liable to be dismissed being not maintainable.

28. Section 14 nowhere, either explicitly or impliedly, casts duty upon the Rent Controller to entertain such application as has been preferred by petitioner for determining the issues raised therein. Permissibility of such application, especially in absence of provision under the Rent Act, would amount to permitting a mini trial during pendency of main petition and it would be not only dehors the provisions but also against the essence of Rent Act.

29. Section 14 does not provide or speak about filing of application for rejection of petition/application/eviction petition as has been filed by tenant in present case under Section 14(3)(a)(i). Therefore, such application is not maintainable.

30. The Supreme Court in ***Joginder Pal's*** case (supra) has held that expression 'for his own use' is not confined in its meaning to actual physical user by the landlord personally but also includes his normal emanations, with following observations:

> "24. We are of the opinion that the expression 'for his own use' as occurring in Section 13(3)(a)(iii) of the Act cannot be narrowly construed. The expression must be assigned a wider, liberal and practical meaning. The requirement is not the requirement of the landlord alone in the sense that the landlord must for himself require the accommodation and to fulfill the requirement he must himself physically occupy the premises. The requirement of a member of the family or of a person on whom the landlord is dependent or who is dependent on the landlord can be considered to be the requirement of the landlord for his own use. In the several decided cases referred to hereinabove we have found the pari materia provisions being interpreted so as to include the requirement of the wife, husband sister, children including son, daughter, a widowed daughter and her son,

> nephew, coparceners, members of family and dependents and kith and kin in the requirement of landlord as "his" or "his own" requirement and user. Keeping in view the social or socio-religious milieu and practices prevalent in a particular section of society or a particular region, to which the landlord belongs, it may be obligation of the landlord to settle a person closely connected with him to make him economically independent so as to support himself and/or the landlord. To discharge such obligation the landlord may require the tenancy premises and such requirement would be the requirement of the landlord. If the requirement is of actual user of the premises by a person other than the landlord himself the Court shall with circumspection inquire: (i) whether the requirement of such person can be considered to be the requirement of the landlord, and (ii) whether there is a close inter-relation or identity nexus between such person and the landlord so as to satisfy the requirement of the first query. Applying the abovesaid tests to the facts of the present case it is clear that the tenancy premises are required for the office of the landlord's son who is a chartered accountant. It is the moral obligation of the landlord to settle his son well in his life and to contribute his best to see him economically independent. The landlord is not going to let out the premises to his son and though the son would run his office in the premises the possession would continue with the landlord and in a sense the actual occupation by the son would be the occupation by the landlord himself. It is the landlord who requires the premises for his son and in substance the user would be by landlord for his son's office. The case squarely falls within the scope of Section 13(3)(a)(ii) of the Act."

31. Similar view has been taken by the Supreme Court in ***Dwarkaprasad v. Niranjan and another*, (2003) 4 SCC 549.**

32. In ***Kailash Chand's*** case (supra), the Supreme Court, reiterating its view, has explained expressions 'for his own use', 'his own occupation' and 'for occupation by family' and has held that these phrases include

requirements of member of family of landlord or those dependent on him, observing as under:

> "24. The expression 'his own occupation' as occurring in sub-clause (i) of clause (a) of section (3) is not to be assigned a narrow meaning. It has to be read liberally and given a practical meaning. 'His own occupation' does not mean occupation by the landlord alone and as an individual. The expressions "for his own use" and "for occupation by himself" as occurring in two other Rent Control Acts, have come up for the consideration of this Court in *Joginder Pal v. Naval Kishore Behal*, (2002) 5 SCC 397 and *Dwarkaprasad v. Nirnajan and Another*, (2003) 4 SCC 549. It was held that the requirement of members of family of the landlord or of the one who is dependent on the landlord, is the landlord's own requirement. Regard will be had to the social or socio-religious milieu and practices prevalent in a particular section of society or a particular region to which the landlord belongs, while interpreting such expressions. The requirement of the family members for residence is certainly the requirement by the landlord for 'his own occupation'."

33. Following the aforesaid judgment, this High Court has decided **Civil Revision No.16 of 2014,** titled as ***Jagat Ram Chauhan v. Smt. Avinash Partap and another,*** reported in **Latest HLJ 2014(HP) 420** (supra)**;** and **Civil Revision No.41 of 2019,** tilted as ***Mandeep Singh v. Gian Chand,*** on 18.7.2018 (supra).

34. In view of aforesaid exposition of law, plea that requirement for wife cannot be a ground for eviction on bonafide requirement is not sustainable and is rejected accordingly.

35. Plea of landlord that premises occupied by Tenant is most suitable for his bonafide requirement as well as plea of Tenant that landlord is having vacant floors/accommodation and that during last 5 years landlord has rented out another available premises to another Tenant, are to be

adjudicated by the Rent Controller on the basis of material placed before him in the light of pronouncements of the Supreme Court in ***Meenal Eknath Kashirsagar (Mrs) v. Traders & Agencies and another,*** **(1996) 5 SCC 344;** ***Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta,*** **(1999) 6 SCC 222;** ***Ragavendra Kumar v. Firm Prem Machinery & Co.,*** **(2000) 1 SCC 679;** ***M.L. Prabhakar v. Rajiv Singal,*** **(2001) 2 SCC 355;** ***Deena Nath v. Pooran Lal,*** **(2001) 5 SCC 705;** ***Sidhalingamma and another v. Mamtha Shenoy,*** **(2001) 8 SCC 561;** ***Savitri Sahay v. Sachidanand Prasad,*** **(2002) 8 SCC 765;** and ***Akhileshwar Kumar and others v. Mustaqim and others,*** **(2003) 1 SCC 462,** wherein it has been held that landlord is the best judge of his requirement for residential or business purpose and subjective choice of landlord shall be respected by the Court without thrusting its own wisdom or Tenant's choice upon the choice of landlord and suitability has to be seen from convenience of landlord and his family members on the basis of totality of circumstances including their profession, vocation, style of living, habits and background, and choice of landlord to choose either or any of two or more tenanted premises as well as requirement of area or space, for bonafide requirement, is not to be questioned by the tenant.

36. Perusal of present application and application filed under Order 7 Rule 11 CPC at earlier point of time, clearly depicts that both applications have been filed exactly on one and same ground with similar averments in verbatim except two new paras disclosing about filing of an application under Order 7 Rule 11 CPC as well as CMPMO No. 290 of 2018. Though it has been stated in para 5 of latter application, which is in reference in present petition, that CMPMO No. 290 of 2018 was dismissed on the ground that provisions of CPC are not applicable in rent cases, however, it is half truth as in para 7 of judgment in CMPMO No. 290 of 2018 it has been categorically held that grounds taken in application were not sufficient to conclude that either the rent petition does not, at an incipient stage, disclose any valid accruable

cause(s) of action or it infracts with provisions of the Rent Act and further that issues raised in application were to be decided after adducing the evidence by parties facilitating the Rent Controller to return findings thereon and grounds, taken, were considered to be pre-mature at that stage and, thus, application was also dismissed for want of sufficient meritworthy ground warranting the dismissal of main petition at an incipient stage. Therefore, in view of verdict of Coordinate Bench, which has not been further assailed, application in reference was not maintainable at all, rather, it is an abuse of process of law for which tenant deserves to be burdened with costs.

37. Therefore petition stands dismissed. However, taking a lenient view, no cost is being imposed, considering that petitioner was acting bonafide on ill advice.

Parties are permitted to use/produce downloaded copy of this judgment from the Website of the High Court before the authorities concerned and that said authorities shall not insist for certified copy, but, if required, may verify passing of the order from the Website of the High Court of otherwise.

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

Between:-

JITENDER SINGH ALIAS JITU, AGED ABOUT 25 YEARS,
SON OF SHRI SHIV SINGH,
RESIDENT OF VILLAGE PATTI, P.O. HAPLA-JAKHMALA, TEHSIL AND POLICE STATION POKHARI, DISTRICT CHAMOLI GADHWAL, UTTRAKHAND.

(BY SH.ANIRUDH SHARMA, ADVOCATE)

.....APPELLANT

AND

STATE OF HIMACHAL PRADESH

(BY SH. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

...RESPONDENT

CRIMINAL APPEAL
NO.314 OF 2021
Decided on: 31.10.2022

Code of Criminal Procedure,1973 - Section 374 - **Indian Penal Code,1860** - Sections 363, 366 -**Protection Of Children from Sexual Offences Act, 2012** - Section 4 - Appellant allured and enticed a 16 year old victim to marry - made her to leave the house - Both of them spotted and apprehended by police - **Held** - Sentence imposed u/s 4 POCSO reduced to sentence already undergone - No need to reduce sentence u/s 363 and 366 IPC - Exceptional case having special and adequate reasons for reducing less than maximum prescribed sentence - Short difference in the minimum prescribed sentence and sentence already undergone - (Paras 16,19)

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

J U D G M E N T

Appellant has approached this Court assailing judgment dated 31.08.2021, passed by Additional District & Sessions Judge, Fast Track Special Court Solan, District Solan, H.P., in Sessions Trial No.78-S/7 of 2020/2016, titled as *State of Himachal Pradesh vs. Jitender Singh @ Jitu,* whereby appellant has been convicted and sentenced to undergo imprisonment for six years and to pay fine of `5000/-, under Section 363 of the Indian Penal Code (in short 'IPC') and in default in payment of fine, to undergo further simple imprisonment for a period of six months; imprisonment for six years and to pay fine of `5000/- under Section 366 of IPC and in default in payment of fine, to undergo further simple imprisonment for a period of six months; and imprisonment for seven years and to pay fine of `10,000/- under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and in default in payment of fine, to undergo further simple imprisonment for a period of one year.

2. Prosecution case is that the appellant, on 07.05.2016, allured and enticed about 16 years old victim to marry and made her to leave the house to accompany him to Selaqui (Dehradun) and, during this period, violated her person and thereafter both of them were spotted and apprehended by the police and father of victim in the market of Selaqui and brought to Police Station Barotiwala, District Solan, H.P.

3. Investigating Agency was set in motion by father of victim by submitting a complaint Ex.PW.4/B to SHO Police Station Barotiwala alongwith Date of Birth Certificate (Ex.PW.4/A) of victim, issued by Registrar Births and Deaths, Gram Panchayat Barotiwala, stating in complaint that his daughter born on 17.12.1999, studying in +1 in Government School

Barotiwala, left the house on 07.05.2016 at 9.00 a.m. for her personal work in Barotiwala Bazaar, but did not come back, and she was not traceable despite searching for her in all relations and from his own resources, he came to know that appellant, resident of Chamoli Garhwal, working in Andose Pharma Barotiwala, had taken her with intention to marry her after alluring and enticing her. On the basis of this complaint, FIR No.0071 of 2016, dated 20.05.2016 Ex.PW.12/A was registered and investigation was carried on.

4. During investigation, father of victim accompanied by relative PW.7 Kuldeep Kumar went to Selaqui alongwith police party and found appellant and victim in the market and apprehended them. Statements of victim Ex.PW.14/B and Ex.PW.14/B-1 were recorded under Section 161 of the Code of Criminal Procedure (in short 'Cr.P.C.') in presence of her elder sister. Accused as well as victim were subjected to medical examination and clothes of victim and samples of vaginal swab and smear were preserved for chemical analysis. For determining age of the victim, opinion of Radiologist on the basis of X-ray was obtained. Blood samples of victim and appellant on FTA Card were taken for comparison for DNA Profiling. As per opinion of Radiologist age of the victim was between 16 and 18 years. DNA Profiling obtained from garments and samples of swabs and smear of the victim matched with DNA profiling of the appellant-accused.

5. After completion of investigation, challan was presented in the Court against the appellant. During trial, fifteen witnesses were examined by the prosecution and after recording statement under Section 313 Cr.P.C., appellant did not opt for leading any evidence in defence.

6. Considering oral, documentary as well as scientific evidence on record, Trial Court convicted and sentenced the appellant as detailed supra.

7. Learned counsel for the appellant during course of addressing arguments without touching the merits of the case, has limited his prayer for reduction of sentence by referring peculiar facts, circumstances, evidence and

nature of relation between appellant and victim. He has submitted that keeping in view statement of PW.1 victim, PW.4 father of victim, PW.7 relative of victim and conduct of the appellant during 07.05.2016 to 22.05.2016, appellant, if not entitled for acquittal, is definitely entitled for reduction of sentence imposed upon him even less than minimum prescribed sentence of seven years under Section 4(1) of POCSO Act. It has been submitted that though as of now under Section 4(1) of POCSO Act, after amendment applicable w.e.f. 16.08.2019, minimum sentence has been provided ten years, however, at the time of commission of offence, in present case, it was seven years. Whereas, as of now, appellant has served sentence six years and about six months out of seven years total sentence required to be served by him under Section 4 of POCSO Act and he has already served the sentence awarded under Sections 363 and 366 of IPC.

8. It has been submitted on behalf of the appellant that it is not a case of spoiling a minor girl for exploiting her, but it a case of love affair, where appellant and victim were in touch with each other since long and were intending to marry and had interacted sexually with each other out of passion of love and victim left her house on her own volition and accompanied the appellant to his brother's place of residence and stayed with him about 15 days and traced by her father and the police, while roaming in the Bazaar freely alongwith appellant, on the basis of interaction and communication of appellant as well as victim with father of the victim during stay at Selaqui (Dehradun).

9. Perusal of statement of PW.1 victim depicts that she stated that appellant and she were in touch with each other through Cell Phone and they started liking each other and fell in love and even after leaving job by the appellant and going to his Village in Uttarakhand, they remained in touch with each other through mobile phone and appellant came to Village of victim on 06.05.2016 and victim met him in the same night near her house and they

indulged in sexual intercourse with her consent. Whereas, prior to that they never interacted sexually. Appellant wanted to marry her and, thus, proposed the victim to accompany him for the said purpose to Dehradun. Whereupon, on next morning, victim met appellant at Barotiwala market and accompanied him to Dehradun and appellant took her to his brother's place at Selaqui (Dehradun). They stayed for 15 days in the residence of elder brother of appellant, where his Bhabhi Kusum was also there. They sexually interacted during that period. On 22.05.2016, her father alongwith police came to Village Selaqui and met her in the market alongwith appellant.

10. In cross-examination, PW-1 victim stated that there was only one room in Village Selaqui and appellant used to reside separately with his friend and during that period, they had sexual intercourse once in the room of brother of appellant. Further that, her parents were not aware about her love affair with appellant and appellant was Rajput by caste and she was Brahmin by caste and further that, appellant never allured her for marriage and she accompanied the appellant voluntarily and case was registered against the appellant under the influence of her parents. However, claim of the appellant that victim disclosed her age as 18 years to him was denied by the victim. She categorically stated that during the period w.e.f. 07.05.2016 to 22.05.2016, she had contacted her parents.

11. PW.4 father of victim, though, has stated that no telephonic call of his daughter came to him during 07.05.2016 to 19.05.2016, however, he has volunteered to say that appellant called him telephonically. From his statement as well as statement of his relative, it can be easily inferred that at the time of lodging FIR and visiting Selaqui for searching the victim, family of victim knew that appellant and victim were at Selaqui. This fact indicates that family of victim knew about stay of victim with appellant at Selaqui and, it appears, that FIR was lodged either for difference in caste of families or parents failed to persuade victim to come back to the house.

12. Father of victim is not a rustic villager, but is an employee in Private Company at Barotiwala and Police Station is also situated in Barotiwala. His daughter went on missing since 07.05.2016, but he did not approach the police immediately thereafter or within a day or two thereafter, but only after about 13 days which also fortifies claim of the appellant as well as victim that both of them were interacting with parents of victim during the said period and probably for difference in caste, ultimately parents of victim decided to lodge FIR to recover and bring their daughter back to avoid inter-caste marriage.

13. It is also noticeable that victim in her deposition in the Court has disclosed her date of birth as 26.10.1999. Whereas, as per Panchayat record her date of birth is 17.12.1999 and Radiologist had opined her age between 16 and 18 years and, therefore, learned counsel for the appellant has also raised doubt about true age of the victim and, thus, as prayed that benefit of doubt deserves to be extended to the appellant, who, by heart, was intending to marry victim, but not to spoil her.

14. There is no positive evidence on record indicating that victim or anybody else had ever disclosed her age to the appellant and there is also nothing on record to establish that appearance and physique of the victim was such so as to enable to construe by any prudent man that she was minor having age below 18 years.

15. In aforesaid facts and circumstances, it is also apparent that appellant is an accused for commission of offence under Sections 363, 366 of IPC and Section 4 of POCSO Act, for age of the victim as for her age of 16 years, her consent is immaterial being no consent in the eyes of law. However, it can be considered for reduction of sentence less than the minimum sentence provided under Section 4 of POCSO Act, particularly for the reason that out of maximum sentence of seven years, appellant has already served sentence about six years and six months and also for the reason that

possibility for lodging FIR on account of difference in caste of boy and girl can also not be ruled out.

16. In the light of evidence on record, I am of the opinion that it is an exceptional case having special and adequate reason and peculiar facts and circumstances for reducing sentence less than maximum prescribed sentence, particularly keeping in view the short difference of period in the minimum prescribed sentence and the sentence already undergone.

17. During pendency of appeal, photocopy of certificate dated 04.01.2022 issued by Superintendent, Model Central Jail, Kanda, was also produced indicating that as on 04.01.2022 appellant had served sentence of five years seven months and twenty eight days and remaining sentence at that time was one year four months and two days. Now, we are in October 2022 and about more than nine months have also passed and, as such, appellant has served sentence about six years and six months.

18. In view of above discussion, sentence imposed upon the appellant under Section 4 of POCSO Act, is reduced to the sentence already undergone. Appellant has already served awarded sentence under Sections 363 and 366 of IPC. Therefore, there is no need to reduce sentence awarded under these sections. Amount of fine imposed by the Trial Court is maintained as it is and in case of default in payment of fine, appellant shall undergo six months simple imprisonment for each default in place of imprisonment awarded by the Trial Court. In case of deposit of fine, appellant shall be released forthwith.

19. With aforesaid modification in the sentence imposed upon the appellant, appeal is dismissed. Pending application, if any, also stands disposed of.

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

Between:-

RAJESH KUMAR (RETIRED INSPECTOR, HRTC, UNA) S/O LATE SHRI DEVI CHAND R/O HOUSE NO. 10, WARD NO.1, SHIV MANDIR AREA, NAGAR PANCHAYAT DAULATPUR CHOWK, TEHSIL GHANARI, DISTT. UNA, H.P.

....PETITIONER

(SH. S. P. CHATERJI, ADVOCATE)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION THROUGH ITS MANAGING DIRECTOR, OLD BUS STAND, SHIMLA 171003, H.P.

2. DIVISIONAL MANAGER, HIMACHAL RD. TPT. CORPORATION, HAMIRPUR DIVISION, HAMIRPUR, HP.

....RESPONDENTS

(SH. VIKAS RAJPUT, ADVOCATE).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.7472 of 2020
Reserved on: 14.10.2022
Decided on: 20.10.2022

Constitution of India 1950-Art 226-Initial appointment of petitioner as Conductor in HRTC-promoted to the post of Inspector- attained the age of superannuation-Matter of consideration of the promotion of applicant to the post of Chief Inspector-**Held**- The promotion to a vacant post is said to have been made from the date, the promotion is granted and not from the date on which, the post fell vacant or vacancy was created-Petition dismissed.(Para 15). Title: Rajesh Kumar vs. Himachal Road Transport Corporation Page-489

Cases referred:

Major General H.M. Singh, VSM vs. Union of India and another, (2014) 3 SCC 6;

Union of India & others vs. K.K. Vadhera & others 1989 (Suppl.) (2) SCC 625;

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

O R D E R

By way of instant petition, petitioner has prayed for the following substantive relief:-

> *"That the respondent corporation may be ordered to consider the promote applicant to the post of Chief Inspector w.e.f. 10.7.2017 or from the date he has become eligible for promotion to the post of Chief Inspectors i.e. 12.8.2017, with all consequential benefits."*

2. Petitioner approached erstwhile H.P. State Administrative Tribunal by filing O.A. No. 146 of 2019. On abolition of the Tribunal, the matter came to be transferred to this Court and registered as CWPOA No. 7472 of 2020.

3. Initial appointment of petitioner was as Conductor in HRTC. He was promoted to the post of Inspector on 12.8.2014. Petitioner attained the age of superannuation on 31.12.2017.

4. On 10.7.2017, DPC was convened to consider the cases of Inspectors for promotion to the post of Chief Inspectors. The DPC recommended names of ten incumbents against fourteen available vacancies to the post of Chief Inspectors.

5. The grievance of the petitioner is that on the date of DPC i.e. 10.7.2017, he had already rendered two years, ten months and twenty eight days service as Inspector and was short of one month and two days to complete three years. As per Recruitment & Promotion Rules for the post of Chief Inspector, by promotion, the feeder category was Inspector and was required to have completed three years service as Inspector. Petitioner was not considered by the DPC held on 10.7.2017. He was not granted the benefit

of relaxation, though such benefit in the past had been granted to the similarly situated persons. Further contention of the petitioner is that he became eligible for promotion to the post of Chief Inspector on 12.8.2017, yet he was not promoted till his superannuation on 31.12.2017, despite availability of eight vacancies to the post of Chief Inspector. As per petitioner, no waiting panel was prepared, which had also prejudiced his rights.

6. Respondents have contested the claim of petitioner on the grounds that on the date of holding of DPC, the petitioner had not completed three years service as Inspector and was not eligible to be considered for promotion to the post of Chief Inspector. It is further submitted that since the petitioner was not eligible, he could not have found place in waiting panel. The DPC could not be held before retirement of petitioner due to enforcement of Model Code of Conduct as also pending dispute with regard to seniority of Inspectors. The next DPC was held in April, 2018 by which time, petitioner had already retired. As regards relaxation given to similarly situated persons in past, it is submitted that it was a onetime exercise taken in the past.

7. In rejoinder, petitioner has placed reliance on Chapter-XVI of Hand Book on Personnel Matters, Volume-I (Second Edition), published by Government of Himachal Pradesh to stress that the respondents were liable to hold DPC as per these instructions not only for existing vacancies but also for anticipated vacancies for the year.

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

9. Learned counsel for the petitioner on being asked by the Court, fairly conceded that no power was vested with the Chairman or the Board of respondent No.1 to relax the condition of Recruitment & Promotion Rules for the post of Chief Inspector, especially to relax the minimum service criteria in the feeder category post. It being so, merely because relaxation was allowed in the past by the Chairman of the Board to some of the incumbent(s), petitioner

cannot claim right of equality or parity as the same would amount to allowing negative parity, which is not permissible under law.

10. Admittedly, the petitioner had not rendered three years service as Inspector on 10.7.2017, when DPC was convened and as such, his non consideration for promotion to the post of Chief Inspector cannot be faulted with. Similarly, petitioner cannot have found place in the waiting panel, if any, as he was well short of eligibility condition.

11. As regards non holding of DPC after 10.7.2017 till the retirement of petitioner, respondents have submitted that the DPC could not be held on account of two reasons; firstly that modal code of conduct was in operation and secondly, there was a pending dispute with respect to seniority list of Inspectors. Such contention has not specifically been rebutted by the petitioner. In this view of the matter, the non holding of DPC before superannuation of petitioner cannot be sufficient to grant relief to the petitioner. The next DPC was held in April, 2018 and petitioner had superannuated before such date. Petitioner had become eligible to be promoted as Chief Inspector on 12.8.2017. There is nothing on record to suggest that the petitioner had raised any grievance before respondents with respect to non holding of DPC before his superannuation. It is not even the case of petitioner that despite his representation, respondents had not convened the DPC.

12. Petitioner approached the erstwhile Tribunal on 8.4.2019 i.e. after more than fifteen months of his retirement. In absence of any claim having been raised by petitioner regarding non holding of DPC before his superannuation, petitioner cannot be held entitled to the relief as prayed for in the instant petition.

13. Learned counsel for the petitioner has placed reliance on Chapter-XVI of Hand Book on Personnel Matters, Volume-I (Second Edition), in support of his case. The contention so raised will not help the cause of

petitioner for the reasons that he had not raised any claim before his superannuation regarding non holding of the DPC or non consideration of anticipated vacancies to the post of Chief Inspector during relevant year. It is settled that the promotion to a vacant post is said to have been made from the date, the promotion is granted and not from the date of which, the post fell vacant or vacancy was created. Reference can be made to judgment passed by Hon'ble Supreme Court in ***Union of India & others*** vs. ***K.K. Vadhera & others 1989 (Suppl.) (2) SCC 625***.

14. Learned counsel for the petitioner further placed reliance on the judgment passed by Hon'ble Supreme Court in ***Major General H.M. Singh, VSM*** vs. ***Union of India and another***, ***(2014) 3 SCC 670***, in support of his case. After going through the aforesaid judgments, I am of the considered view that the petitioner cannot draw any benefit therefrom as the fact situation in both the cases is different. In that case, the DPC was not held for fourteen months and was held only two days prior to superannuation of the petitioner therein. Further, the petitioner in that case had been repeatedly seeking consideration orally as well as writing by informing the authorities about the date of his retirement, whereas in the facts of instant case, petitioner had not agitated his alleged cause of action before date of his superannuation.

15. Resultantly, the petition fails and the same is accordingly dismissed, with no orders as to costs. Pending applications, if any, also stand disposed of.

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

Between:

KULDEEP SINGH THAKUR, S/O SH. LEKH RAM THAKUR, AGED 35 YEARS, PRESENTLY WORKING AS JE DW IN HGPPWSD SUB DIVISION, R/O VILL: DEORIGHAT, PO & TEHSIL: THEOG, DISTT: SHIMLA, HP

….PETITIONER.

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

AND

1. STATE OF HP THROUGH SECRETARY (PWD) TO THE GOVT. OF HP, SHIMLA, HP.
2. ENGINEER-IN-CHIEF, HPPWD, SHIMLA-1.
3. SUPERINTENDING ENGINEER, 2nd CIRCLE, HPPWD, SHIMLA-2.
4. EXECUTIVE ENGINEER, HPPWD, DIVISION, THEOG, SHIMLA, HP.

….RESPONDENTS.

(M/S SUMESH RAJ, DINESH THAKUR, SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.235 of 2019
Decided on: 30.09.2022

Constitution of India, 1950-Article 226-Claim of the petitioner that he was engaged as a Daily Wage Surveyor-claims for being entitled for being regularized against the post of Junior Engineer-Matter of regularization in service-**Held**- Neither the petitioner fulfilling the criteria of ten years of service

as a Junior Engineer as contemplated in Mool Raj Upadhyaya Versus State of H.P. and others, 1994 Supp (2) Supreme Court Cases 316, nor completing eight years of service in terms of the subsequent policy of regularization which was brought into force by the State Government from time to time-Petition devoid of merits.(Para 10).

This petition coming on for hearing this day, the Court passed the following: **J U D G M E N T**

Brief facts necessary for the adjudication of the present petition are as under:-

The petitioner claims that he was engaged as a Daily Wage Surveyor w.e.f. 01.01.1994. As per him, though the muster roll of Surveyor was issued to him, yet the work of Junior Engineer was extracted from him by the Department. Further, according to the petitioner, he was entitled for being regularized against the post of Junior Engineer w.e.f. 01.01.2002. However, this was not done and his services were regularized vide order dated 06.07.2007, which action of the Department is totally against the law laid down by the Hon'ble Division Bench this Court in *Gouri Dutt* & Ors. Versus *State of H.P. Latest HLJ 2008 (HP) 366* as well as other decisions rendered by this Court, reference whereof is given in Para 6.7 of the amended plaint. It is in this background that the petition has been filed with the prayer that direction be issued to the respondents to regularize the services of the petitioner against the post of Junior Engineer w.e.f. 01.01.2002 on the basis of law laid down by this Court in *Gouri Dutt* & Ors. Versus *State of H.P.* (supra).

2. Learned counsel for the petitioner by placing reliance upon this Court in *Gouri Dutt* & Ors. Versus *State of H.P.* (supra) has vehemently argued that the act of the respondent-Department of not following the said judgment in the course of regularizing the service of the petitioner is totally arbitrary.

Learned counsel further submitted that as the case of the petitioner was squarely covered by the pronouncement of law made by this Court in *Gouri Dutt* & Ors. Versus *State of H.P.* (supra), therefore, the act of the respondent-State of regularizing the service of the petitioner as a junior engineer w.e.f. 06.07.2007 be declared as bad in law and the services of the petitioner be ordered to be regularized as Junior Engineer, w.e.f. 01.01.2007, with all consequential benefits. No other point was urged.

3. The petition is opposed by the State, *inter alia*, on the ground that the reliance being placed upon the judgment of *Gouri Dutt* & Ors. Versus *State of H.P.* (supra) by the petitioner is totally mis-misconceived. Learned Additional Advocate General has argued that it is not as if the petitioner was initially engaged as a Surveyor and thereafter as a Junior Engineer on daily wage basis, but while regularizing his services, his services were regularized as a Surveyor without calling upon him to opt as to whether he intended to be regularized as a Surveyor or Junior Engineer. Learned Additional Advocate General submits that here is a case where services of the petitioners were regularized as a Junior Engineer only and that too as per his seniority as determined vis-a-vis his status when he was initially engaged on muster roll basis as Junior Engineer. On these basis, it has been prayed that the present petition being devoid of any merit be dismissed.

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

5. The contentions of the petitioner have already been recorded by me hereinabove. A perusal of the reply which has been filed to the amended petition by the State demonstrates that the petitioner initially joined the respondent-Department as a daily wage Surveyor (Class-III) w.e.f. 01.01.1994 and he worked as such upto 25.08.1997. Taking into consideration the fact that the petitioner was possessing the diploma in Civil Engineering, he was issued muster roll of Junior Engineer (Civil) Class-III w.e.f. 26.10.1997.

Thereafter, he served the Department on daily wage basis as such. The services of the petitioner were regularized as Junior Engineer (Civil) vide order dated 06.07.2007, in terms of the regularization policy of the respondent-State, dated 09.06.2006, which provided for prospective regularization post completion of eight years of service with cut of date as 31.03.2004. It is further mentioned in the reply that the petitioner accepted his regularization as a Junior Engineer and joined his duties as such w.e.f. 11.07.2007, without any protest.

6. Now, in the backdrop of the averment as they are contained in the petition as also in the reply, when one peruses the law laid down by this Court in *Gouri Dutt* & Ors. Versus *State of H.P.* (supra)), the Court concurs with the arguments made by learned Additional Advocate General that the reliance being placed upon the petitioner upon the said judgment is totally misconceived. Here the case of both the parties is that though the petitioner was initially engaged as a Surveyor in the year 1994, but taking into consideration the qualification possessed by the petitioner, he was issued the muster roll as a Junior Engineer w.e.f. October, 1997 and he continued to serve as such till his services were regularized as a Junior Engineer in the year 2007. Therefore, it is not a case where the services of the petitioner were regularized against a lower post as compared to his right of regularization against a higher post.

7. In *Gouri Dutt* & Ors. Versus *State of H.P.* (supra), Hon'ble Division Bench of this Court in Para-20 thereof has been pleased to hold as under:-

> "*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 prayer 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 the 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. As mentioned hereinabove, the facts of this case are not akin to the fact situation as stands envisaged by the Hon'ble Division Bench while delivering the judgment in *Gouri Dutt* & Ors. Versus *State of H.P.* (supra).

9. At this stage, learned counsel for the petitioner submits that if that is so, then it was incumbent upon the State to have had offered regularization to the petitioner against the post of Surveyor upon completion of eight years of service as Surveyor and Junior Engineer. The Court is of the considered view that this contention of the petitioner cannot be considered by the Court at this stage, because it was for the petitioner to have had raised this issue at the relevant point of time, which admittedly was not done. However, otherwise also the relief being prayed for by the petitioner that his services be ordered to be regularized as a Junior Engineer w.e.f. from the year 2002, cannot be granted to him. This is for the reason that it is own case of the petitioner that as in the year 1994 he was given muster roll of a Surveyor and muster roll of a Junior Engineer was given to him only for the month of October, 1999 onwards. That being the case, in the year 2002, neither the petitioner was fulfilling the criteria of ten years of service as a Junior Engineer as contemplated in *Mool Raj Upadhyaya* Versus *State of H.P. and others, 1994 Supp (2) Supreme Court Cases 316*, nor he was completing eight years of

service in terms of the subsequent policy of regularization which was brought into force by the State Government from time to time.

10. Accordingly, in view of the above observations, this petition being devoid of any merit is dismissed, so also the pending miscellaneous applications, if any.

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

Between:

1. SHYAM LAL S/O SH. DINA NATH R/O VILLAGE BAHAL, P.O. HANUMAN BAROG, TEHSIL ARKI DISTRICT SOLAN, H.P.

2. DHANI RAM S/O OF SH. MAHIYA RAM, R/O VPO GHAYANA, TEHSIL ARKI DISTRICT SOLAN, H.P.

....PETITIONERS.

(BY. MR. DALIP K. SHARMA, ADVOCATE)

AND

1. HIMACHAL PRADESH STATE ELECTRICITY BOARD LTD. THROUGH ITS SECRETARY, VIDUT BHAWAN SHIMLA-4.
2. SE HPSEB, OPERATION CIRCLE, SOLAN, H.P.
3. EXECUTIVE ENGINEER, ELECTRICAL DIVISION, HPSEB, ARKI DISTRICT SOLAN, H.P.
4. DURGA RAM S/O SH. PARAS RAM, T MATE, SECTION GIANA CHANDI, ELECTRICAL DIVISION, HPSEB, ARKI, DISTRICT SOLAN, H.P.
5. JAI RAM S/O SH. PAAS RAM, T MATE, SECTION KHALIA, ELECTRICAL DIVISION, HPSEB, ARKI DISTRICT SOLAN, H.P.
6. DHANI RAM S/O SH. BIHARI RAM, T MATE, SECTION BHARARIGHAT, ELECTRICAL DIVISION, HPSEB, ARKI DISTRICT SOLAN, H.P.
7. RATTI RAM S/O SH. NARAYANU RAM, T MATE, SECTION ARKI, ELECTRICAL DIVISION, HPSEB, ARKI DISTRICT SOLAN, H.P.
8. PREM CHAND S/O SH. CHET RAM, T MATE, SECTION DARLAGHAT, ELECTRICAL DIVISION, HPSEB, ARKI, DISTRICT SOLAN, H.P.
9. BALDEV S/O SH. SHIV RAM, T MAT, SECTION BHUMTI, ELECTRICAL DIVISION, HPSEB, ARKI DISTRICT SOLAN, H.P.
10. JAGAT RAM, S/O SH. TULSI RAM, T MATE, SECTION BHUMTI, ELECTRICAL DIVISION,HPSEB, ARKI DISTRICT SOLAN, H.P.

....RESPONDENTS.

(BY. MR. ANIL K. GOD, ADVOCATE, FOR RESPONDENTS NO.1 TO 3)
(NONE FOR REMAINING RESPONDENTS)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.1652 of 2019
Decided on: 28.09.2022

Constitution of India, 1950-Art 226-the petitioners engaged in the respondent-Board on daily wage basis as T-mates-Matter of promotion of the petitioners from the due date along with all consequential benefits with interest-**Held**- petitioners have been discriminated vis-à-vis the private respondents-the provisional and final seniority list are ordered to be read down by issuing a direction to the respondent-Board to re-fix the work charge status as also the date of regularization of the petitioners by construing their initial date of engagement to be the date of their first engagement in the respondent-Board-Petition allowed-(Para 11).

This petition coming on for hearing this day, the Court passed the following: **J U D G M E N T**

By way of this petition, the petitioners have prayed for the following relief:-

> "*a) That Writ of Certiorari may kindly be issued for quashing and setting aside Annexure P-6 & Annexure P-7, whereby the representation of the petitioners has been rejected as well as the provisional seniority list circulated by the respondent board dated 26.2.2011.*
> *b) That writ of Mandamus may kindly be issued directing the Respondents to promote the petitioners from the due date alongwith all consequential benefits with interest.*"

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

The case of the petitioners is that they were engaged in the respondent-Board on daily wage basis as T-mates as under:-

Petitioner No.1: Date of engagement 26.11.1981,
petitioner No.2: date of engagement 21.11.1982,
petitioner No.3: date of engagement 26.11.1983.

Further, as per the averments made in the petition, petitioner No.1 continuously served with respondent-Board w.e.f. 01.08.1986, petitioner No.2 w.e.f. 21.09.1986 and petitioner No.3 w.e.f. 21.08.1987. Annexure P/1 is the seniority list dated 04.07.1997, which has been placed on record to demonstrate the said fact, in which the names of the petitioners are at serial No.17, 18 and 22, respectively. It is further the case of the petitioners that the services of the petitioners were subsequently regularized w.e.f. 01.01.2000 and the work charge status was conferred upon them w.e.f. 01.01.1998. This was done by respondent-Board by construing their date of engagement, to be the date and year from which they continuously served the respondent-Board.

3. The grievance of the petitioners is that in the year 2011, vide Annexure P/7, a provisional seniority list of T-mates as on 01.01.2011 was circulated by respondent-Board and perusal thereof demonstrated that whereas the petitioners were placed on work charge status and thereafter regularized by taking their date of engagement to be 01.08.1986, 21.09.1986 and 21.08.1987, respectively, however, the services of the private respondents who were initially recruited on daily wage basis as T-mates after the petitioners, were in fact brought on work charge basis and were subsequently regularized by taking the date of their recruitment to be the initial date of their engagement.

4. Learned counsel for the petitioners has submitted that the documents on record (including the documents appended with the reply filed by respondent-Board, Annexure P/1) clearly demonstrates that the initial date of engagement of the petitioners on daily wage basis is prior to the private respondents, yet in the matter of conferment of work charge status as also regularization, they have discriminated vis-à-vis the private respondents.

Accordingly, he has submitted that Annexures P/6 and P/7 as prayed for, be quashed and set aside as the provisional seniority list which has been circulated by respondent-Board be also declared as bad and a direction be issued to the respondents to confer the work charge status as well as regularize services of the petitioners by taking into consideration the date when they were initially recruited on daily wage basis with all consequential benefits including promotions.

5. The petition is resisted by respondent-Board, *inter alia*, on the ground that in terms of Annexure RA1, as the private respondents were senior to the petitioners as far as the date of initial engagement is concerned, therefore, there is nothing wrong with the action of respondent-Board of conferring work charge status/regularization and promotion on the private respondents before the petitioners.

6. Learned counsel also argued that respondent-Board has been regularizing the daily wage rated persons in different categories engaged by it, pursuant to the settlement arrived between the Board of Management and the representatives of the Employees Union before the Hon'ble Supreme Court on the issue of fixation of seniority etc. as also the relevant Recruitment and Promotion Rules. Petitioners belong to the cadre of T-mates and the said cadre is a divisional cadre and the private respondents were brought on regular cadre of T-mate on the basis of seniority position as also subject to the availability of the post. According to him, the petitioners were juniors as daily rated beldar to the private respondents and the services of the petitioners were thus brought on regular cadre by the respondent-Board as per their turn. Accordingly, a prayer has been made that as there is no merit in the present petition, the same be dismissed.

7. I have heard learned counsel for the parties and have also carefully gone through the pleadings as well as documents appended with the petition.

8. The prayer of the petitioners has already been referred to by me in the above part of the order. The stand of the respondent-Board has also been referred to by me in the above part of the order. A perusal of Annexure P/5, which is the order passed by the competent authority, pursuant to the directions passed by this Court in an earlier writ petition filed by the present petitioners, i.e. CWPT No.7517 of 2008, decided on 13.12.2010, demonstrates that the reasons which have been given therein while rejecting the claim of the petitioners are akin to the stand which has been taken by the respondent-Board in its reply.

9. As per the petitioners, the initial date of engagement of the private respondents is later than that of the petitioners. A perusal of Annexure P/1, which is the seniority list of the daily rated temporary workmen circulated by the respondent-Board, dated 04.07.1992 harmoniously read with Annexure RA-1, which is a comparative statement of the applicants and respondents appended by the respondent-Board with its reply, demonstrates that there is merit in the said contention of the petitioners. The date of initial engagement of private respondents as per record is after the petitioners.

10. That being the case, it is not understood as to how the conferment of work charge status and regularization of the private respondents could have been before the petitioners. Though, it has been mentioned in the reply by the respondent-Board that the cadre of T-mates is a divisional cadre, but then it is not spelled out either in Annexure P/6 or in the reply of the respondent-Board that the private respondents were serving in some other divisional cadre as compared to the petitioners. In fact, the stand of the respondent-Board is that the private respondents were senior to the petitioners. As there is no justification in the reply in the light of what is contained in Annexure P/1 as also Annexure RA-1, as to why the private respondents were conferred work charge status and regularization as also further promotion before the petitioners, this Court is of the considered view

that the present petition deserves to be allowed. At this stage, it is further relevant to mention that there is no whisper in the response filed by the respondent-Board, from which it could be inferred that though the engagement of the petitioners was prior to that of private respondents, but in between the petitioners either left the job, so as to justify the conferment of work charge status/regularization/promotion of the private respondents before the petitioners or there was some other valid reason behind it.

11. Accordingly, as the petitioners have been discriminated vis-à-vis the private respondents, who were initially engaged after the petitioners, this writ petition succeeds and whereas Annexure P/6 is quashed and set aside, the provisional and final seniority list are ordered to be read down by issuing a direction to the respondent-Board to re-fix the work charge status as also the date of regularization of the petitioners by construing their initial date of engagement to be the date of their first engagement in the respondent-Board, as mentioned in the petition, i.e. the initial date of their engagement. Consequential benefits including promotion etc. to ensue. Actual monitory benefits be confined to three years before the passing of the judgment by this Court and till then monitory notional benefits be given to the petitioners. It is made clear that the Court is not setting aside the conferment of work charge status or regularization or subsequent promotions which have been given to the private respondents and in case the need so arises, then for the purpose of implementation of this judgment, the respondent-Board may create superannuary posts in favour of the petitioners, as a matter personal to them.

12. Petition is disposed of in above terms, so also the pending miscellaneous applications, if any.

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

Between:

OM PRAKASH SHARMA S/O SH. BHONTU RAM, R/O VILLAGE DHANGO, P.O. BADHERA, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P.

....PETITIONER.

(BY MR. DALIP K. SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY, PUBLIC WORKS DEPARTMENT, TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002, H.P.
2. THE ENGINEER-IN-CHIEF, HIMACHAL PRADESH PUBLIC WORKS DEPARTMENT, SHIMLA-171002, H.P.
3. THE SUPERINTENDING ENGINEER, 6TH CIRCLE, HIMACHAL PRADESH PUBLIC WORKS DEPARTMENT, KULLU.
4. EXECUTIVE ENGINEER, KULLU, DIVISION NO.1, H.P.P.W.D. KULLU, H.P.

....RESPONDENTS.

(M/S DINESH THAKUR, SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2126 of 2019
Decided on: 31.08.2022

Constitution of India, 1950-Article 226-Petitioner initially appointed as Road Inspector on daily wage basis in the respondent-Department in the year 1982-services regularized-Matter of consideration of the case of the petitioner for promotion to the post of Junior Engineer (Civil) as per the Recruitment and Promotion Rules, 1979-**Held**-It is a matter of record that when the earlier DPC took place in the year 2003, the higher qualification acquired by the petitioner was not reflected in his service record. Unfortunately, the petitioner neither agitated this fact at the relevant time, nor in this Writ Petition also, this fact has not been agitated-Petition devoid of merits-Petition dismissed.(Para 11).

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

J U D G M E N T

By way of the present petition, the petitioner has prayed for the following relief:-

> *"(i) That the respondents may kindly be directed to consider the case of the petitioner for promotion to the post of Junior Engineer (Civil) as per the Recruitment and Promotion Rules, 1979, keeping in view the backlog of the posts, falling in the category of Road Inspectors (W.I.) prior to 19.2.2004 and also to grant all consequential benefits to the petitioner.*"

2. The case of the petitioner is that he was initially appointed as Road Inspector on daily wage basis in the respondent-Department in the year 1982. His services were regularized as Road Inspector w.e.f. 01.01.1994. Respondent-Department vide notification dated 13.01.1979 framed Himachal Pradesh Public Works Department Subordinate Services Class-III Junior Engineer (Civil) Technical, Recruitment and Promotion Rules. In terms of these Rules, the post of Junior Engineer (Civil) was to be filled in 90% by way of direct recruitment and 10% by way of promotion. 4% of the posts were to be filled in by way of promotion from amongst Surveyors and Road Inspector who possessed the recognized and unrecognized diplomas in Civil Engineering. The additional 4% quota of promotion was to be filled in from amongst Surveyors and Road Inspector who were not possessing any technical qualification and were matriculate and having twelve years service in the grade. These Rules were amended in the year 1982. The State of Himachal Pradesh issued a notification dated 06.04.1995, in terms whereof different categories of Inspectors i.e. Road Inspector, Mortar Mate, work Inspector, Ferry Inspector, Work Supervisors and Earth Work Mistries etc. were clubbed together and a new category of Work Inspectors was constituted. Further, as per the petitioner, while in job, he sought permission from the concerned Department to obtain a diploma in Civil Engineering from British Institute, Mumbai. This permission was granted to him and accordingly, he completed his diploma course of Civil Engineering from the said Institute in the year

2001. After acquiring the qualification, he requested the Department to enter the same in his Service Book. The seniority list of Work Inspectors was circulated by the respondent-Department from time to time and the name of petitioner was figuring at serial No.494 thereof, whereas name of one Shri Shamsher Singh, Work Inspector, whose initial date of appointment on regular basis was 01.01.1994, was being reflected at serial No.500. Office Order dated 15.03.2003 (Annexure PE) was issued by respondent No.2, on the recommendation of the Departmental Promotion Committee (hereinafter to be referred as 'DPC') and in terms thereof, Shamsher Singh, who was working as a Work Inspector in Jubbal Division and who was at serial No.500 in the seniority list was promoted against the post of Junior Engineer. Petitioner preferred a representation dated 09.09.2004 to respondent No.2, in terms whereof he made a request to the respondent to consider his case for promotion against the post of Junior Engineer taking into consideration his technical qualification. However, whereas no action was taken on the representation of the petitioner, a notification dated 19.02.2004 by the was issued by the Department in terms whereof the earlier Recruitment and Promotion Rules to the Post of Junior Engineer (Civil) were repealed and the new R&P Rules to the post were brought into force. In terms of the new Rules, copy whereof is appended with the petition as Annexure PG, 90% of the posts were to be filled in by way of direct recruitment and 10% to be filled in by way of promotion. The quota of promotion was to be filled in *inter alia* 1% from amongst Work Inspector having diploma of at least three years duration in the trade of Civil Engineering or its equivalent from a recognized University. The incumbent was also to have at least eight years' service in the grade. The petitioner continued to rake up his case for promotion in terms of the 1979 Rules and the matter was also under active consideration of the Department as is evident from the documents appended with the petition. In terms of Annexure PL, the communication dated 02.09.2005, Chief Engineer, Central

Zone, Himachal Pradesh Public Works Department, Mandi wrote to Engineer-in-Chief, Public Works Department and stated that the case of the petitioner for promotion to the post of Junior Engineer be considered sympathetically. In the meanwhile, on the issue as to whether the posts by way of promotion were to be filled in as per the Recruitment and Promotion Rules which were in force at the time when the posts fell vacant or in terms of the Rules which were in vogue with the DPC met, a judgment was passed by this Court in *CWP(T) No.2967 of 2008*, titled *Narain Dutt* Versus *Financial Commissioner-cum-Secretary, P.W.D. to the Govt. of Himachal Pradesh and another and other connected matters*, decided on *22.03.2010*, in which directions were issued to consider the case of the petitioners therein for promotion to the post as per the old Recruitment and Promotion Rules. It is in this background that the present Writ Petition filed by the petitioners seeking a mandamus to the respondents to consider the case of the petitioner for promotion to the post of Junior Engineer as per 1979 Rules.

3. The petition has been resisted by the State, *inter alia*, on the grounds that when DPC was convened on 07.03.2003 for consider the eligible candidates for promotion to the post of Junior Engineer from amongst the Work Inspector, though, the petitioner was possessing the qualifying service of eight years, yet his name could not be considered for promotion as he had not submitted the diploma certificate to the office of Engineer-in-Chief, Himachal Pradesh Public Works Department till then. As per the respondents, the petitioner through his representation dated 09.09.2003, had requested Engineer-in-Chief, Himachal Pradesh Public Works Department to consider his name for promotion to the post meant for said category which had already been filled up in terms of the DPC convened on 07.03.2003. Thereafter, new Recruitment and Promotion Rules came into force. It is further mentioned in the reply by the State that the petitioner sought No Objection Certificate from the competent authority to acquire higher education, which was subsequently

granted to him by Superintendent of Engineer, 6th Circle, Kullu, vide letter dated 02.05.2001. The petitioner acquired the diploma in Civil Engineering from Britist Institute, Mumbai within an year and three months from the date of permission, which course otherwise was of three years duration. The Diploma was submitted by the petitioner to the Executive Engineer on 23.09.2002, but the same was not intimated to the competent authority, i.e. the office of Engineer-in-Chief, Himachal Pradesh Public Works Department and petitioner thereafter, vide letter dated 09.02.2004, requested the office of Superintending Engineer, Mandi to incorporate his additional qualification i.e. diploma in Civil Engineering in his service record, but by that time the DPC had already been convened on 07.03.2003. Further, as per the Department, the incumbent appearing at serial No.500 (Shamsher Singh) was the last person having diploma in Engineering from British Institute, Mumbai and though the petitioner was above him in the seniority list, but he could not be considered for promotion due to the reason that request of the petitioner through Superintending Engineer to incorporate his diploma in Civil Engineering in the service record was received after the DPC was convened.

4. As far as holding of the Review DPC is concerned, it is mentioned in the reply that in terms of the directions of this Court given in CWP No.2967 of 2008 and other connected matter, a Review DPC was convened on 18.08.2011 on the basis of vacancies available upto 18.02.2004, in which the name of the petitioner alongwith others was considered for promotion and the petitioner was also found fit for promotion, but due to non-availability of adequate posts meant for Work Inspector category, he could not be promoted. His counterpart, namely, Narayan Singh, being senior to the petitioner was considered for promotion.

5. In rebuttal, learned counsel for the petitioner has submitted that in the Review DPC, one Shri Jagat Pal was also considered and promoted from the category of the petitioner against the post of Junior Engineer and as on

the date when the Review DPC was held, Shri Jagat Pal was dead. He apprised the Court that Shri Jagat Pal died on 26.04.2005, whereas promotion was conferred upon him on the basis of the Review DPC w.e.f. 18.02.4004.

6. I have heard learned counsel for the parties and have gone through the pleadings as well as documents appended with the petition.

7. In compliance to the directions passed by this Court, learned Additional Advocate General has produced the record of the DPC which was convened on 07.03.2003. A perusal of the report of the DPC demonstrates that in all the DPC recommended seven candidates fit for promotion and this did not include the name of the petitioner for the reason that the qualification of diploma had not yet been entered in the service record of the petitioner. A perusal of the Review DPC which was hold on 18.08.2011 demonstrates that the candidates who were at serial No.239, 263, 302, 427, 444, 445, 494, 500, 527 and 851 in the seniority list of Work Inspector were considered by the DPC for promotion by way of Review DPC. From amongst the said incumbents, the candidate whose name was at serial No.239, namely, Partap Singh Khimta, who had retired on 31.03.2011 was found fit for notional promotion w.e.f. 18.02.2004 and recommendation was made accordingly. Similarly, with regard to the candidate mentioned at serial No.263, Shri Ranvir Singh, the remarks were that this candidate already stood promoted on 15.03.2003. Candidates at serial No.302, namely, Narayan Dutt and candidate at serial No.427, namely, Jagat Pal, were found fit for promotion by the DPC and they were recommended for promotion w.e.f. 18.02.2007. The candidate at serial No.444 Bhagwant Singh was not found fit for promotion by the DPC. The candidate who was at serial No.445 in the seniority list, namely, Shri Narayan Singh was also found fit for notional promotion w.e.f. 18.02.2004 and so was the petitioner whose name was at serial No.494 in the seniority list. Learned Additional Advocate General has apprised the Court

that the reason as to why Shri Jagat Pal was considered for promotion in the Review DPC despite the fact that he had died on 26.04.2005 was the fact that as on the date when the eligibility of the candidates was being considered by the DPC to assess them for promotion, this candidate was alive and therefore, as even dead and retired persons have to be considered by the DPC, Shri Jagat Pal was accordingly considered for promotion by the DPC and notional promotion was conferred by him w.e.f. 18.02.2004. He, however, informs the Court on the basis of record that though the petitioner was also found fit for notional promotion w.e.f. 18.02.2004, but as no vacancy was available, it is in lieu thereof that he could not be promoted.

8. In view of the record which has been produced by the learned Additional Advocate General in the Court and having given a careful consideration to the averments made in the petition as well as the stand taken by the respondent-Department in the reply, this Court is of the considered view that at this stage, the prayer of the petitioner cannot be accepted. It is a matter of record that when the earlier DPC took place in the year 2003, the higher qualification acquired by the petitioner was not reflected in his service record. Unfortunately, the petitioner neither agitated this fact at the relevant time, nor in this Writ Petition also, this fact has not been agitated.

9. Be that as it may, even in the Review DPC, it is not as if the petitioner was not considered, but as the vacancies were not available, therefore, promotion could not be conferred upon the petitioner.

10. As far as the contention of the petitioner that promotion could not have been conferred upon Shri Jagat Pal, who died on 26.04.2005 is concerned, this Court is of the considered view that said contention of the petitioner does not has any merit, for the reason that the incumbent in issue was alive as on 18.02.2004, i.e. the date from which notional promotions were conferred upon him and no fault can be found on the said act of the State.

11. Therefore, in view of the above discussion, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Between:
SH. MANGAL SINGH ALIAS NARINDER SINGH S/O SH. MANI RAM, R/O VILLAGE KHILL, P.O. MAKRIRI, TEHSIL JOGINDER NAGAR, DISTRICT MANDI, H.P.

….PETITIONER.

(BY. MR. RAHUL MAHAJAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH ITS PRINCIPAL SECRETARY (IPH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. THE ENGINEER-IN-CHIEF, I&P.H., U.S. CLUB, SHIMLA, H.P.
3. THE EXECUTIVE ENGINEER, I&P.H., DIVISION, PADHAR, DISTRICT MANDI, H.P.

….RESPONDENTS.

(M/S SUMESH RAJ, DINESH THAKUR, SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.3128 of 2019
Decided on: 15.09.2022

Constitution of India, 1950- Article 226- Petition to direct the respondents to grant seniority and to regularize the petitioner w.e.f. 01.04.1998 along with all consequential benefits – Issue as to whether the period for which petitioner was in police custody shall be counted as break in service- **Held-** Petitioner was arrested for alleged commission of certain offences- was acquitted and such acquittal was confirmed by the High Court – Labour Court held that in case of acquittal by High Court, period of custody shall not be considered as break in service- Accordingly, the petition is allowed as petitioner has been in continuous service except for the period of custody- Petitioner to be regularized with all consequential benefits including seniority (Para 13-16)

This petition coming on for hearing this day, the Court passed the following: **J U D G M E N T**

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

> "*a). Direct the respondents to give seniority from the date when the petitioner was entitled for regularization/work charge status i.e. w.e.f. 1.04.1998, in accordance with law.*
> *b). Direct the respondents to regularize the petitioner w.e.f. 01.04.1998 alongwith all consequential benefits.*"

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

The case of the petitioner is that he was initially engaged by respondent No.4 on muster-roll basis as a daily wage Beldar. He continued to serve as such under the supervision of Assistant Engineer, I.&P.H. Sub-Division, Joginder Nagar, upto 23.02.1996. On account of false FIR being registered against the petitioner, under Sections 147, 148, 149, 452, 506, 323, 302 and 326 of the Indian Penal Code, at Police Station Joginder Nagar, on 23.02.1996, the petitioner was arrested. The petitioner remained in custody till his acquittal by the learned Trial Court, i.e. 24.02.1998, when the petitioner and other co-accused were acquitted by the Court of learned Sessions Judge, Mandi, District Mandi, H.P. Thereafter, the service of the petitioner were re-engaged by respondent No.3 w.e.f. 17.03.1998 and he continued to serve as such till 13.06.1998, when his services were again terminated by the concerned Assistant Engineer without issuance of any show cause notice etc. He was reengaged subsequently.

3. Thereafter, an industrial dispute was raised by the petitioner and the Reference which was made by the appropriate Government to the learned

Labour Court stood adjudicated in terms of order dated 21.09.1998 (Annexure P-2), which is quoted hereinbelow:-

> "*This reference has been received from the appropriate government on 19.5.1999. The petitioner right from 24.2.1996 to 24.2.1998 remained under detention on account of a criminal case. The parties have settled the matter amicably. The Executive Engineer, present in the court made a statement that the petitioner is not entitled for back wages for the period he remained under detention as per the reference, but he will be given continuity in accordance judgment of Hon'ble High Court as the respondent has appealed in the Hon'ble Court. Therefore, I order that the petitioner is not entitled to the back wages for the period he remained under detention but he shall be entitled for continuity in service, but subject to the decision of the Hon'ble High Court in the appeal. The reference is answered accordingly."*

4. It is not in dispute that the petitioner, thereafter, continued to serve respondent-Department and in between he raised a demand of his regularization by way of an industrial dispute. Upon a Reference being made by the appropriate Government to the learned Labour Court, as to whether the demand raised by the petitioner through the President, B.M.S. Joginder Nagar for regularization w.e.f. 01.04.1998, when persons junior to him were so regularized, was proper and justified and if yes, from which date the aggrieved workman was entitled for regularization and with what reliefs.

5. The Reference was answered by the learned Labour Court in terms of Annexure P-4, i.e. Award dated 12.12.2005, vide which learned Labour Court held that it was of the "settled view" that only on the High Court acquitting the accused, would he be entitled to claim that the period of his absence from duty from 24.02.1996 to 24.02.1998, for which period he remained in police as well as judicial detention, be, not reckoned as a break in service and only on such a verdict of his acquittal having been handed over by the High Court of Himachal Pradesh, can he be said to have satisfied the conditions as contained in Ext.P14 and he would then obviously have the right

to be considered for regularization of his service w.e.f. 31.03.1998. The Reference was answered accordingly.

6. It is further the case of the petitioner that the appeal which was filed against the judgment of acquittal passed in favour of the petitioner and other accused was disposed of by this Court by upholding the judgment of acquittal, as was passed by the learned Court below in favour of the petitioner. The details of the appeal are Criminal Appeal No.281 of 1998, titled State of H.P. Versus Budhi Singh & others, decided on 12.05.2010. It is after the adjudication of the present appeal that this writ petition was filed by the petitioner, praying for the reliefs already enumerated hereinabove.

7. Mr. Rahul Mahajan, learned counsel for the petitioner has submitted that in view of the facts as have been narrated in the writ petition, there are two orders of the learned Labour, which are to the effect that the period of detention of the petitioner shall be counted for period of continuity in service, but subject to the decision of the High Court in the Criminal Appeal which stood filed by the State against the judgment of acquittal passed in favour of the petitioner. As per the learned counsel, after the High Court decided the Criminal Appeal in favour of the petitioner, the act of the respondents of not granting regularization to the petitioner against the post of beldar w.e.f. 01.04.1998, i.e. the date when persons junior to the petitioner were regularized, is arbitrary and not sustainable in the eyes of law. He, accordingly submitted that the writ petition be allowed and respondent/State be directed to regularize the petitioner. Learned counsel has apprised the Court that services of the petitioner have otherwise being regularized as a beldar, vide Office Order dated 33729-33, dated 28.01.2010.

8. The petition is opposed by the State, *inter aliia*, on the ground that as the petitioner actually did not work for the period when he was in detention, therefore, he is not entitled to have the said period counted for continuity in service. According to the State, the petitioner did not serve the

State, till he was again reengaged w.e.f. 07.04.1998. Learned Additional Advocate General also submitted that as has been mentioned in Para-4 of the petition, though on acquittal by the learned Sessions Court, the petitioner was re-engaged on 07.04.1998 and he worked as such from 07.04.1998 to 17.06.1998, but thereafter, he was given break in service from 18.06.1998 to 30.06.1998. The petitioner reported for duties on 25.09.1998 and did not work during the month of July, 1998, August, 1998, upto 24.09.1998, as he abandoned the work. In this background, learned Additional Advocate General submitted that the petitioner is not entitled for regularization in service w.e.f. 01.04.1998.

9. In rebuttal, Mr. Rahul Mahajan, learned counsel for the petitioner has submitted that the petitioner did not voluntarily leave the service at any stage and in fact, perusal of the averments made in Para-4 of the reply would demonstrate that with regard to one break, the stand of the respondent-Department is that a break was given to the petitioner and as far as the allegation of the respondent that the petitioner abandoned the job, nothing has been placed on record to this effect to substantiate this contention.

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

11. In the present case, the relief which has been prayed for by the petitioner is that a mandamus be issued, directing the respondent-State to order regularization of the petitioner/confer work charge status upon him w.e.f. 01.04.1998. The petitioner, as has been mentioned hereinabove was initially engaged as a beldar on muster-roll basis w.e.f. 21.08.1988. A perusal of Annexure P-2, which is the order passed by the learned Presiding Judge, Labour Court on 21.09.1998, on a Reference which was made by the appropriate Government, demonstrates that the matter was reconciled by the parties in the Court and the Executive Engineer made a statement that the

petitioner would not be entitled for back wages for the period he remained under detention as per the Reference, but he would be given continuity in service in accordance with the judgment of the High Court in the appeal, which was filed by the State against the acquittal of the petitioner.

12. Vide Annexure P-4, while answering the reference made by the appropriate Government, on an industrial dispute raised by the petitioner with regard to his regularization, learned Labour Court in terms of award dated 12.02.2005 held that the period of absence form duties from 24.02.1996 to 24.02.1998 for which period the petitioner remained in police custody as well as in detention, will not be reckoned as a break in service only in case the judgment of acquittal in favour of the petitioner was so maintained by the High Court.

13. Thus, perusal of the pronouncements made by the learned Labour Court dated 21.09.1999 and 12.12.2005 clearly demonstrate that the period of detention of the petitioner was to be considered for continuity in service, provided the appeal which was filed by the State against the judgment of acquittal passed by the learned Sessions Court in the High Court was upheld. In fact, this was an agreed position between the parties.

14. Now, it is a matter on record that the judgment of acquittal which was passed in favour of the petitioner by the learned Sessions Court was upheld by this Court.

15. In this background, this Court is of the considered view that the right of the petitioner for claiming regularization has to be considered by taking into consideration the date on which he was initially engaged as beldar. The arguments of learned Additional Advocate General on the basis of the averments made in Para-4 of the reply, in the considered view of the Court have no relevance for the adjudication of the present petition, for the reason that herein the petitioner is seeking his regularization/conferment of work charge status upon him w.e.f. 01.04.1998, whereas the averments which are

contained in Para-4 of the petition as well as reply pertain to the period post the month of April, 1998.

16. Accordingly, as there is not much dispute that as from the date when the petitioner was initially engaged on muster-roll basis w.e.f. 21.08.1988, he was in continuous service of the respondent-Department till his detention on account of an FIR being lodged against him and now, as this period is liable to be counted as continuity in service on account of his acquittal by this Court, by upholding the judgment of acquittal passed in his favour by the learned Sessions Court, this writ petition is disposed of with the direction that the petitioner be regularized/conferred the work charge status as from the date when incumbent junior to the petitioner, details whereof have been given in the petition, was regularized/conferred work charge status, with all consequential benefits including seniority. The monitory benefits, however, will be notional as from the date when the services of the petitioner are ordered to be regularized/conferment of work charge status upon him as upto three years before the date of filing of the writ petition and thereafter, the monitory benefits shall also in actual terms accrue upon the petitioner.

17. With these observations, this petition is disposed of, so also the pending miscellaneous applications, if any.

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

Between:

STATE OF HIMACHAL PRADESH

...APPELLANT

(BY MR. J.S. GULERIA, DEPUTY ADVOCATE GENERAL)

AND

1. NAVEEN KUMAR, S/O SHRI PREM LAL,
R/O ARKI, TEHSIL ARKI, DISTT. SOLAN, H.P.

2. YOG RAJ ALIAS BITTU, S/O SHRI BALAK RAM,
R/O VILLAGE GAHAR, P.S. & TEH. ARKI,
DISTT. SOLAN, H.P.

3. KISHORE KUMAR, S/O SHRI VIDYA SAGAR,
R/O VILLAGE KAWLI, P.S. & TEH. ARKI,
DISTT. SOLAN, H.P.

...RESPONDENTS

(MS. SHARMILA PATIAL, ADVOCATE, AS LEGAL AID COUNSEL, FOR R-1,

APPEAL AGAINST R-2 STANDS ALREADY ABATED,

R-3 DECLARED AS PROCLAIMED OFFENDER)

2. CRIMINAL MISC. PETITION (MAIN) No. 628 of 2017

Between:

COURT ON ITS OWN MOTION

...PETITIONER

AND

NAVEEN KUMAR, S/O SHRI PREM LAL, R/O TEHSIL ARKI,
DISTT. SOLAN, H.P.

...RESPONDENT

(BY MS. SHARMILA PATIAL, ADVOCATE, AS LEGAL AID COUNSEL)

3. CRIMINAL MISC. PETITION (MAIN) No. 1193 of 2018

Between:

COURT ON ITS OWN MOTION

...PETITIONER

AND

VIKAS KASHYAP, S/O LATE SH. UADHAY CHAND,
R/O VILLAGE GAHAR, P.O. BATAL, TEHSIL ARKI,
DISTT. SOLAN, H.P.

...RESPONDENT

CRIMINAL APPEAL
No. 486 of 2003
ALONGWITH CRIMINAL MISC. PETITIONS (MAIN)
No. 628 of 2017 & 1193 of 2018
Decided on: 29.09.2022

Code of Criminal Procedure, 1973 - Section 378(3) - **Narcotics Drugs and Psychotropic Substances Act,1985** - Section 20 - Police patrolling - Vehicle was stopped and checked - Charas of 2.650 kg was recovered - **Held** - No Test Identification Parade was conducted - Feeble attempt of the prosecution to connect the accused with the alleged crime remained futile - Court has to draw an adverse inference against the prosecution - No clear explanation as to how PW9 arrested the accused - Dismissal of appeal - (Paras 36,39,44)

Cases referred:

Noor Agah vs State of Punjab & others, 2009 (1) Criminal Court Cases 230;

This Criminal Appeal and the Criminal Misc. Petitions (Main) coming on for hearing this day, ***Hon'ble Mr. Justice Virender Singh,*** *delivered the following:*

J U D G M E N T

Cr. Appeal No. 486 of 2003

State has preferred the present appeal under Section 378 (3) of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') against the judgment of acquittal, dated 9th July, 2003, passed by the learned Sessions Judge, Shimla, H.P. (hereinafter referred to as 'the trial Court'), in Sessions Trial No. 1-S/7 of 2003.

2. By way of the judgment of acquittal, dated 9th July, 2003, the learned trial Court has acquitted the respondents from the offence punishable under Section 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

3. For the sake of convenience, the respondents, hereinafter, are referred to, as the accused, as referred to, by the learned trial Court.

4. It is worthwhile to record herein that the present appeal has been filed against all the three accused persons. During the pendency of the appeal before this Court, accused-Yog Raj alias Bittu (respondent No. 2) has expired and the appeal against him was ordered to be abated, vide order, dated 13th March, 2012.

5. Accused-Kishore Kumar (respondent No. 3), after receiving the notices from this Court, has not opted to put appearance, as such, he has been declared as Proclaimed Offender, vide order, dated 25th May, 2017.

6. The appeal against accused-Kishore Kumar is ordered to be separated and will be taken up, on the application of the State, as and when, said Kishore Kumar is brought before this Court.

7. Brief facts, as transpired from the report, under Section 173 (2) CrPC, are as under:

On the intervening night of 2nd/3rd October, 2002, when HC Padam Dev, alongwith another police official, was on patrolling duty and was present at a place, known as *'Gaudap Mor'*, he noticed, one white coloured Maruti Van, being driven by its driver, came there from Basantpur side and was moving towards Dhami side. The said vehicle was signalled to stop for checking by him. When the vehicle was stopped, the driver was directed to switch on the cabin lights, upon which, he had disclosed that those lights were not working. When the police had peeped inside the van, one matured person was found sitting on the front seat and on the rear seat, another person was found sitting, who was having beard on his face. When HC Padam Dev had opened the rear window of the vehicle, the person sitting there opened the window of the other side.

8. Thereafter, HC Padam Dev had noticed a rucksack lying underneath the rear seat of the vehicle and tried to check the same. Meanwhile, the driver drove away the vehicle from the spot and fled. However, by that time, HC Padam Dev had lifted the rucksack. The rucksack, which was found in the vehicle, was checked, wherein black substance, in the shape of sticks and small balls, was found wrapped in the polythene. Efforts to chase the said vehicle were made, but, till the time, the motorcycle of the police could be started, the driver had vanished from the spot. When the vehicle was being driven away, HC Padam Dev, in the dim light of the torch, had noticed the registration number of the van, as HP-11-1418. However, the said HC/IO was not sure about the said registration number, but, mentioned, in the report, that he could identify the said van. The information about this was given to the seniors and efforts were made to put picketing towards Arki, Darlaghat and Boileauganj sides, so that the persons, who had fled from the spot, could be nabbed.

9. The black substance, which has been stated to be *charas*, in the report under Section 173 (2) CrPC, was weighed in the presence of one independent witness, namely Anup Gupta and Constable Hans Raj. On weighment, the same was found to be 2 kg 650 grams. Two samples, weighing 25 grams each, were separated for chemical analysis and the sample parcels and bulk parcel containing the contraband were sealed. Other codal formalities were completed on the spot and *rukka* was thereafter prepared and submitted to Police Station Boileauganj, where FIR No. 237 of 2002 has been registered.

10. After the registration of the FIR, other codal formalities were completed. The samples of the contraband, so separated, on the spot, were sent to CTL Kandaghat, for chemical analysis.

11. Thereafter, the driver of vehicle No. HP-11-1418, Naveen Kumar, was associated in the investigation of the case. On inquiry, he has disclosed that on 2nd October, 2002, his vehicle was hired from Arki by accused-Kishore Kumar and Yog Raj. After reaching Anni, the vehicle was parked on the side of the road and accused-Kishore Kumar and Yog Raj had received *charas* from another person and thereafter, the *charas* was put in the blue coloured bag and they had started from there to Arki via Basantpur. When, during the midnight, they had reached near Dhami, the police had directed them to stop the vehicle. Thereafter, vehicle No. HP-11-1418 was taken into possession. Accused-Naveen Kumar was arrested on 8th October, 2002. Accused-Yog Raj and Kishore Kumar were also associated in the investigation and were arrested.

12. After completion of the investigation, the police filed charge-sheet under Section 20 of the NDPS Act, against the accused persons.

13. From the report under Section 173 (2) CrPC, the learned trial Court found a *prima facie* case against the accused persons for the commission of

the ofence punishable under Section 20 of the NDPS Act. As such, all the accused persons were charge-sheeted accordingly.

14. When the charge, so framed, was put to the accused persons, they had not pleaded guilty and claimed to be tried.

15. Since the accused persons had not pleaded guilty, as such, the prosecution has been directed to adduce evidence, in order to substantiate the charge, so framed, against the accused persons. Consequently, prosecution has examined as many as 10 witnesses, in this case.

16. After closure of the evidence, the entire incriminating evidence, appearing against the accused persons, was put to them, in their statements, recorded under Section 313 CrPC, in which the accused persons had denied the entire prosecution case and took the plea that they have falsely been implicated, in this case, at the instance of ASI Hem Raj, as, he was having animosity with accused-Yog Raj. However, the accused persons had not opted to lead any evidence in defence.

17. The learned trial Court, after hearing the arguments of the learned Public Prosecutor as well as the learned defence counsel, has acquitted the accused persons from the charge framed against them, vide judgment of acquittal, dated 9th July, 2003.

18. Feeling aggrieved from the judgment of acquittal, the State has preferred the present appeal, assailing the judgment of acquittal, on the ground that the learned trial Court has wrongly acquitted the accused persons from the charge framed against them, as the evidence of the prosecution witnesses has wrongly been discarded without any reasonable ground. The judgment of acquittal has also been challenged on the ground that the material placed on the record has not been considered by the learned trial Court and undue reliance has been placed upon the fact that the accused persons were not identified by the police officials. Highlighting this fact, it is the case of the appellant that PW-1, PW-9 and PW-10 have

categorically identified the accused persons, on the spot and the learned trial Court has wrongly discarded their testimonies.

19. On the basis of the above facts, Mr. J.S. Guleria, learned Deputy Advocate General, appearing for the appellant-State has prayed that the appeal may kindly be accepted, by setting aside the judgment of acquittal and the accused may kindly be convicted for the offence, for which, he has been charge sheeted, in this case.

20. Per contra, Ms. Sharmila Patial, learned counsel appearing for accused-Naveen Kumar has supported the judgment of acquittal on the ground that when the identification of the accused persons has not been established, in this case, then what to talk about proving his guilt beyond any shadow of doubt. Thus, a prayer has been made to dismiss the appeal.

21. In order to decide the present appeal, in an effective manner, it would be just and appropriate for this Court, to discuss the evidence adduced by the prosecution, to prove the guilt of the accused, in this case.

22. As state above, after framing the charge, the prosecution has examined as many as 10 witnesses, in this case.

23. The Investigating Officer of this case is PW-10 HC Padam Dev. According to this witness, on the intervening night of 2nd/3rd October, 2002, at about 12.30 a.m., he, alongwith Constable Hans Raj, was on the patrolling duty in the area of Dhami. When they were present at *Gaudap Mor,* they noticed one maruti van coming from Basantpur side. Since this witness wanted to check the same, as such, he has given the signal to stop the vehicle. When the vehicle was stopped, the driver was directed to switch on the cabin light, upon which, the driver had disclosed that the same is not working. As soon as this witness opened the rear window of the driver side, then, the person occupying the rear seat opened the window on the opposite side. When this witness was checking the vehicle, with the help of the torch, the driver, all of a sudden, started the van and drove the vehicle away from

the spot. However, this witness had succeeded to take out the bag, which was lying underneath the rear seat of the vehicle. The van was stated to be driven by accused-Naveen Kumar, the another accused was stated to be sitting by the side of the driver and the third accused-Kishore Kumar was sitting on the rear seat.

24. When the driver fled away from the spot, alongwith the van, the bag was checked, which was found to be containing *charas* in the shapes of sticks and balls. According to this witness, in the dim light of the torch, he could only read the number of the van as HP-11-1418. This information was given to the Police Assistance Room, Shimla. Thereafter, the contraband, so found in the bag, was weighed, which was found to be 2 kg 650 grams. The process of weighment was done in the presence of PW-Anup Gupta. The weighing scale and weights were also brought by PW-Anup Gupta.

25. In order to comply with the codal formalities, two samples of 25 grams each, were separated and were separately sealed by the Investigating Officer. Other codal formalities were also completed on the spot. The statements of the witnesses were recorded. On the same day, the case property was deposited with SHO Ashok Kumar. Thereafter, the investigation of the case was further handed over to SI Hem Raj.

26. In the cross-examination, this witness has admitted that he had not recorded, in *rukka,* Ex. PB, that accused were present in the van. The accused were not known to this witness prior to the occurrence and he had also not recorded the fact that he had identified the accused, in *rukka,* Ex. PB.

27. PW-9, SI Hem Raj, has conducted the partial investigation, in this case. On 3rd October, 2002, when the case file was handed over to him for investigation, he had gone towards Arki, where vehicle No. HP-11-1418 was found parked and its driver, Naveen Kumar, was interrogated, who had disclosed that on 2nd October, 2002, he, alongwith accused-Kishore Kumar and Yog Raj had gone to Anni, from where, they had brought *charas* in the

van. Said Naveen Kumar had also disclosed the fact that while coming back from Anni, at a place near Dhami, van was stopped by the police, from where they had fled away with the vehicle without stopping the same. Consequently, vehicle No. HP-11-1418 was taken into possession. Accused-Naveen Kumar was duly identified by this witness. Thereafter, accused-Yog Raj and Kishore Kumar were also arrested on 8th October, 2002.

28. In the cross-examination, this witness has admitted that vehicle No. HP-11-1418 was owned by Parmod Kumar and the said vehicle was not registered as a taxi. Said Parmod Kumar was not arrayed as accused, in this case, as he was not present in the vehicle. Neither the statement of Parmod Kumar was recorded nor he has been cited as a witness, in this case. Accused-Naveen Kumar was arrested, in this case, on the basis of his statement.

29. In the further cross-examination, this witness has feigned his ignorance about the fact as to whether he had investigated any case against accused-Yog Raj and his family members, while he was posted at Arki. He has denied that during the course of the said investigation, he had some altercations with accused-Yog Raj and on his acquittal in the case, this witness had threatened him to implicate in some other case.

30. Apart from the above, the prosecution has examined PW-1, Constable Hans Raj, as star witness, in this case. This witness has stated that he was present at *Gaudap Mor,* alongwith PW-10, HC Padam Dev. During the midnight, at about 12.30 a.m., vehicle, bearing registration No. HP-11-1418, being driven by its driver, came there from Sunni side, which was signalled to be stopped by PW-10, HC Padam Dev. The van was being driven by accused-Naveen Kumar. The driver was asked to switch on the cabin light, upon which, he has informed that there was no light. When PW-10 tried to lift the bag, which was lying in the rear portion of the van, then, the driver immediately started the van and fled away from the spot. The other

two accused have also been stated to be sitting in the van. PW-10 is stated to have lifted the bag before accused-Naveen Kumar succeeded in driving away the vehicle. PW-10 thereafter informed the Police Control Room. Rest, he has supported the version of PW-10 on all the material aspects of the case.

31. In the cross-examination, this witness has admitted that he was not knowing the name of the driver of the vehicle as Naveen Kumar, at the time of recording his statement. He has admitted that he had got recorded, in his statement under Section 161 CrPC, that because of the darkness and dim light of the torch, he could not verify the number of the van.

32. PW-2, Anup Gupta, is the person, who has been associated in the weighment of the contraband. This witness has not supported the case of the prosecution, as such, has been declared hostile and despite the best efforts made by the learned Public Prosecutor, nothing material could be elicited from his cross-examination.

33. Similarly, PW-8, Leela Dass, who has been cited as an independent witness, in this case, has also not supported the case of the prosecution. The efforts of the learned Public Prosecutor remained futile to elicit something material from the cross-examination of this witness, from which, any help could be derived by the prosecution, to prove the charge against the accused persons.

34. This is the entire evidence.

35. The accused has been charge-sheeted for the commission of offence under Section 20 of the NDPS Act, for which, the stringent punishment has been provided. It is the golden principle of criminal jurisprudence that harsher the punishment, the stricter the proof should be. Since the stringent punishment has been provided for the offences, as such, the prosecution is bound to prove each and every ingredient. The Hon'ble Supreme Court in **Noor Agah versus State of Punjab and others, 2009 (1) Criminal Court Cases 230,** has held that the prosecution has to prove the case beyond any

shadow of doubt. The relevant para 16 of the said judgment is reproduced, as under:

> *"The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remission, specific provisions for grant of minimum sentence enabling provisions granting power to the Court to impose fine of more than maximum punishment of ₹ 2,00,000/- as also the punishment of guilt emerging from possession of Narcotic Drugs and Psychotropic Substances, the extent of burden to prove the foundational facts on the prosecution, i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to upheld the individual human right and dignity as provided for under the U.N. Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary forgiving effect to the concept of 'wider civilization'. The Courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A Higher degree of assurance, thus, would be necessary to convict an accused."*

36. In this case, there is no iota of evidence, which, even remotely connect the accused persons with the commission of crime, what to talk about adducing the evidence, which could prove the case of the prosecution beyond any shadow of doubt. The person, who has allegedly stopped the vehicle, in which the accused were allegedly travelling on the alleged date and time, has mentioned the fact that in the dim light of the torch, the registration number of the vehicle seems to be HP-11-1418 and he has mentioned that he is not sure about the number of the vehicle, but, will be in a position to identify the same. Interestingly, the said vehicle was taken into possession by PW-9, SI Hem Raj, who has conducted the partial investigation, after receiving

the case file, on 3rd October, 2002, after the investigation of the case was entrusted to him, PW-10, HC Padam Dev, on whose instance, the vehicle, in which, the accused were allegedly travelling, stated to be HP-11-1418, has not been associated by PW-9 HC Hem Raj, to get the vehicle identified from him. He has deposed nothing about the identity of the accused persons, in his statement, on oath, in the Court.

37. Moreover, the admission of PW-9 SI Hem Raj that accused-Naveen Kumar has been implicated, in this case, on the basis of his statement, is a fact, which destroyed the case of the prosecution beyond any repair.

38. The accused persons were not arrested by the police on the spot. As per the case of the prosecution, all the three had fled away from the spot. Then, how the prosecution has arrayed them, in the present case, as accused, is a question which remained unanswered by PW-10, HC Padam Dev, the Investigating Officer as well as PW-9, SI Hem Raj.

39. PW-10, HC Padam Dev, although identified all the three accused in the Court, during his examination, but his identification in the Court, for the first time, is a very weak type of evidence, as, he has admitted, in his cross-examination, that the accused persons were not known to him before the occurrence. No test identification parade was conducted by the Investigating Officer, in this case, nor the accused were arrested by PW-9, SI Hem Raj at the instance of PW-10, HC Padam Dev. PW-10, HC Padam Dev, was not with PW-9, SI Hem Raj, when he had allegedly interrogated accused-Naveen Kumar.

40. Learned Deputy Advocate General could not point out even a single document, containing the name or any other particulars, of the persons, who were allegedly found travelling in the van, on the day of the alleged incident and fled away, which was allegedly prepared by the Investigating Officer (PW-10) on the spot. In the *rukka,* Ex. PB, the name of accused has not been mentioned and there is no evidence on the record to demonstrate that the

physical features mentioned in *rukka,* Ex. PB, match with the physical built of the accused persons.

41. The feeble attempt of the prosecution, to connect the accused with the alleged crime, remained futile, as the evidence of PW-9, SI Hem Raj, qua the fact that, on 3rd October, 2002, he had gone to Arki, in search of vehicle No. HP-11-1418, which was found parked there and accused-Naveen Kumar was found present in it, is too short to raise even a finger of suspicion against the accused. No doubt, this witness has stated that on interrogation, accused-Naveen Kumar disclosed the story, but this witness has not made any attempt to record the alleged confession of accused-Naveen Kumar, as per the procedure prescribed in Section 67 of the NDPS Act. Only the document, Ex. PD, was prepared by this witness, which was witnessed by HC Raj Kumar and HC Rajesh Kumar.

42. One of the witnesses of document, Ex. PD, has been examined by the prosecution as PW-5. PW-5 HC Rajesh Kumar, in his entire statement, has not uttered a single word qua the fact that acccused-Naveen Kumar, on interrogation, by PW-9 HC Hem Raj, had disclosed anything, what to talk about the story regarding their alleged involvement in the crime, as deposed by PW-9, HC Hem Raj.

43. Other signatory of Ex. PD has simply been given up by the learned Public Prosecutor, vide statement, dated 27th June, 2003.

44. In such situation, this Court has no other option, but to draw an adverse inference against the prosecution, by holding that, had the said witness been examined by the prosecution, he would have deposed against the case of the prosecution.

45. There is no explanation coming from PW-9, SI Hem Raj, as to how he had arrested accused-Naveen Kumar on the basis of his alleged disclosure, which has admittedly not been recorded.

46. There is nothing on the file that accused-Naveen Kumar was got identified from PW-10, HC Padam Dev, by PW-9, SI Hem Raj. Admittedly, PW-10, HC Padam Dev, was not present, when, PW-9, SI Hem Raj, had allegedly interrogated accused-Naveen Kumar.

47. The learned Deputy Advocate General could not point out any document on the file to even *prima facie* satisfy the conscience of this Court to connect the accused with the commission of the alleged crime. Accused-Naveen Kumar was admittedly not the registered owner of the vehicle and the registered owner of the vehicle has not been associated in the investigation of the case.

48. In such a situation, there is no occasion for this Court to differ with the findings recorded by the learned trial Court acquitting accused-Naveen Kumar, in this case. As such, the appeal filed by the State qua accused-Naveen Kumar is dismissed. Bail bonds are ordered to be discharged.

49. Records be sent back.

CrMPs(M) No. 628 of 2017 & 1193 of 2018

50. In view of the dismissal of Criminal Appeal No. 486 of 2003 vide judgment of even date (supra), the proceedings in both these miscellaneous petitions are dropped and the same are disposed of accordingly.

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

Between:

BED RAM, S/O SH. MURLU RAM, R/O VILLAGE SHILHA-MASHORA (ARSHU-RA-NALA) P.O. NAGWAIN, TEHSIL AUT, DISTT. MANDI, H.P. AGED 77 YEARS.

.....PETITIONER

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

AND

SH. SHYAM LAL, S/O SH. JAGDISH RAM, R/O VILLAGE BANALA, P.O. AND TEHSIL, AUT, DISTRICT MANDI, H.P.

.....RESPONDENT

(BY MR. VIJAY SHARMA, ADVOCATE)

CRIMINAL MISC. PETITION (MAIN) U/S 482 Cr.P.C
No. 231 of 2022
RESERVED ON :18.10.2022
DECIDED ON :21.10.2022

Code of Criminal Procedure, 1973 - Section 482 - Inherent Power - **Negotiable Instrument Act,1881** - Complaint filed u/s 138 NIA - No liability to pay any amount - Respondent has misused the signed cheque - **Held** - Petition Dismissed - No merit in the petition - Section 139 - Presumption in favor of holder - Section 482 CrPC is exercised to protect the interest of justice or to save the abuse of process of law - Parties to prove their respective cases in accordance with law - Court will not venture into question of facts. (Paras 10,12)

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

O R D E R

By way of instant petition, petitioner has sought the quashing of Complaint No.29-III/2022, titled as Shyam Lal Vs. Bed Ram, pending in the Court of learned Judicial Magistrate First Class, Court No.2, Mandi, District Mandi, H.P.and also order dated 21.01.2022, passed by the said Court.

2. The precise ground on which petitioner has prayed for aforesaid relief is that the complaint filed by respondent against the petitioner under Section138 of Negotiable Instruments Act, is without any cause of action. As per petitioner, he is under no legal liability to pay any amount to the respondent much less the amount as claimed in the complaint filed by him. Petitioner further submits that respondent has misused the signed cheque of petitioner, which was lost in the year 2014. The fact of the matter, according to petitioner, is that he hasfiled a complaint No. 186-III/17/14 under Section 138 of Negotiable Instruments Act, against respondent way back in 2014 as the cheques issued by respondent, in favour of petitioner, to discharge his outstanding legal liability had remained unpaid on presentation.Said complaintis still pending adjudicationbefore learned Judicial Magistrate First Class, Court No. 2, Mandi District Mandi, H.P.Respondent has been duly served. Since, petitioner already is in litigation with respondent, there is no question of any cheque being issued by him in favour of the respondent, as he was under no legalliability to do so.

3. *Per-contra*, the case of respondent is that the petitioner had issued the cheque favouring respondent with the undertaking that petitioner would withdraw his Complaint No. 186-III/17/14 and in case of failure to do so, respondent would be having right to present the cheque, in lieu of harassment caused to him. Thus, the cheque against which the complaint has been filed by the respondent against petitioner is stated to be for lawful consideration.

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

5. The facts of the case, if seen chronologically, reveal that petitionerfiled a complaint under Section 138 of Negotiable Instruments Act,against respondent in December, 2014 with the allegation that respondent was a property dealer and had undertaken a deal of sale of property at Village Katrain, District Kullu, H.P.from a willing seller in favour of the petitioner. A sum of Rs.17,00,000/-had been paid by petitioner to respondent for said purpose. Respondent failed to finalise the deal and issued cheque No. 922422, dated 22.08.2014 for a sum of Rs. 17,00,000/- drawn on Punjab National Bank, Branch Aut, District Mandi, HP in favour of the petitionerin order to repay the amount. Before the cheque could be encashed, respondent represented that in case petitioner paid him additional sum of Rs. 7,00,000/-, the deal would be through. Accordingly, petitioner paid additional sum of Rs. 7,00,000/- to respondent. Again, the deal failed and respondent issued another cheque dated 15.10.2014 bearing No. 922423in the sum of Rs. 7,00,000/- favoring petitioner. Both the abovenoted cheques were dishonoured on presentation.Petitioner issued notice to respondent demanding the cheque amounts to be paid to him within 15 days from the date of receipt of notice. Despite receipt of notice, respondent did not make the payment. Accordingly, the petitioner filed the complaint.

6. Petitioner,on 24.11.2014, reported to the police,vide D.D.R No. 23, recorded at Police Station Bhuntar, District Kullu, H.P. that his documents including a cheque book issued by H.D.F.C.Bank, had been stolen from his parked vehicle.

7. During the pendency of the complaint filed by the petitioner against respondent, a notice dated 16.12.2021 was received by the petitioner issued on behalf of the respondent alleging therein that the petitioner had issued cheque No. 000069, dated 25.10.2021 in favour of the respondent,

amounting to Rs. 30,00,000/- drawn on H.D.F.C.Bank, Kullu, H.P., for discharge of legal liability, but the same was dishonoured, as the signatures of drawer were different.Accordingly, a demand for Rs. 30,00,000/- was made by respondent from petitioner to be paid within 15 days. Petitioner replied to the said notice, through his counsel, vide reply dated 04.01.2022. The factum of earlier transactions between the parties and pendency of complaint filed by petitioner against respondent was highlighted. It was also pointed outthat on 13.05.2015 also another cheque, out of the same cheque book which had been stolen in 2014, was presented for encashment, but the petitioner could not take appropriate legal action at that time as the banker had not disclosed the identity of the respondent. The factum of issuance of cheque by petitioner in favour of the respondent was specifically denied. It was alleged as a counter that respondent had again misused another cheque, out of the stolen cheque book.

8. Petitioner made another complaintto the police, regarding misuse of stolen cheques, after receiving aforesaid notice.

9. Respondent then filed impugned complaint against petitioner with avermentsthat petitioner was interested to purchase a land at Village Katrain, District Kullu, H.P. that belonged to Amritsar Diocesan Trust Association**.**Respondent was known to the Chairman of the Trust and hence was involved in the deal. It is further alleged by respondent in his complaint that petitioner had paid him some amount for expenses etc., but had also received two cheques as security/guarantee towards the success of the deal. An agreement to sell was executed between the G.P.A. of the Trust and petitioner on 23.06.2014. Petitioneris alleged tohave misused those two securities cheques against respondent. It is further alleged that subsequently the deal failed and petitioner had promised to withdraw the complaint filed by him against respondent and in order to secure the performance of said promise, he had issued a cheque dated 25.10.2021 in favour of the

respondent. Since the petitioner failed to withdraw his complaint, respondent presented the cheque issued by petitioner for encashment and when the same was not honoured, the impugned complaint was filed.

10. It becomes evident from the above noticed facts that petitioner and respondent were involved in some deal relating to sale and purchase of property. Consequently, there are allegations and counter allegations from both the sides. Petitioner and respondent have filed their respective complaints under Section 138 of Negotiable Instruments Act by making counter allegations. Such allegations and counter allegations are subject to proof during trial of the respective complaints. It is not the case of either side that the cheques used against them by the other side were not signed by them. It being so, the initial presumption to the cheques is available under Section 139 of the Negotiable Instruments Act. Under Section 139(supra), the holder of the cheque is presumed to be holding such cheque for discharge, in whole or in part of any debt or other liability, unless contrary is proved.

11. This Court exercises restrictive jurisdiction under Section 482 of Cr.P.C;which can be exercised only for the purpose either to protect the interest of justice orto save the abuse of process of law. None of the situations are warranted in the facts of instant case. The parties are to prove their respective cases in accordance with law. This court will not venture into the question of facts.

12. Resultantly, there is no merit in the petition and the same is accordingly dismissed.

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

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

Between:-

MOHIT KALIA SON OF SHRI YASH PAL
KALIA RESIDENT OF MOHALLA SAPRI
CHAMBA TOWN, TEHSIL AND DISTT.
CHAMBA H.P. .....PETITIONER

(BY SHRI VIVEK SINGH THAKUR, ADVOCATE)

AND

RITU WIFE OF SHRI MOHIT KALIA, DAUGHTER
OF SH.CHETAN MARWAH, RESIDENT OF
MOHALLA SAPRI CHAMBA TOWN, DEVELOPMENT
BLOCK, TEHSIL & DISTT. CHAMBA (HP)

..... RESPONDENT

(NONE)

CRIMINAL MISC.PETITION (MAIN) U/S 482 CRPC
NO. 900 OF 2022
Decided on: 26.09.2022

Code of Criminal Procedure, 1973 - Section 482 - Inherent Power - Respondent filed petition U/S 125 CrPC - Petitioner filed reply to the petition - No rejoinder was filed by the respondent- Grievance is before framing points for determination, court granted no time to file documents to substantiate their pleadings - **Held** - Petitioner is not precluded from obtaining the documents - No effort has ever been made by the petitioner - No infirmity, illegality or irregularity in the impugned order - Petition dismissed.(Paras 11,12)

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

O R D E R

Petitioner, by way of instant petition, preferred under Section 482 of Code of Criminal Procedure, has assailed order dated 25.8.2022, passed by the Principal Judge, Family Court (District Judge), Chamba Division, Chamba HP, in case No. 20 of 2020, titled as Ritu vs. Mohit Kalia.

2. Respondent, who is wife of petitioner, has filed a petition under Section 125 of Cr.PC against the petitioner for grant of maintenance to her wherein, after service, petitioner has filed reply to petition and whereafter, no rejoinder was intended to be filed on behalf of respondent. Thereafter, on the basis of pleadings of parties, Principal Judge, Family Court has framed following points for determination:-

1. Whether the petitioner is entitled for maintenance, if so, to what amount?

OPP

2. Whether the petition is not maintainable?

OPR

3. Final Order.

3. The grievance raised on behalf of petitioner is that before framing points for determination, the Court should have granted time to parties, especially petitioner-husband, to file documents to substantiate their pleadings, and more particularly an opportunity to petitioner should have been granted in reference to reply filed by him to petition as the petitioner intended to file certain documents like income certificate of respondent-wife along with other documents for proper adjudication of matter. But Family Court, without giving an opportunity for filing original documents, framed the points for determination, and denial of such opportunity to petitioner, is causing prejudice to petitioner as for obtaining certain documents with respect to income of respondent-wife, being earned by her as Asha Worker and other sources, a considerable time is required.

4. From order sheets, placed on record, it is apparent that on 22.3.2022 notice, returnable on 18.5.2022, was issued to petitioner-husband by Trial Court. He was not found at home and his mother refused to receive the summons but provided mobile number of petitioner to Process Server whereupon Process Server informed him about summons and had also sent a copy thereof through Whatsapp message. But petitioner-husband did not appear in the Court, and resultantly he was proceeded ex-parte and case was listed for recording ex-parte evidence on 21.6.2022.

5. On 21.6.2022, on filing an application by petitioner-husband, order dated 18.5.2022 was recalled and he was permitted to join the proceedings and time to file reply was given to him by adjourning the case for 25.8.2022.

6. On 25.8.2022, reply was filed and no rejoinder was intended to be filed by respondent-wife. On the basis of pleadings of parties, points for determination, referred supra, were framed by Family Court and case was ordered to be listed for evidence of respondent-wife on 20.10.2022.

7. Procedure for proceedings under Section 125 Cr.P.C., is provided in Section 126 Cr.PC. Sub-section (2) of Section 126 Cr.P.C. is relevant to be referred in present proceedings, which reads as under:-

> "(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases.
>
> Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including

terms as to payment of costs to the opposite party as the Magistrate may think just and proper."

8. Family Court, on filing of petition, by respondent-wife had issued notice to respondent-husband returnable after about two months which was served upon husband through Whatsapp on his cell number provided by mother of husband after having dialogue with him by Process-Server but he did not turn up and was proceeded ex-parte and, thereafter, matter was adjourned for more than one month. Whereafter, husband appeared on next date and was allowed to join the proceedings and to file reply by giving more than two months' time and on filing reply points for determination were framed on 25.8.2022 about five months after issuance of notice and at least after two months from joining the proceedings by husband.

9. In the points determined by Family Court, where first point is to be proved by wife regarding her entitlement for maintenance; second point has to be established by husband by proving on record that petition of wife is not maintainable. Both parties have right to lead the evidence to substantiate their respective pleadings by oral as well as documentary evidence. Husband shall also have a right to cross-examine the wife during recording of evidence on her behalf and at that time any document relevant to the facts based on pleadings, can be put either to wife or to her witnesses, including documents related to her income, to confront her with claim of husband regarding quantum of her income. Thereafter also, any evidence to rebut the evidence of wife and also to discharge the onus to prove that petition is not maintainable, petitioner/husband shall have a right to lead oral as well as documentary evidence in support of his contentions raised in reply.

10. In case documents are not in possession of petitioner/husband and he intends to refer those documents or to put those documents to wife during her cross-examination, then he has a right to summon the record from

concerned office/authority/person to produce in Court, on the date fixed for recording the evidence of wife, by filing an appropriate application for that purpose and similarly record can also be summoned from any office at the time of recording the evidence of petitioner/husband.

11. Otherwise also, the husband was having sufficient time to obtain documents from concerned quarters in order to substantiate his plea taken in reply and there is no such procedure as is being claimed by petitioner to grant time to parties to file documents before determining the points for consideration in a petition filed under Section 125 Cr.P.C. However, no doubt, sufficient reasonable time is required to be given to the parties to contest/defend/prove their case/ defence.

12. Petitioner-husband has filed reply to the petition before Family Court, taking a plea with specific mention of income being earned by wife-respondent. The said information must be on the basis of knowledge gathered on the basis of document or information received from concerned Office/ Department. Petitioner-husband is not precluded from obtaining the documents from any office or producing the same in Court or summon such record in the Court in accordance with law. From the material placed on record, it does not appear that petitioner-husband has ever made any such effort by applying for such document and further there is nothing on record that any prayer was ever made before Family Court to give time to him so as to enable him to procure and produce relevant documents before or after filing the reply. Parties always have a right to seek reasonable time for filing response and to procure documents with specific detail of such documents and person/authority/Department wherefrom such documents are to be procured with disclosure of efforts made for procuring such documents and Trial Court always considers and has to consider such prayer/request on its merit.

13. In view of aforesaid discussion, I do not find any infirmity, illegality or irregularity or perversity in the impugned order passed by Family Court. Accordingly, I do not find any merit in petition and, therefore, petition is dismissed. No order as to costs.

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

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

Between:
GURMINDER SINGH, S/O SH. HIMMAT SINGH, R/O HOUSE NO. 34, DIARA SECTOR, TEHSIL SADAR, DISTRICT BILASPUR, HIMACHAL PRADESH AGED 33 YEARS, OCCUPATION PRIVATE BUSINESS.

....PETITIONER

(MR. PRASHANT SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH

2. SMT. KALYANI DEVI @ SHIVANI D/O SH. GOPAL DASS, R/O HOUSE NO. 95, MEAT MARKET, NEAR COWSHED, BILASPUR, DISTRICT BILASPUR, HIMACHAL PRADESH, AGED 31 YEARS.

....RESPONDENTS

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATES GENERAL, WITH MS. SVANEEL JASWAL, DEPUTY ADVOCATE GENERAL AND MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR R-1/STATE)

(MR. HITENDER VERMA, ADVOCATE, FOR R-2)

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC
No.942 OF 2022
Decided on: 14.10.2022

Code of Criminal Procedure, 1973- Section 482 - Inherent Power - FIR filed U/S 376,376(2)(n),452,497 and 506 **Indian Penal Code, 1860** - Petitioner came in her contact - Decided to marry - She became pregnant - But he refused to marry - **Held** - High Court has inherent power to quash criminal proceedings which are not compoundable - Power to be exercised sparingly and with great caution to examine whether the possibility of conviction is remote and bleak - Interest of respondent appears to be more important than of the society - Quashing of FIR - Prayer accepted.(Paras 10,11)

Cases referred:
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013) 11 SCC 497;
Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303;
Narinder Singh &others vs State of Punjab & another (2014) 6 SCC 46;
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & others vs State of Gujarat & Another, SLP(Crl) No.9549 of 2016;

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

O R D E R

By way of instant petition, prayer has been made on behalf of the petitioner for quashing of FIR No.245/2020, dated 26.10.2020, under Sections 376, 376(2) (n), 452, 497 and 506 IPC, registered with Police Station Sadar, Bilaspur, District Bilaspur, H.P., as well as consequent proceedings, if any, pending before the court below, on the basis of compromise/amicable settlement arrived inter-se parties.

2. Averments contained in the petition, which is duly supported by an affidavit, reveal that FIR sought to be quashed in the instant proceedings, came to be lodged at the behest of respondent No.2 Smt. Kalyani Devi (herein after referred to as " the complainant"), who alleged that her first marriage was solemnized with person namely Vinod Kumar, r/o village Maryani and out of their wedlock, one girl was born. She alleged that in the year, 2013, she solemnized second marriage with person namely Pawan Kumar, r/o Roura, Bilaspur and out of their wedlock, one boy (7 years old)was born. She alleged that since above named Pawan Kumar deserted her and present petitioner came in her contact, she started living with him and decided to marry him. She alleged that present petitioner had been residing with her since 2017, but when she became pregnant and asked the petitioner to solemnize marriage, he started making excuses and as such, appropriate action in accordance with law be taken against him. In the aforesaid background, FIR sought to be

quashed in the instant proceedings came to be lodged against the petitioner. Though after completion of investigation, police presented challan in the competent court of law, but before same could be taken to its logical end, parties to the lis have resolved to settle their dispute amicably *inter-se* them by way of compromise placed on record and as such, petitioner has approached this Court in the instant proceedings.

3. Vide order dated 11.10.2022, this Court while directing the respondent-State to verify the factum with regard to compromise also deemed it necessary to cause presence of respondent No.2 in the court so that correctness and genuineness of the compromise placed on record is ascertained.

4. Though instructions of respondent-State are awaited, but respondent No.2 has come present and is being represented by Mr. Hitender Verma, Advocate. Respondent No.2 Smt. Kalyani Devi, states on oath that she of her own volition and without there being external pressure has entered into compromise with the petitioner-accused, whereby both the parties have resolved to settle their dispute amicably inter-se them. She states that FIR sought to be quashed is a result of misunderstanding and since she has already solemnized love marriage with the petitioner in a temple and one issue has also been born out of their wedlock, coupled with the fact that petitioner is taking good care of her and child, she does not wish to prosecute the case further and shall have no objection in case FIR as well consequent proceedings, are quashed and set-aside and accused is acquitted. While admitting the contents of the compromise to be correct, she also admits her signature on the same. Her statement made on oath is taken on record.

5. Having heard aforesaid statement made by respondent No.2-complainant, Mr. Sudhir Bhatnagar, learned Additional Advocate General, submits that though parties have compromised the matter, but keeping in view the gravity of the offence alleged to have been committed by the

petitioner, prayer made on his behalf for quashing of FIR deserves to be rejected. While inviting attention of this court to the judgment passed by the Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014) 6 Supreme Court Cases 46,** Mr. Bhatnagar, contends that otherwise also, this Court while exercising power under Section 482 Cr.PC may not quash the proceedings in heinous crimes like rape. However, he fairly states that keeping in view the statement of respondent No.2, made on oath, there are very remote chances of conviction of the accused.

6. True it is that power under Section 482 Cr.PC is required to be exercised by the court sparingly and very cautiously. Hon'ble Apex Court in ***Narinder Singh's*** case supra, has no doubt held that normally, court should not exercise power under Section 482 Cr.PC, to quash the proceedings or FIR under Section 376 IPC, but if aforesaid judgment is read in its entirety, it suggests that court with a view to meet ends of justice and to prevent abuse of process of law can always accept the prayer made by the parties to quash the proceedings. Though in the case at hand, respondent complainant has levelled serious allegations of rape against the petitioner, but if contents of FIR sought to be quashed are read in conjunction with the statement of the complainant recorded in this Court on oath, this Court finds that both the petitioner and respondent No.2 had been living as husband and wife and prior to alleged solemnisation of marriage inter-se petitioner and respondent No.2, respondent No.2 had solemnised two marriages, which unfortunately failed. Otherwise also, allegedly petitioner had been sexually assaulting the complainant against her wishes since year 2017, but she chose to remain silent for approximately three years and lodged FIR after an inordinate delay of three years, i.e.2020. Though in the FIR, it has been stated that petitioner had been sexually assaulting the complainant against her wishes on the pretext of marriage, but as per statement of victim-prosecutrix/complainant recorded on oath before this Court, she and the petitioner had solemnised love

marriage in the temple and thereafter, they both had been living as husband and wife for good three years. Dispute inter-se petitioner and the respondent arose when respondent became pregnant. Since respondent No.2, who is major and is mother of three children, has categorically stated before this court that she of her own volition and without there being any external pressure had been joining the company of the petitioner and does not wish to prosecute the case further, there appears to be no impediment in accepting the prayer made in the instant petition. In case, prayer made in the instant petition is not allowed and the proceedings are allowed to continue, petitioner would be unnecessarily put to the ordeal of protracted trial, which otherwise is bound to fail on account of statement made on oath by the victim-prosecutrix/respondent No.2 as has been taken note herein above.

7. Since the petition has been filed under Section 482 Cr.PC, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh's*** case supr**a,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a

crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

"32. We find from the impugned order that the sole reason which weighed with the High Court in refusing to accept the settlement between the parties was the nature of injuries. If we go by that factor alone, normally we would tend to agree with the High Court's approach. However, as pointed out hereinafter, some other attendant and inseparable circumstances also need to be kept in mind which compels us to take a different view.

33. We have gone through the FIR as well which was recorded on the basis of statement of the complainant/victim. It gives an indication that the complainant was attacked allegedly by the accused persons

> because of some previous dispute between the parties, though nature of dispute, etc. is not stated in detail. However, a very pertinent statement appears on record viz. "respectable persons have been trying for a compromise up till now, which could not be finalized." This becomes an important aspect. It appears that there have been some disputes which led to the aforesaid purported attack by the accused on the complainant. In this context when we find that the elders of the village, including Sarpanch, intervened in the matter and the parties have not only buried their hatchet but have decided to live peacefully in future, this becomes an important consideration. The evidence is yet to be led in the Court. It has not even started. In view of compromise between parties, there is a minimal chance of the witnesses coming forward in support of the prosecution case. Even though nature of injuries can still be established by producing the doctor as witness who conduced medical examination, it may become difficult to prove as to who caused these injuries. The chances of conviction, therefore, appear to be remote. It would, therefore, be unnecessary to drag these proceedings. We, taking all these factors into consideration cumulatively, are of the opinion that the compromise between the parties be accepted and the criminal proceedings arising out of FIR No.121 dated 14.7.2010 registered with police station Lopoke, District Amritsar Rural be quashed. We order accordingly."

8. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it

cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

> *"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.*
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> *The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)*
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> > *61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and*

serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its

jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed.

9. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In

such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

> *"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."*

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> *"… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid*

argument. The offence is gender neutral in this case. We say no more on this score…"

"…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote

and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

10. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C., must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has

reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment, Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

11. Though, offences alleged to have been committed by the petitioner-accused fall in the category of heinous crime as has been held by Hon'ble Apex Court in ***Narinder Singh case*** *(supra)* and as such, this Court should be reluctant in exercising power under section 482 Cr.P.C, for quashing of FIR, but in the peculiar facts and circumstances, where petitioner-accused and complainant have solemnized marriage and out of their wedlock, one child has also born, this Court, in the interest of the complainant as well as her minor child, deems it fit to exercise power under section 482 Cr.P.C, for accepting the prayer made in the instant petition. In case, prayer made on behalf of the petitioner-accused is not accepted at this stage, great prejudice would be caused to respondent No.2-victim-proseuctrix, who has not only solemnized marriage with the petitioner-accused, but has also given birth to one child. In case, petitioner-accused is made to face the trial in terms of FIR sought to be quashed and ultimately he is convicted, it is respondent No.2-complainant, who would be the ultimate sufferer. No doubt, while exercising power under Section 482 Cr.P.C, for quashing of FIR, this Court is also required to take into consideration interest of the society at large, but in the present case, interest of respondent No.2 appears to be more important than of the society and as such, in the peculiar facts and circumstances of the case, this Court while exercising powers under section 482 Cr.P.C, deems it fit to quash the FIR lodged against the petitioner-accused

under Sections 376, 376(2)(n), 452, 497 and 506 of IPC. Moreover, chances of conviction of the petitioner-accused are very remote and bleak in view of the statement made by respondent No.2/complainant and as such, no fruitful purpose would be served in case FIR as well as consequent proceedings are allowed to sustain.

12. Since the matter stands compromised between the parties and they are no more interested in pursuing the criminal proceedings against each other, no fruitful purpose would be served in case criminal proceedings are allowed to continue, as such, prayer made in the petition at hand can be accepted.

13. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised and keeping in mind the well settled proposition of law as well as the compromise being genuine, FIR No.245/2020, dated 26.10.2020, under Sections 376, 376(2) (n), 452, 497 and 506 IPC, registered with Police Station Sadar, Bilaspur, District Bilaspur, H.P., as well as consequent proceedings, if any, pending before the court below, are ordered to be quashed and set-aside.

14. The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Between:-

SUDERSHAN KUMAR, AGED ABOUT 46 YEARS,
SON OF SH. BIDHI CHAND, RESIDENT OF VILLAGE BILWAN GHATTI, POST OFFICE GHATI, TEHSIL JASWAN, DISTRICT KANGRA, H.P.

....PETITIONER

(BY SH. ARUSH MATLOTIA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERAL).

CRIMINAL MISC. PETITION (MAIN)
NO. 1703 OF 2022
Reserved on:18.10.2022
Date of decision: 20.10.2022

Code of Criminal Procedure, 1973 - Section 439 – Bail- **Indian Penal Code, 1860** - Sections 341, 323, 504, 506, 302 and 34 - Petitioner is in custody - Land dispute arose between three brothers - Construction of a latrine - Threatened to stop the work- Threw a brick on his head - **Held** - Bail is granted subject to the condition of his furnishing personal bond in the sum of Rs.50,000/- with one surety in the like amount- Pre trial incarceration is not the rule - No apprehension of petitioner absconding or fleeing from the course of justice.(Paras 11-13)

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

O R D E R

Petitioner is an accused in case registered vide FIR No. 101 of 2021, dated 14.08.2021, at Police Station, Dehra, District Kangra, H.P. under

Sections 341, 323, 504, 506, 302 and 34 IPC. Petitioner is in custody since 16.08.2021.

2. Brief facts necessary for adjudication of petition are that on 14.08.2021 police reached the ESI Hospital, Sansarpur Terrace on being informed that an injured person named Shakti Chand S/o Sh. Bidhi Chand (now deceased), had been brought for treatment. His statement was recorded to the effect that he had two other brothers and his father had died. The land was joint between all the three brothers, but they were in possession of their respective shares on the basis of private arrangement. He stated that on 14.08.2021 he alongwith his younger brother Rajesh Kumar, labourerAshwani Kumar and mason Paramjeet were busy in construction of a latrine on the land which was in his possession, the bail petitioner alongwith his son KeshavJariyal threatened him to stop the work. Petitioner pushed the injured (now deceased), as a result of which, he received injury on his back. In the meantime, the son of petitioner threw a brick towards the injured and hit his head. The injured was accordingly brought to the hospital, who later succumbed to the injuries. The investigation was completed. As per medical opinion, the cause of death was shock due to ante-mortem head injury.

3. The petitioner has made a prayer for grant of bail on the ground that he is innocent and has been implicated falsely. The petitioner has already been in prolonged custody and no fruitful purpose shall be served by keeping him in custody till the conclusion of trial. It is stated that petitioner is sole bread earner of the family. He is local resident of the State of Himachal Pradesh. Petitioner has undertaken to abide by all the terms and conditions as may be imposed against him.

4. The bail application has been opposed only on the ground that in case of release of petitioner on bail, he may influence the prosecution witnesses.

5. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State and also have gone through the records.

6. Earlier also the petitioner had approached this Court with bail application being Cr.MP(M) No.41 of 2022, but the same was withdrawn on 24.03.2022, with liberty to file afresh. At that stage, the trial had not begun. Therefore, there is a change in circumstances and the successive bail petition is maintainable.

7. The allegations against the petitioner are of commission of offence under Sections 302, 341, 323, 504, 506 read with Section 34 IPC. The facts as place on record do not prima-facie suggest any pre-meditated assault on the deceased with the intent to kill him. It appears to be a case where the dispute arose on the spur of the moment. The overt act attributed to the petitioner is that he pushed his brother (deceased). The fatal injury was caused by the son of petitioner, who also was accompanying the petitioner. The deceased did not die instantaneously after receiving the injury. There is nothing on record to suggest that even after causing injury to the deceased, petitioner or his co-accused had continued their assault. In fact, it has been suggested that they had run away from the spot.

8. Though this Court while deciding bail application is not to minutely scan the evidence collected by the Investigating Agency, but the same can always be looked into for prima-facie assessment as to seriousness and gravity of allegations. The observation made hereinabove are only for such specific purpose.

9. In the given circumstances of the case, the requisite intent or knowledge for commission of offence under Section 302 IPC is yet to be proved. The facts of the case do not warrant the prolonged custody of petitioner till final adjudication, as no fruitful purpose shall be served thereby. Even otherwise, the pre-trial incarceration is not the rule.

10. The son of the petitioner, who is co-accused is a juvenile in conflict with lawhas already been released.

11. The only concern of the Court at this stage is to facilitate the fair and expeditious trial. For such purpose, appropriate conditions can be imposed against the petitioner.

12. The petitioner is permanent resident of Village BilwanGhatti, Post Office Ghati, Tehsil Jaswan, District Kangra, H.P. and there is no apprehension of petitioner absconding or fleeing from the course of justice.

13. In the peculiar facts and circumstances of the case, the application is allowed and the petitioner is ordered to be released on bail in case FIR No. 101 of 2021, dated 14.08.2021, registered at Police Station, Dehra, District Kangra, H.P. under Sections 341, 323, 504, 506, 302 and 34 IPC, on his furnishing personal bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of learned trial Court. This order is, however, subject to following conditions: -

i) Petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case and shall not tamper with prosecution evidence.

ii) Petitioner shall not leave India without leave of the trial Court.

iii) Petitioner shall not delay the trial of the case and shall regularly attend the hearings, except in circumstances beyond his control.

iv) Upon his re-indulging in criminal activities, it shall be open to the respondent, to move this Court for cancellation of bail.

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

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

Between:

SHIVAM MONGA S/O SHRI ASHOK KUMAR MONGA, R/O HOUSE NO.33, NAMDEV NAGAR NEAR DEEPA JYOTI PARK, TEHSIL & DISTRICT FAZILKA, PUNJAB AGED 25 YEARS.

….PETITIONER.

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE, WITH MR. PRANAV SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

….RESPONDENT.

(BY MR. DINESH THAKUR, MR.SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH SHRI AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

Cr.MP(M) No.1320 of 2022

Between:

AKSHAY SHARMA, AGED ABOUT 25 YEARS, S/O SH. BABU RAM, R/O VILLAGE BHAGTANWALAN, P.O. HARIPUR (KHOL), TEHSIL NAHAN, DISTRICT SIRMAUR, H.P., THROUGH FATHER-CUM-FIRST FRIEND, SH. BABU RAM, S/O SH. DHANI RAM, R/O VILLAGE BHAGTANWALAN, P.O. HARIPUR (KHOL), TEHSIL NAHAN, DISTRICT SIRMAUR, H.P.

….PETITIONER/APPLICANT.

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE, WITH MR. PEEYUSH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

….RESPONDENT/NON-APPLICANT.

Cr.MP(M) No.1321 of 2022

Between:

ANKIT SHARMA, AGED ABOUT 24 YEARS, S/O SH. BAL KRISHAN SHARMA, R/O VILLAGE GARLA, P.O. BAROH, BANERI, TEHSIL DADAHU, DISTRICT SIRMAUR, H.P., THROUGH FATHER-CUM-FIRST FRIEND, SH. BAL KRISHAN SHARMA, S/O SH. JAGAT RAM, R/O VILLAGE GARLA, P.O. BAROH BANERI, TEHSIL DADAHU, DISTRICT SIRMAUR, H.P.

….PETITIONER/APPLICANT.

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE, WITH MR. PEEYUSH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

….RESPONDENT/NON-APPLICANT.

(BY MR. DINESH THAKUR, MR.SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH SHRI AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) No.1113 of 2022 & CRIMINAL MISC. PETITION (MAIN)
Nos.1320 AND 1321 of 2022
Decided on: 29.08.2022

Code of Criminal Procedure, 1973 - Section 439 - Bail - **Narcotics Drugs and Psychotropic Substances Act, 1985** - Sections 20, 25, 29 - Petitioner is in custody - Charas/Cannabis recovered was 1.642 Kg - **Held** – Bail

application Dismissed - The record demonstrates that the contraband was in fact recovered from the car in which the accused were sitting -Section 37 NDPS - Offence to be cognizable and non-bailable - Court is not in a position to record its prima facie satisfaction as is required U/S 37 NDPS.(Paras 2,6,10)

These petitions coming on for orders this day, the Court passed the following:

O R D E R

With the consent of the parties, all these petitions are being disposed of by the same order.

By way of these petitions, a prayer has been made for release of the petitioners on bail, in F.I.R. No.52 of 2020, dated 25.07.2020, registered against them under Sections 20,25, 29 of the Narcotic Drug & Psychotropic Substances (hereinafter to be referred as 'NDPS') Act, 1985, at Police Station Swarghat, District Bilaspur, H.P.

2. There are three petitioners before this Court. Petitioner Shivam Monga and Ankit Sharma are in custody since 25.07.2020, whereas petitioner Akshay Sharma stated to be in custody since 28.07.2020. The case of the prosecution is that on 25.07.2020, a policy party was on patrolling duty and at around 3:30 a.m., when it was patrolling on the link road leading to Village Ree, it saw a car bearing registration No.PB 22U-0324 (white colour) parked on the side of the road. In the said car, besides the driver, three other persons were found sitting. As soon as these persons saw the policy party approaching them, they all got perplexed and two of the them who were occupying the back seat of the car, opened the door and fled away towards the jungle. The police party, however, apprehended the driver of the vehicle as well as other person who was sitting in the front seat. When confronted as to what they were doing at such odd hours at the place concerned, they could not give any

satisfactory answer. As the police party suspected that the persons might be in possession of some stolen or illegal property, therefore, they searched for independent witness. However, as none could be found after search of about thirty minutes, the police party made Constable Manish Kumar as the witness of the spot and in his presence, the particulars of the persons were inquired. The persons revealed their names as Shivam Monga, son of Shri Ashok Kumar Monga, resident of House No.33, Namdev Nagar, near Deepa Jyoti Park, Tehsil and District Fazilka, Punjab and the other accused disclosed their names as Ankit Sharma, son of Shri Bal Krishan Sharma, resident of Village Garla, Post Office Baroh, Baneri, Tehsil Dadahu, District Sirmaur, H.P. On being asked as to what the name of the persons who rushed towards the jungle, they disclosed their names as Rakesh Kumar, son of Shri Ramesh Kumar, resident of Village and Post Office Bhajond, Tehsil Nehradhar, District Sirmaur, H.P. and Akshay Kumar, son of Shri Munna, resident of Village Kodewala, Post Office Haripur Khol, Tehsil Nahan, District Sirmaur, H.P. The search of the vehicle lead to the discovery of a carry bag wrapped adjacent to the tubeless tyre lying in the car, in which there was some solid article. From inside the carry bag, the substance when checked, on experience appeared to be cannabis/Charas and when weighed the same was found to be 1 kg 642 grams. Thereafter, the procedure prescribed in the NDPS Act was followed and said two persons were taken into custody. The other two accused were arrested on 28.07.2020.

3. Learned Senior Counsel appearing for the petitioners has argued that the petitioners are innocent and they have been falsely implicated in the case by the police. He submitted that the petitioners are in custody since the month of July, 2020. The investigation is long complete and now the trial is going on. He submitted that taking into consideration the fact that the petitioners are in custody for more than two years, it will be in the interest of justice in case they are ordered to be released on bail for the reason that no

one knows how much time the trial will take to complete and in case the petitioners are convicted, then the law will take its own course, but till then the petitioners do deserve to be released on bail. He further informed the Court that as per instructions, in all the prosecution has to examine thirty one witnesses. Out of these thirty one witnesses, five have been examined and twenty six witnesses are still to be examined which is likely to take some time. Learned Senior Counsel placed relies upon the order passed by the Hon'ble Supreme Court of India in *Abdul Majeed Lone* Versus *nion territory of Jammu and Kashmir, petition for Special Leave to Appeal (Cri.) No.3961 of 2022*, as also the order passed by the Hon'ble Supreme Court in *Vishambhar Isiah Striesand* Versus *The* State of Himachal Pradesh, *Criminal Appeal No.1106 of 2022, (Arising out of SLP (Cri.) No.498 of 2022)* and submitted that as the Hon'ble Supreme Court has been pleased to grant bail to the petitioners before it in the above referred two cases, primarily taking into consideration the period for which they were in custody, therefore, it will be in the interest of justice in case the petitioners are also ordered to be released on bail. Learned Senior Counsel submitted that even otherwise, the case of the prosecution does not inspires any confidence as is evident from the fact that though as per the prosecution, the vehicle in issue was found to be allegedly parked on a link road leading to Village Ree, however, the spot map which was prepared by the prosecution demonstrates that in terms thereof, the vehicle was apprehended on the main National Highway leading from Swarghat to Kiratpur. He further argued that the Special Report which has been filed under Section 57 of the NDPS Act is to the effect that on the fateful day as per the investigation, Ankit Sharma, Rakesh Kumar and Akshay Kumar were on their way to Manali to Chandigarh and when they reached at Sarabai, a place near Bhunter, District Kullu, H.P., they met Shivam Monga. Thereafter, Akshay Kumar sat in the vehicle of Shivan Monga. Rakesh Kumar and Shivam Monga both left in different vehicles towards Bilaspur. Learned Senior

Counsel further submitted that in terms of this report, when they reached Swarghat, then at a Naaka, on being checked, the four accused were found to be sitting in the same vehicle, i.e. bearing registration No.PB 22U-0324, from which Charas weighing 1 kg 642 grams was recovered. Learned Senior Counsel submitted that what is contained in the report so filed under Section 57 of the Act is totally contradictory to the case as has been made out by the prosecution against the accused, which creates a serious doubt with regard to the veracity of the case of the prosecution and therefore, the petitioners deserve to be released on bail on this count also. Mr. Peeyush Verma, has adopted the arguments of Mr. N.S. Chandel, learned Senior Counsel.

4. Opposing the bail petitions, learned Additional Advocate General has argued that taking into consideration the fact that the petitioners are in custody in a case registered against them under the provisions of the NDPS Act and that too, a case involving commercial quantity of contraband, they cannot be ordered to be released on bail on the conjunctures as have been argued by the learned Senior Counsel appearing for the petitioners. Learned Additional Advocate General while relying upon the judgment of the Hon'ble Supreme Court in *Criminal Appeal Nos.1001-1002 of 2022 arising out of petitions for Special Leave to Appeal (CRL.) No.6128-29 of 2021*, titled as *Narcotics Control Bureau* Versus *Mohit Aggarwal*, has argued that Hon'ble Supreme Court has categorically held that until and unless the parameters of Section 37 are satisfied by an accused, bail cannot be granted to the accused *dehors* the length of the period of his custody. Learned Trial Court is proceeding with the matter in a expedient manner and otherwise also he submits that the State assures the Court that all the assistance shall be provided to the learned Trial Court to complete the trial as expeditiously as possible. Learned Additional Advocate General has also argued that there is no confusion with regard to the spot map as the same is being wrongly interpreted by the learned Senior Counsel appearing for the petitioners and

otherwise also as per him, the veracity of the evidence which has been collected by the prosecution has to be tested by the learned Trial Court and it is not for this Court in exercise of its jurisdiction under Section 439 of the Code of Criminal Procedure to go into the veracity of the evidence of the parties. He further states that the second car in issue was subsequently recovered at the instance of one of the accused and thus, there is no confusion qua mention of two cars n the report filed under Section 47 of the NDPS Act as has been argued by the learned Senior Counsel. Accordingly, he prayed that the bail petitions be dismissed.

5. I have heard learned counsel for the parties and have carefully gone through the pleadings as well as documents appended therewith as also the status report and documents which were made available to the Court by the learned Senior Counsel for the petitioners in the course of arguments.

6. It is not in dispute that the petitioners are in custody since July, 2020. It is further not in dispute that they are in custody in a FIR registered against them, in terms whereof they have been booked under the provisions of the NDPS Act for being in possession of commercial quantity of contraband (Charas). This Court is of the considered view that it will be in the interest of justice in case this Court does not makes any observation with regard to the arguments which have been raised by the learned Senior Counsel for the petitioners vis-a-vis the Special Report filed under Section 57 of the NDPS Act as also the spot map for the reason that any observation made qua them by this Court at this stage may adversely affect the rights of the parties in the course of the trial.

7. Suffice it to say, at this stage, this Court is not satisfied that on the basis of what has been urged by the learned Senior Counsel for the petitioners by placing reliance upon the above said documents, the petitioners are entitled to be released on bail.

8. Section 37 of the NDPS Act, *inter alia*, provides that notwithstanding anything contained in the Code of Criminal Procedure, no person accused of an offence involving commercial quantity shall be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds of believing that he is not guilty of such offence.

9. Hon"ble Supreme Court in *N*arcotics Control Bureau Versus Mohit Aggarwal's case (Supra), has been pleased to hold that a plain reading of non obstantic Clause inserted in sub-section (1) and conditions imposed in sub-section (2) of Section 37 of the NDPS Act demonstrates that there are certain restrictions placed on the power of the Court while granting bail to a person accused of having committed an offence under the provisions of the NDPS Act. Hon'ble Supreme Court after referring to its earlier judgment in *Collector of Customs, New Delhi* Versus A*hmadalieva Nodira, (2004) 3 Supreme Court Cases 549*, has held that the expression "reasonable grounds" used in Clause-3 of sub-section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. Hon'ble Supreme Court has further held that for arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Hon'ble Supreme Court has also held that the Court is not required to record a finding that the accused person is not guilty and it is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the provisions of NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing the accused on bail. Thus, the focus is on the availability of the reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with. Hon'ble

Supreme Court has also held that the length of period of custody of the accused or the fact that charge sheet has been filed and trial has commenced by themselves are not considerations that can be treated as persuasive grounds for granting relief to the party under Section 37 of the NDPS Act.

10. Applying the aforesaid observations of the Hon'ble Supreme Court to the facts of the present case, the petitioners have not been able to demonstrate that two of the accused were not actually apprehended from the vehicle in issue on the fateful day by the police party and the other two were not later on arrested on their particulars being provided. The factum of there being four persons in the car is the very foundation of the case of the prosecution and therefore, it is not as if two of the accused have been arrayed as such on the basis of confessional statement of other accused. Further, the Investigation Report demonstrates that investigation revealed that all the petitioners were together in District Kullu and all were on their way towards Bilaspur-Chandigarh on the fateful day, be it in one car or two cars. As for now, the record demonstrates that the contraband was in fact recovered from the car in which the accused were sitting as per the prosecution. In these circumstances, this Court is not in a position to record its *prima facie* satisfaction as is required under Section 37 of the NDPS Act that there are reasonable grounds for believing that the petitioners are guilty of such ofence. As far as the orders of the Hon'ble Supreme Court relied upon by the learned Senior Counsel for the petitioners are concerned, this Court is of the considered view that in light of the judgment of the Hon'ble Supreme Court on the provisions of Section 37 of the NDPS Act pronounced in Narcotics Control Bureau Versus Mohit Aggarwal's case (Supra), all that this Court can observe is that the orders which have been referred to by the learned Senior Counsel, is the discretion which has been exercised by the Hon'ble Supreme Court in favour of the party before it. But this Court being bound by the pronouncement of law as has been declared by the Hon'ble Supreme Court is

duty bond to follow the verdict as it stands laid down in Narcotics Control Bureau Versus Mohit Aggarwal's case (Supra).

11. Accordingly, as this Court is not convinced that case for grant of bail is made, these petitions are accordingly dismissed. There would be no need for a certified copy of this order and learned counsel for the parties can download this order alongwith case status from the official web page of this Court and attest it to be a true copy.

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

Between:

CHHALLO DEVI, W/O LT. SH. PARKASH CHAND, R/O VILLAGE MAJHACH, P.O. BURUA, TEHSIL MANALI, DISTRICT KULLU, H.P., AGED ABOUT 54 YEARS (BAIL APPLICATION IS BEING FILED THROUGH HER SON SH. ASHOK KUMAR)

….PETITIONER.

(BY MR. GAURAV SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

….RESPONDENT.

(BY MR. SUMESH RAJ, MR. DINESH THAKUR, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

(ASI GIRDHARI LAL, I/O P.S. MANALI, DISTT. KULLU, H.P., PRESENT IN PERSON)

CRIMINAL MISC. PETITION (MAIN)
No.1781 of 2022
Decided on: 17.08.2022

Narcotic Drug & Psychotropic Substances Act, 1985- Section 20- Bail petition filed by the petitioner in case registered under the Act- **Held-** Petition dismissed. Where the allegation against the petitioner is that she was apprehended with commercial quantity of Charas on the fateful night, she cannot be ordered to be released on bail, simply on the ground that she happens to be a lady and further that she has been in custody for more than two years. These pleas do not satisfy the test of Section 37 of the Narcotic Drug & Psychotropic Substances Act, in terms whereof, no person accused of an offence/offences punishable under Sections 19, 24 or 27A of the Narcotic

Drug & Psychotropic Substances Act and also for the offence involving commercial quantity, shall be released on bail unless, *inter alia,* where the bail petition is opposed by the learned Public Prosecutor, the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. (Para 6)

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

O R D E R

Status report filed, which is ordered to be taken on record. By way of this petition, a prayer has been made for release of the petitioner on bail, in F.I.R. No.14 of 2020. dated 02.02.2020, registered against her at Police Station Manali, District Kullu, H.P., under Section 20 of the Narcotic Drug & Psychotropic Substances Act, 1985.

2. Learned counsel for the petitioner has submitted that the petitioner happens to be a lady and is a first time offender and therefore, keeping into consideration these two facts coupled with the fact that the petitioner is in custody for more than two years now, the bail petition be allowed. No other point has been urged.

3. The petition is opposed by learned Additional Advocate General, *inter alia*, on the ground that the quantity involved in the case is 1 kg 130 grams of Charas which is a commercial quantity and further the investigation which has been carried out in the matter and on the basis of which charges were framed against the accused points out towards the culpability of the petitioner vis-a-vis the offence alleged to have been committed by her. Learned Additional Advocate General has also relied upon the judgment of Hon'ble Supreme Court, in *petitions for Special Leave to Appeal (CRL) No.6128-29 of 2021*, titled as *Narcotics Control Bureau* Versus *Mohit Aggarwal* and submitted that the factum of the petitioner being in custody for more than two years is

immaterial and the person accused for having committed an offence punishable under the provisions of Narcotic Drug & Psychotropic Substances Act cannot be released on bail in view of the provisions of Section 37 of the same and unless the petitioner satisfies the tests so laid in Section 37 of the Act for grant of bail. Accordingly, he has prayed that the present petition be dismissed.

4. I have heard learned counsel for the parties and have gone through the petition as well as the status report.

5. The allegation against the petitioner is that on 01.02.2020, the police party which was on patrol duty and was proceeding towards Bhootnath Temple, Manali, at around 10:40 p.m. saw a lady all alone walking from the Volvo Bus Stand side. As soon as the lady saw the police party, she threw a packet which was concealed inside her shawl (Pattu) and started walking so as to evade herself from the police party. The Lady Constables stopped the lady and asked her as to what was she doing at said time of night all alone at the place concerned and what were the contents of the packet which was thrown by her. As no satisfactory answer came forth from the petitioner, the police party became suspicious and after following the procedure prescribed in the Narcotic Drug & Psychotropic Substances Act when the packet was opened, the same was found to be containing 1 kg 130 grams of Charas. This lead to the registration of FIR.

6. It is not in dispute that the petitioner is in custody since 01.02.2020. The Court has been further informed that as of now, the statements of prosecution witnesses are to be recorded and the next date fixed for this purpose is 29.09.2022. Be that as it may, this Court is of the considered view that in the peculiar facts of the case where the allegation against the petitioner is that she was apprehended with commercial quantity of Charas on the fateful night, she cannot be ordered to be released on bail, simply on the ground that she happens to be a lady and further that she has

been in custody for more than two years. These pleas do not satisfy the test of Section 37 of the Narcotic Drug & Psychotropic Substances Act, in terms whereof, no person accused of an offence/offences punishable under Sections 19, 24 or 27A of the Narcotic Drug & Psychotropic Substances Act and also for the offence involving commercial quantity, shall be released on bail unless, *inter alia,* where the bail petition is opposed by the learned Public Prosecutor, the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. In the facts of this case, this Court cannot record its satisfaction that the accused is not guilty of the offence alleged to have been committed by her.

7. Hon'ble Supreme Court in Narcotics Control Bureau Versus Mohit Aggarwal's case (supra), in Paras 14 & 18 thereof has been pleased to hold as under:-

> "*14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.*
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> ---
>
> *18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for*

granting relief to the respondent under Section 37 of the NDPS Act."

8. Therefore, in view of the reasons assigned hereinabove as well as the judgment of the Hon'ble Supreme Court, as this Court does not finds any merit in the present petition, the same is dismissed.

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

Between:
PURAN CHAND, S/O SH. AJIT SINGH, M/S THAKUR CLINIC, VILLAGE AND POST OFFICE, BALDUHAK, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P.

.....PETITIONER

(BY MR.N.K THAKUR, SENIOR ADVOCATE WITH MR. DIVYA RAJ SINGH, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.....RESPONDENT

(BY MR.DESH RAJ, ADDITIONAL ADVOCATE GENERAL WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL REVISION PETITION
NO. 290 of 2014
Reserved on: 20.10.2022
Decided on: 31.10.2022

Code of Criminal Procedure, 1973 -Section 397- **Drugs and Cosmetics Act, 1940-** Revision petition filed against order of Additional Sessions Judge confirming the conviction and sentencing order of trial court under Sections 27 & 28 of the Act – **Held** - Petition allowed and accused/ petitioner acquitted. Prosecution carried a very heavy burden to prove its case beyond all reasonable doubts. This could only be possible had the evidence produced by it been so confidence inspiring as to negate the possibilities of all other hypothesis than the guilt of accused. There were many gaps in the prosecution story which remained unexplained. Thus, when two views appear

to be possible, the view favourable to the accused has to be given precedence (Para 17)

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

O R D E R

By way of instant Revision petition, petitionerhas challengedthe judgment dated 28.08.2014, passed by learned Additional Sessions Judge, Hamirpur, H.P. in Cr.Appeal No. 56 of 2011, whereby judgment dated 29.8.2011 passed by learned Judicial Magistrate First Class, Nadaun, District Hamirpur in case No. 40-1 of 2008 convictingand sentencing petitioner for offences under Section 27(b)(ii) and Section 28 of Drugs and Cosmetic Act, 1940 has been affirmed.

2. The Drug Inspector, Hamirpur, H.P. filed Complaint No. 40-1/2008 against petitioner alleging *inter-alia* that petitioner was found selling, stocking and exhibiting for sale allopathic drugs without valid license. As per Drug Inspector, he inspected the premises of petitioner on 04.04.2006 andfound petitioner running a Clinic-cum- Medical Store under the name and style of M/s Thakur Clinic at Village and Post Office Balduhak, Tehsil Nadaun, District Hamirpur, H.P. Large number of allopathic medicines were found in the business premises of petitioner being exhibited for sale. Petitioner could not produce valid license for such exhibition or sale of allopathic drugs.The Drug Inspector, seizedall allopathic drugs found in the premises of the petitioner. Prepared its inventory in Form No.16 and sealed them in two separate cardboard cartons. Independent witnesses were associated, in whose presence seizureand sealing procedure was concluded. Later, petitioner was afforded an opportunity by Drug Inspector to submit the license, if any, to exhibit for sale allopathic drug, but the petitioner failed to

do so, hence the complaint for commission of offences under Section 18(c) and 18-A of Drugs and Cosmetics Act, 1940.

3. The Drug Inspector examined himself and three other witnesses to prove the allegation against the petitioner. CW-2 Chaman Lal,CW-3 Sukh Dev and CW-4 Rakesh Kumar,were examined as independent witnesses, but none of them supported the prosecution case. Petitioner was examined under Section 313 of Cr.P.C. Petitioner also examined one Subhash Chand as defencewitness.

4. Learned Trial Court convicted the petitioner for commission of offence under Section 27(b)(ii) of Drugs and Cosmetics Act, 1940 and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs. 5,000/-. In default of payment of fine to further undergo simple imprisonment for three months. Petitioner was also convicted for offence under Section 28 of the Act,*ibid* and was sentenced to undergo simple imprisonment for six months and to pay fine of Rs. 1,000/-.In default of payment of fine to further undergo simple imprisonment for one month. The substantive sentences were ordered to run concurrently.

5. Petitioner challenged the judgment of conviction and sentence passed by learned Trial Court by filing an appeal under Section 374 of Code of Criminal Procedure, but remained unsuccessful. Learned Additional Sessions Judge, Hamirpur, dismissed the appeal of the petitioner vide impugned judgment and affirmed the conviction and sentence imposed by learned Trial Court.

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

7. Learned Trial Court convicted the petitioner on the sole testimony of the complainant/Drug Inspector. It was held that the petitioner had failed to prove any purpose or motive with the Drug Inspector to falsely

implicate him, therefore,the testimony of the complainant/Drug Inspectorcould not be doubted.

8. Learned Appellate Court while affirming the findings returned by learned Trial Court further held that the independent witnesses, though had turned hostile, their testimonies could not be discarded as a whole as these witnesses had admitted their signatureson recovery memo Ext. CW-1/D and the sealed boxes Ext. CW-1/E-1 and E-2 and further had failed to render any plausible explanation for having signedsuch documents. Finding corroboration to the version of complainant fromstatements of witnesses CW-2 to CW-4 in aforesaid manner, learned Appellate Court affirmed the conviction and sentence of the petitioner as imposed by learned Trial Court.

9. Learned counsel for the petitioner has contended that the judgments passed by both the Courts below suffer from grave illegalitybeing against cardinal principles of criminal jurisprudence. He submitted that the prosecution had failed to prove its case beyond all reasonable doubts.

10. On the other hand, Mr. Desh Raj Thakur, learned Additional Advocate General has supported the judgments passed by learned Courts below on the ground that the conclusion as to guilt of the petitioner has been rightly drawn after appreciation of evidence.

11. The case as set-up by Drug Inspector was that he visited the business premises of the petitioner on 04.04.2006. Initially, he was alone. He found allopathic drugs exhibited for sale in the business premises of the petitioner without any license or permission.

12. Complainant/Drug Inspector examined himself as CW-1. In his examination-in-chief, CW-1 remained totally silent as to at what stage and in what manner, he associated the independent witnesses. He only stated that hemade an inventory of the allopathic drugs found from the store of the petitioner in Form No.16.The seized drugs were sealed in two separate

cardboard cartons in presence of the witnesses who appendedtheir signatures on such boxes.

13. CW-1 did not state that he had seized allopathic drugs in presence of witnesses and that the witnesses had signed inventory Form No. 16, Exhibit CW1/D. Perusal of the document Ext. CW1/D reveals that this document runs in two pages and the contents written on second page are in fact on the reverse of first page. The signatures of Sukh Dev are on top left margin of first page and signatures of Caman Lal are on the bottom of the first page on left side. Signatures of Rakesh Kumar are on the bottom of second page on left side. Thus, there is no set pattern of getting the signatures of the witnesses on the document. It appears thateither thewitnesses were made to signExt. CW1/D at such places where some spaces were left after writing its contents or the signatures were so obtained on blank papers so as to have sufficient blank space to scribe the contents at ease. Had the document been written in presence of witnesses, the scribe must be mindful of the fact that it was being witnessed by others who were also to sign the same. With such thought in mind sufficient and proper space would have been left for witnesses to append their respective signatures on each of the page. The manner of execution of document creates doubt regarding seizure being made in presence of independent witnesses. CW-2 to CW-4 have stated that no recovery was affected in their presence and their signatures were taken subsequently. As per CW-2, he had signed Ext. CW1/D and other documents at Sharma Medical Store, Hamirpur and document was blank, when he had appended his signature thereon.Similarly, CW-3 has rendered the explanation that he had signed the document Ext. CW1/D at District Hospital, Hamirpur, H.P. on the asking of a Medical Representative named as Rinku. CW-4 Rakesh Kumar also stated that he had signed blank document in good faith.

14. To prove the signatures of witnesses on a document is quite distinct from proving the authenticity of contents of the documents. It has to

be suggestive from all attending circumstances that the witnesses had appended their signatures on the document after witnessing the facts detailed therein. The purpose of association of independent witnesses in a criminal investigation is to lend authenticity to the version of the prosecution. Thus, keeping in view the entirety of attending circumstances, explanation rendered by CW-2 to CW-4 for appearance of their signatures on document Ext. CW1/D and Ext. CW-1/E-1 to CW-1/E-2 could not have been brushed aside lightly.

15. Even otherwise, document Ext. CW1/D needs to be looked at with circumspection for the reason that CW-1 did not state that that he had incorporatedthe factum of the seizure of documents Ext. CW-1/C-1 to C-27 in memo Ext. CW1/D, nor had such fact been suggested to CW-2 to CW-4 while being cross- examined by complainant. Noticeably, such insertion at serial No. 31 of page No.2 of document Ext. CW-1/D, on the face of it, appears to been made subsequently. This apparently has been done to overcome the omission to prepare separate memo regarding recovery of documents Ext. CW1/C-1 to C-27. Had the Drug Inspector carried his inspection in the presence of independent witnesses, the seizureof documentsExt. CW1/C-1 to C-27 would also have been in presence of such witnesses. Such hypothesis is, however, belied by the fact that documents Ext.CW1/C-1 to C-27 donot bear the signaturesofany of the independent witnesses.Further, it has also not been proved that the documents Ext. CW-1/C-1 to C-27 were either in the handwriting of petitioner or were prepared under his instructions.

16. Another fact that cannot be brushed aside is that out of three independent witnesses, two witnesses i.e. CW-3 and CW-4 were not from the same village what to talk of same locality. There is no explanation, as to how, the Drug Inspector was able to procure the presence of witnesses who evidently were from other villages. There is also no explanation as to why,

thepetitioner did not associate the witnesses from same locality. This again creates doubt on the story put forth by Drug Inspector.

17. Prosecution carried a very heavy burden to prove its case beyond all reasonable doubts. This could only be possible had the evidence produced by it been so confidence inspiring as to negate the possibilities of all other hypothesis than the guilt of accused. However, in light of observations made hereinabove, there were many gaps in the prosecution story which remained unexplained. Thus, when two views appear to be possible, the view favourable to the accused has to be given precedence.

18. In light of above discussion, the revision petition isallowed. Judgment dated 28.08.2014, passed by learned Additional Sessions Judge, Hamirpur, H.P. in Cr. Appeal No. 56 of 2011 and judgment dated 29.8.2011 passed by learned Judicial Magistrate First Class, Nadaun, District Hamirpur in case No. 40-1 of 2008 convicting and sentencing petitioner for offences under Section 27(b)(ii) and Section 28 of Drugs and Cosmetic Act, 1940 are set-aside. Petitioner is acquitted of all the charges.

19. The petition is accordingly disposed of, so also the pending miscellaneous application(s), if any.

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

Between:-

SH. KISHORE KAMTA
SON F SH. BIJA RAM,
RESIDENT OF PREM COTTAGE,
NEAR ENGINE GHAR, SANJAULI,
SHIMLA – 171006. …PETITIONER

(BY SH. SANJEEV BHUSHAN, SENIOR ADVOCATE WITH MR. RAJESH KUMAR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH
   SECRETARY (EDUCATION),
   GOVERNMENT OF H.P., SHIMLA.

2. DIRECTOR OF HIGHER EDUCATION,
   H.P. SHIMLA.

3. PRINCIPAL, GSSS, LALPANI,
   TEHSIL AND DISTRICT SHIMLA, H.P.

… RESPONDENTS.

(SH.DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION
No. 1901 OF 2015
RESERVED ON: 29.09.2022
DECIDED ON:11.10.2022

Constitution of India, 1950 - Article 226 - Petition filed for the grant of benefit of contract employment and regularization of services; and release of arrears of grants in aid in favour of the petitioner – **Held** - Petition allowed. Petitioner was duly qualified from the very inception of his joining as DPE in GSSS, Lalpani, Shimla in October, 2005. There is no allegation of petitioner being incompetent to discharge his duties. Respondent No.1 as a model employer cannot be allowed to indulge in exploitative actions towards the citizens of the country. The administrative failure of respondents to sanction a

post despite requirement cannot be allowed to be used as a shield for such exploitative action.(Para 14)

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

O R D E R

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

(I) *That an appropriate writ, order or directions may kindly be issued and the respondents may kindly be directed to bring the services of the petitioner on contract basis from the date when juniors of the petitioner in the State have been given such benefits with further directions to give all the monetary benefits of the contract services to the petitioner w.e.f. January, 2015 when such benefits were extended to the juniors of the petitioner in the State of HP in the interest of justice.*

(ii) That a writ in the nature of mandamus may kindly be issued and the respondents may kindly be directed to release all the entire arrears of grant in aid to the petitioner with effect from 2007, the date when respondents started releasing grant in aid to the PTA teachers with interest @ 12 % p.a. till date and also to pay grant in aid in future to the petitioner.

2. The case of the petitioner in nutshell is that in 2005, the strength of students in +1 and +2 classes in GSSS Lalpani, Shimla was around 2000. Only 1 (one) DPE was posted in the said school. The school management found it difficult to cope with the requirements of students with only one DPE posted in the school. Permission was sought for another post of DPE in GSSS, Lalpani, Shimla from respondent No.2. Keeping in view the strength of the students, respondent No.2 granted the sanction to employ a DPE in GSSS, Lalpani, Shimla through the PTA. A selection committee was

constituted. The post of DPE in GSSS, Lalpani, Shimla was advertised. Total 24 candidates participated in the selection process. Interviews were conducted and a panel of successful candidates was prepared. Petitioner was placed at serial No.2. The post of DPE in GSSS, Lalpani, Shimla was initially offered to the person placed at serial No.1 of the merit list, however, the said person resigned from the post within a month from the date of joining. Thereafter, the petitioner was offered appointment in October, 2005. Petitioner accepted the offer and has been working as DPE in GSSS, Lalpani, Shimla since then.

3. The grievance of the petitioner is that despite being allowed to work as DPE in GSSS, Lalpani, Shimla since 2005, he was not granted the benefit of grant-in-aid and was paid meagre emoluments from PTA funds. His further grievance is that he had also become entitled for the benefit of contract appointment after requisite period ofservice followed by regularization as per the policy adopted by the State Government.

4. The respondents, by way of their reply, have contested the claim of petitioner only on the ground that there was only one sanctioned post of DPE in GSSS, Lalpani, Shimla and it was held by a regular incumbent. Petitioner was not appointed against the sanctioned post and hence had no right to claim the benefits of grant-in-aid scheme to PTA teachers formulated by the State Government. The other factual aspects of the matter have not been denied on behalf of the respondents.

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

6. It is evidently clear from the pleadings of the parties that the petitioner has been working as DPE in GSSS, Lalpani, Shimla since October, 2005. Almost 17 years have elapsed since the appointment of petitioner. Petitioner is being paid meager emoluments out of the PTA funds. Petitioner has been denied the benefit of PTA-GIA Policy-2006 only on the ground that he was not appointed against the sanctioned post. It is also not denied that

respondent No.2 had allowed the Principal, GSSS, Lalpani, Shimla vide communication dated 13.07.2005 to appoint a DPE in the school out of the PTA funds keeping in view the strength of the students in the school. It is also not in dispute that on the basis of such sanction accorded by respondent No.2, a selection process was initiated and petitioner was appointed as DPE in the school in pursuance thereto. The qualification of petitioner for the post of DPE is also not in question.

7. In the aforesaid circumstances, the question arises whether the petitioner can be denied the benefit of PTA-GIA-2006 policy and further benefits of contract employment and regularization, merely on the ground that the petitioner was not appointed against a sanctioned post?

8. The State Government has been justifying the appointment of teachers by PTA on the grounds of its financial constraints. The temporary employment to teachers by PTA has continued for many years. The continuance of the employment in aforesaid form crystalized certain rights in favour of the incumbents so employed. The State Government formulated the PTA-GIA Policy in 2006. Subsequently, after requisite number of years, the incumbents appointed by the PTAs were given contract employment followed by regularization.

9. Petitioner was appointed by the PTA of the school before formulation of PTA-GIA-2006 Policy. The mere fact that petitioner has been allowed to work as DPE in GSSS, Lalpani, Shimla for such a long spell proves that the requirement of deployment of second DPE to cope with the pressure of work continued throughout. That being so, the stand of the respondents to deny petitioner the grant-in-aid and all consequential benefits is clearly unjustified.

10. The respondents have utilized the services of the petitioner for 17 long years for their own cause and requirement. It is on record that the Administrative Department recommended to the State Government for

creation of an additional post of DPE in GSSS, Lalpani, Shimla, but the same was rejected by the Finance Department. The failure of the Government to create an additional post of DPE in GSSS, Lalpani, Shimla despite the requirement to meet students-teachers ratio cannot be used as a tool to exploit the petitioner. In case there was no requirement to have second DPE in the school, petitioner should not have been allowed to work for such a long period. Once the respondents have utilized the services of the petitioner, they are estopped from denying him the claims as have been given to other PTA teachers.

11. In CWP No. 226 of 2010, titled ***Promila Devi*** vs. ***State of H.P. and others,*** decided on 02.04.2015, a Co-ordinate Bench of this Court in almost identical facts, posed a pertinent question as under:

> *"6. At this stage, a wider issue arises for consideration as to whether the State as a model employer after having extracted nearly a decade of service from the petitioner can claim that she had not been regularly appointed. Further, can the State be permitted to argue that petitioner even in these days of high cost of living should remain content with the remuneration of Rs.1000/- more particularly when admittedly the petitioner has already been paid the salary out of PTA fund with effect from April 2010 to March 2013."*

12. While answering the above noted question, it was observed as under:

> *"9.The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the High Court of H.P. Constitution of India.*

> 10. *The State government is expected to function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the 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 its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer."*

13. Similarly, in CWP No. 384 of 2017, titled Renuka Devi vs. State of H.P. and others, decided on 26.05.2018, another co-ordinate Bench of this Court in related facts situation observed as under:

> "***13***.It is strange behavior on the part of the State *that for teaching students, petitioner is eligible, but for making payment of grant-inaid, she is being considered ineligible for want of certain formalities to be performed by PTA on behalf of respondents-State. In case her appointment was defective or illegal, she should not have permitted to continue for 11 years. There is no dispute about the eligibility of the petitioner for her appointment as Science teacher.*
>
> ***16.*** *Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact*

State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution."

14. Applying the above noticed exposition to the facts of the case, there is no hesitation to hold that the treatment given to petitioner by respondents is harsh and discriminatory and hence cannot be sustained. Petitioner was duly qualified from the very inception of his joining as DPE in GSSS, Lalpani, Shimla in October, 2005. There is no allegation of petitioner being incompetent to discharge his duties. Respondent No.1 as a model employer cannot be allowed to indulge in exploitative actions towards the citizens of the country. The administrative failure of respondents to sanction a post despite requirement cannot be allowed to be used as a shield for such exploitative action.

15. Resultantly, the petition is allowed. The respondents are directed as under:

i) To release the grant-in-aid in favour of petitioner from the date when the grant-in-aid Rules were notified and;

ii) To consider the case of petitioner for contract employment and regularization in accordance with the policy.

16. The aforesaid directions be complied with within a period of three months.

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

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

Between:-

SH. BABU RAM, SON OF SH. MUNNA RAM, RESIDENT OF VILLAGE MALONWALA BHOOD, P.O. SAMBHUWALA, TEHSIL NAHAN, DISTRICT SIRMAUR, H.P. EX. T-MATE, HPSEB LTD. DIVISION NAHAN, DISTRICT SIRMAUR, H.P. …PETITIONER

(BY SH. A.K. GUPTA, ADVOCATE)

AND

4. THE HPSEB LTD. THROUGH ITS EXECUTIVE DIRECTOR (PERS.) WITH HEADQUARTERS AT SHIMLA-4.
5. THE CHIEF ACCOUNTS OFFICER, HPSEB LTD. WITH HEADQUARTERS AT SHIMLA, H.P.
6. THE EXECUTIVE ENGINEER, HPSEB LTD. DIVISION NAHAN, DISTRICT SIRMAUR, H.P.

.. RESPONDENTS.

(SH.T.S. CHAUHAN, ADVOCATE, FOR THE RESPONDENTS)

CIVIL WRIT PETITION
No. 3421 OF 2019
RESERVED ON:12.10.2022
DECIDED ON:18.10.2022

Constitution of India, 1950-Article 226- Petition filed by the petitioner to order the respondent to take into account the service rendered by him on daily wage basis/temporary basis w.e.f. 1987 till 1998 for the purpose of pension - **Held-** Petition dismissed. Respondent No.1 maintains four types of establishments i.e. Regular establishment, Work-charge establishment, Casual establishment and Apprentices. As per his own admission, petitioner was placed in work-charge establishment w.e.f. 01.01.1998. It being so, the petitioner cannot claim to have worked in regular establishment prior to 01.01.1998 because a person working in regular establishment will not be again taken on work charge establishment, whereas vice versa can be true. Having accepted the work charge status w.e.f 01.01.1998, petitioner cannot subsequently turn around and claim that his employment prior to 01.01.1998

was in regular establishment. The petitioner has otherwise failed to lay any factual foundation to establish his claim. (Paras 8 & 9)

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

O R D E R

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

> *"i) That the respondents may be ordered to take into account the service rendered by the petitioner on daily wage basis/temporary basis w.e.f. 1987 till 1998 for the purpose of pension and the entire service may be ordered to qualify and the same may be added to the qualifying service for the purpose of pension and other retiral benefits and the pension of the petitioner may be ordered to be re-fixed from the due date with all the benefits incidental thereof."*

2. The facts as pleaded in the petition are that the petitioner was engaged as T-mate by the respondents in March, 1987. His services were brought on work charge/regular establishment w.e.f. 01.01.1998. Petitioner retired in November, 2012 and he is getting pension on the basis of 13 years of his service after 01.01.1998.

3. The petitioner claims that his services prior to 01.01.1998 are also liable to be counted as qualifying service for pension and other retiral benefits. As per petitioner, he was employed as temporary workman in the regular establishment of respondent No.1 prior to 1.1.1998 and as such, his entire service would qualify for the purpose of pension as per the CCS(Pension) Rules, 1972. The petitioner further claims that the respondents had prepared his service book and he was also subjected to medical examination before his appointment which means that petitioner was temporary workman.

4. The claim of the petitioner has been contested by respondents. It is averred that petitioner is estopped from filing the petition and is also not

entitled for relief on account of delay and laches. On merits, it is submitted that the services of the petitioner rendered as daily wager cannot be counted towards pensionary benefits.

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

6. The petitioner has placed reliance upon the Standing Orders applicable to respondent No.1. Petitioner submits that since his services were utilized continuously from 1987 till 1997 with 240 days in each calendar year, his employment cannot be said to be casual. As per the petitioner he has worked as a temporary employee in regular establishment of respondent No.1 which gives him right to claim the period of service rendered by him before 01.01.1998 to be counted towards qualifying service for pension.

7. Clause 5 of the Standing Orders relied upon by the petitioner read as under:

> **"5**. The Board shall have the following classes of workmen in the different establishments: -
>
> (a) Regular establishment having temporary and permanent workmen.
>
> (b) Workcharge establishment having workcharge workmen.
>
> (c) Casual establishment having Casual/Temporary workmen.
>
> (d) Apprentices.
>
> **Explanation: -**
>
> (a) The workmen (Temporary & Permanent) on regular establishment shall be governed by F.R.& S.R.
>
> (b) The workmen in workcharge establishment shall also be governed by F.R. & S.R. but for the purpose of leave the provisions of these Standing Orders shall apply.
>
> (c) A 'Temporary Workman' in casual establishment shall mean a workman who has been engaged for a work which is essentially of a temporary nature and likely to be finished within a limited period.

(ii) A 'Casual workmen' in Casual establishment is a workman whose employment is of a Casual nature.

(iii) A Casual Workman shall be said to be in continuous service for a period if he is, for that period, in un-interrupted service, including service which may be interrupted on account of reasons as indicated hereunder in the Note.

Where a Casual workman is not in continuous service within the meaning of above sub-para for a period of one year, he shall be deemed to be in continuous service for one year, if he, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked in the different areas of the Pradesh as under:-

1. All areas of H.P. except Lahaul&Spiti District Bharmour area in Chamba Distt., and Pangi/Killar areas in Chamba Distt. — 240 days

2. Lahaul&SpitiDistt. — 140 days

3. Bharmour area in Chamba Distt. — 180 days

4. Pangi and Killar area in Chamba Distt. — 120 days

The Casual Workman fulfilling the above criteria shall be made temporary in its services in the Casual establishment and shall be given 10% additional marks at the time of making regular selections for the work-charged/regular posts, if he has un-interrupted service of five years in the Board and he fulfills the eligibility qualifications and has been employed through employment exchange. Further, he shall be given age relaxation if he becomes overage by serving in the Board on daily wages.

****Note.*****

"Uninterrupted Service" includes service interrupted on account of the following reasons, namely: -

(i) Sickness, as certified by a Doctor or Employees State Insurance Scheme where such scheme is applicable, or elsewhere by a Registered Medical Practitioner.
(ii) Accident.
(iii) Authorised leave.
(iv) Lay-off as defined in the Industrial Dispute Act, 1947 (XIV) of 1947)
(v) Strike which is not illegal.
(vi) Lock-out.
(vii) Cessation of work which is not due to any fault of the workman concerned.
(viii) Involuntary employment.

(d) **Apprentice:** An apprentice is a learner who is paid an allowance during the period of his training."

8. According to aforesaid provision, respondent No.1 maintains four types of establishments i.e. Regular establishment, Work-charge establishment, Casual establishment and Apprentices. As per his own admission, petitioner was placed in work-charge establishment w.e.f. 01.01.1998. It being so, the petitioner cannot claim to have worked in regular establishment prior to 01.01.1998 because a person working in regular establishment will not be again taken on work charge establishment, whereas vice versa can be true. Having accepted the work charge status w.e.f 01.01.1998, petitioner cannot subsequently turn around and claim that his employment prior to 01.01.1998 was in regular establishment. Explanation (b) to Clause 5 reproduced above, clearly provides that only the workmen on regular establishment and in workcharge establishment shall be governed by F.R. & S.R. subject, however, to an exception that in case of work charge employees, the provisions of the Standing Orders shall apply for the purpose of leave.

9. Further, the petitioner has otherwise failed to lay any factual foundation to establish his claim. Petitioner has not placed on record his

initial order of appointment or the document by virtue of which he was conferred work charge status w.e.f. 01.01.1998.

10. Petitioner has tried to draw strength to his case from judgment passed by the Division Bench of this Court in ***Veena Devi vs. Himachal Pradesh State Electricity Board Ltd. and another, CWP No. 5400 of 2014,*** decided on 21.11.2014. Perusal of said judgment reveals that the reliance thereon by petitioner is misplaced. The same cannot be used by petitioner to propagate his cause as the facts in the case of *Veena Devi* (supra)were entirely different. Petitioner in said case was appointed as a Clerk on contract basis and had worked as such continuously. It was on consideration of her contract employment vis-à-vis the provisions of Rule 17 of the CCS(Pension) Rules, 1972, that the matter was decided.

11. The petitioner was granted work charge status on 01.01.1998. He did not raise any grievance at that stage. He retired in November, 2012 and kept silent thereafter without any justifiable cause. The petition has been filed at highly belated stage, hence the petition also suffers from vice of delay and laches.

12. Resultantly, there is no merit in the petition and the same is accordingly dismissed, so also the pending application(s) if any.

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

Between

SMT. CHANDER KALA, WIFE OF SHRI BARU RAM, RESIDENT OF VILLAGE DHAR CHANDNA, TEHSIL KUPVI, DISTT SHIMLA H.P. PRESENTLY WORKING AS ANGANWARI WORKER IN ANGANWARI CENTRE SHIMOLA, TEHSIL SHILLAI, DISTRICT SIRMOUR HP

.....PETITIONER

(BY SH. SANJEEV BHUSHAN, SR. ADVOCATE WITH SHRI RAJESH KUMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY, (WOMEN & CHILD DEVELOPMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2. DIRECTOR OF WOMAN AND CHILD DEVELOPMENT, HIMACHAL PRADESH SHIMLA.

3. STAFF SELECTION COMMISSION, HAMIRPUR, DISTRICT HAMIRPUR THROUGH ITS SECRETARY.

....RESPONDENTS

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL FOR R-1 & 2
(SHRI SANJEEV KUMAR MOTTA, ADVOCATE FOR R-3)

CIVIL WRIT PETITION
NO.4497 OF 2021
Decided on: 14.10.2022

Constitution of India, 1950 - Article 226- Petition filed to order direction to the respondents to provide proportionate reservation to OBC (UR) category against 10 posts requisitioned and to offer appointment to petitioner from the

same date i.e. July, 2021 when similarly situated persons were offered appointment - **Held** - Petition allowed. As recruitment to the post of Supervisor from amongst Anganwari workers is a direct recruitment out of non-Governmental employees, who have been engaged as Anganwari workers on honorarium basis under the Project/Scheme, therefore, reservation applicable to direct recruitment at the time of initial appointment shall also be applicable to vacancies/posts available to be filled by way of Limited Direct Recruitment from amongst Anganwari workers as applicable for other direct recruitment and therefore, candidates belonging to Other Backward Classes working (engaged) as Anganwari workers are also entitled for reservation in Limited Direct Recruitment to the post of Supervisor through Limited Direct Recruitment. Thus, omission or commission on part of respondents No.1 and 2 by not providing reservation to OBC category (UR) in 10 additional posts is unconstitutional, arbitrary, unreasonable and irrational. (Para 12)

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

O R D E R

Petitioner, working as Anganwari worker in AnganwarI Centre, Shimola, Tehsil Shillai, District Sirmaur HP and eligible to be considered for the post of Supervisor to be filled-in through Limited Departmental Recruitment (LDR) and placed at Serial No.1 in waiting list of OBC category in such process completed by respondents, has approached this Court seeking direction to respondents to provide proportionate reservation to OBC (UR) category against 10 posts requisitioned in addition to originally notified 41 posts advertised vide advertisement dated 28.12.2019, Annexure P-1, with further direction to respondents to offer appointment to petitioner from the same date i.e. July, 2021 when similarly situated persons were offered appointment, with all consequential benefits of pay, arrears, seniority etc.

2. Admittedly, in pursuance to requisition sent by respondents No. 1 and 2, respondent No.3 initiated the process for filling-up 41 posts of Supervisor through LDR, on contract basis, in the Department of Women and

Child Welfare through Advertisement No. 35-3/2019. Out of 41 posts, 23 posts were alloted to General (UR) category whereas 8, 7, and 3 posts were alloted to SC (UR), OBC(UR) and ST (UR) categories respectively. On declaration of result, 41 posts were filled by appointing candidates of various categories as per allotment of posts referred supra. At the time of preparation of select list, merit/categorywise waiting panel was also prepared wherein petitioner was placed at Sr.No.1 in OBC (UR) category.

3. Vide communication/Office letter No. WCD-A-B(I)9/2012-Estt.(Sup.)Vol-XIX-4400 dated 30.6.2021, respondent No.2-Director sent another requisition for recommendation to fill-up 10 posts in addition to 41 posts but in these additional 10 posts available for appointment of candidates from waiting list, reservation was provided only for Scheduled Caste Category (UR) but no reservation was provided for OBC Category and, as such, respondent No.3 vide communication/notification dated 9th July, 2021 recommended 10 candidates from existing waiting panel as per additional requisition.

4. On knowing aforesaid filling-up of 10 additional posts of General (UR) category, petitioner through counsel served a legal notice dated 12th July, 2021 under Section 80 CPC upon respondent No.2-Director calling upon to rectify the defect/mistake immediately by sending requisition for appointment of candidates from OBC (UR) category by applying reservation roster strictly.

5. Finding no response to notice, present petition was filed on 11th August, 2021.

6. In response to petition, factual matrix has been admitted by respondent, either explicitly or impliedly, by not responding to same, stating it as a matter of record.

7. Respondent No.3-Commission has justified its action of recommendation made on the basis of additional requisition stating that

Commission is Recruiting Agency and its work is limited to recommend the candidates as per R&P Rules and break-up of posts provided by Employer Department with admission that petitioner was at Sr. No.1 of waiting panel of OBC (UR) category and a fresh requisition was received from respondent No.2 vide communication dated 30.6.2021 along with break-up of posts and, accordingly, 10 candidates were recommended from waiting panel as per break-up of posts. Requisition dated 30.6.2021 has also been placed on record as Annexure R3/A, whereby requisition of 10 posts was sent with break-up of caegory and out of 10 posts, 8 posts were alloted to General (UR) category and two posts were allotted to SC (UR) category. In response to it, respondent No.3-Commission, vide communication dated 9th July, 2021 had recommended 8 candidates from waiting list of General (UR) category and two candidates were recommended from waiting list of SC (UR) category.

8. In response filed on behalf of respondents No. 1 and 2, allotment of 8 posts to General category and 2 posts to SC category, out of 10 additional posts available for recruitment through Limited Direct Recruitment process, has been claimed to have been made in accordance with instructions dated 17.11.2014 issued by Department of Personnel (Annexure R-1) by claiming that as per these instructions, Limited Direct Recruitment is to be construed as part of promotion and at the time of filling-up these vacancies under Limited Direct Recruitment quota reservation is to be provided only to SC and ST categories and no other category is to be provided reservation under Limited Direct Recruitment and, therefore, no posts were reserved for OBC category. It has been further stated in reply that 41 posts, proposed to be filled under Limited Direct Recruitment, were filled after seeking one time relaxation from the Government to fill-up these posts from residuary category as no eligible Anganwari workers were available from categories of Ex-servicemen, Distinguished Sports Persons, BPL, Specially Abled persons, WFF categories under Horizontal Reservation and thus, these posts were filled from residuary

category as a special case, allocating quota to OBC category also. However, in addition, 10 posts of second requisition, reservation only for SC category was given in accordance with instructions issued by the Department of Personnel as, according to these instructions, no posts were to be earmarked to OBC category. It has been claimed that earlier allotment of 7 posts to OBC Category, in first requisition, was an exceptional case but not rule.

9. Admittedly, respondent/State does not consider Anganwari workers its employees but they are considered to have been engaged as Anganwari workers in the ICDS Scheme formulated by Central/State Government, in terms of Scheme/Guidelines for appointment of Anganwari Workers/Helpers under ICDS Programme in Himachal Pradesh on honorary basis, under ICDS Scheme run by Social Justice and Empowerment Department, notified and revised by Government of Himachal Pradesh, vide Notifications No.WLF-B(14)-3/87 dated 11.4.2007, 6.7.2007, 20.9.2007, 17.6.2008, 18.11.2008, 7.1.2009 and 5.10.2009. Under this Scheme, Anganwari Workers are appointed on honorarium basis, paid by Centre and State Governments on sharing basis, as agreed and notified and they are responsible to perform all duties/ responsibilities related to ICDS and Women Empowerment Programmes, as per ICDS manual and instructions issued by the Centre and State Government from time to time. As per Scheme, Anganwari Workers or Helpers engaged under the Scheme shall have no right to claim regularization/absorption/appointment as regular employees of the State Government. Thus, Anganwari Workers are not extended any benefit as an employee of State Government or department of Women and Child Welfare, whereas Supervisor is Government employee of the said department and appointment to the post of Supervisor is made through Direct Recruitment, wherein certain percentage of posts, as per R&P Rules, are to be filled from amongst the candidates working as Anganwari workers by way of Limited Direct Recruitment restricting the eligibility of candidates for such percentage

of posts of Supervisor, who are serving as Anganwari Workers with certain qualification with specified length of period of service. Therefore, appointment of Anganwari workers as a Supervisor is not a promotion but is a direct recruitment to the said post, but by limiting the source for such direct recruitment for a particular percentage of posts. This fact is also evident from Advertisement 35-3/2019 (Annexure P-1) whereby 41 posts of Supervisor were advertised to be filed by direct recruitment by inviting Online applications for direct recruitment to the post advertised through this advertisement.

10. Had Anganwari workers been employees of Department, the Limited Direct Recruitment may have been construed as promotion channel provided to such employees. But Anganwari workers are not employees of Government, therefore, Limited Direct Recruitment provided for Anganwari worker to the post of Supervisor can at no stretch of imagination be considered a promotion. Therefore, plea of respondents-department for not providing any post to OBC (UR) category in additional 10 posts is misconceived, irrational, arbitrary and unreasonable.

11. Instructions dated 17th November, 2014 issued by the Department of Personnel are not the instructions dealing with Limited Direct Recruitment as provided to the post of Supervisor in Women and Child Welfare Department from amongst Anganwari workers who are not employees of State but are only engaged Anganwari workers on honorarium basis under a project/scheme. These instructions are applicable where LDR is provided to the Government employees as promotion to next higher post. Further, quota in these instructions clearly indicates that instructions are related to promotion of Class-IV employees to the post of Clerk, meaning thereby that such limited direct recruitment quota is that quota which has been provided to already serving employees in the department to next higher post i.e. from Class-IV to Class-III post and as discussed earlier Anganwari workers are not

any kind of employees of Government, muchless Class-IV or Class-III employees of department.

12. As recruitment to the post of Supervisor from amongst Anganwari workers is a direct recruitment out of non-Governmental employees, who have been engaged as Anganwari workers on honorarium basis under the Project/Scheme, therefore, reservation applicable to direct recruitment at the time of initial appointment shall also be applicable to vacancies/posts available to be filled by way of Limited Direct Recruitment from amongst Anganwari workers as applicable for other direct recruitment and therefore, candidates belonging to Other Backward Classes working (engaged) as Anganwari workers are also entitled for reservation in Limited Direct Recruitment to the post of Supervisor through Limited Direct Recruitment. Thus, omission or commission on part of respondents No.1 and 2 by not providing reservation to OBC category (UR) in 10 additional posts is unconstitutional, arbitrary, unreasonable and irrational and, therefore, respondents No. 1 and 2 are directed to provide proportionate reservation to OBC (UR) category against the 10 posts of Supervisor requisitioned to be filled vide communication/ requisition dated 30.6.2021 and to offer appointment to petitioner against post allotted against the said category, since 1st July, 2021 or the date from which 10 persons recommended for additional posts in pursuance to requisition dated 30.6.2021 were offered appointment and to extend all consequential benefits, including pay, arrears, seniority etc. to petitioner on or before 31st December, 2022 failing which petitioner shall also be entitled for interest on arrears at the rate of 5% per annum from the date of accrual thereof.

Petition is allowed and disposed of in aforesaid terms.

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

Between:

1. KULDEEP KUMAR SON OF SH. SHANKAR DASS, RESIDENT OF VILLAGE ASAN, P.O. JASANA, TEHSIL BANGANA, DISTRICT UNA, H.P.

2. JOGINDER KUMAR, SON OF NANAK CHAND, RESIDENT OF VPO CHATARA, TEHSIL AND DISTRICT UNA, H.P.

3. SURYA PARKASH SON OF SH. AMAR NATH, RESIDENT OF VILLAGE RAKKAR COLONY, P.O. TABBA NEAR SUVIDA FARM BASSI COLONY, TEHSIL AND DISTRICT UNA, H.P.

4. KAMAL DEV, SON OF SH. HARI CHAND, FIELD KANUNGO DULEHAR, SUB TEHSIL DULEHAR, DISTRICT UNA, H.P.

5. SATISH KUMAR, SONOF SH. PREM CHAND, RESIDENT OF VPO NANGRAN, SUB TEHSIL MEHATPUR, DISTRICT UNA, H.P.

6. BALJEET SINGH, SONOF SH. JAGIR SINGH, RESIDENT OF VPO SANTOSHGHAR, WARD NO.1, SUB, TEHSIL MEHARPUT, DISTRICT UNA, H.P.

7. ASHWANI KUMAR, SON OF SH. RIKHI RAM, RESIDENT OF VPO BASSAL, TEHSIL AND DISTRICT UNA, H.P.

‘

….PETITIONERS.

(MR. NITIN THAKUR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH F.C.-CUM-PRINCIPAL SECRETARY, (REVENUE) GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-2.

2. THE DEPUTY COMMISSIONER-CUM-COLLECTOR, UNA, DISTRICT UNA, H.P.

3. SHRI SANTOSH DHIMAN,
S/O SHRI KISHAN CHAND, AGED 57 YEARS, R/O VILLAGE SAKON, TEHSIL BANGANA, DISTRICT UNA (H.P.) PRESENTLY WORKING AS KANUNGO, TEHSIL OFFICE BANGANA, TEHSIL BANGANA, DISTRICT UNA (H.P.)

4. SHRI VIJAY KUMAR S/O
SHRI KISHAN CHAND, R/O
VILLAGE NARHUN, TEHSIL BANGANA, DISTRICT UNA (H.P.) PRESENTLY WORKING AS RECORD KANUNGO, TEHSIL OFFICE BANGANA, DISTRICT UNA (H.P.)

5. SHRI TILAK RAM, S/O
SHRI AMAR NATH, R/O
VILLAGE MACHHALI,
TEHSIL BANGANA,
DISTRICT UAN (H.P.)
PRESENTLY WORKING
AS KANUNGO IN DISTRICT
UNA (H.P.)

6. SWAROOP CHAND, S/O SH. NAND LAL, AGED 58 YEARS, PRESENTLY POSTED AT VILLAGE KANGO, CIRCLE YOL, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.

7. AJAY SINGH, AGED 56 YEARS, S/O LATE SH. BHIKHAM SINGH, R/O VILLAGE AN P.O. MALNU, SUB- TEHSIL BHAWARNA, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. AND PRESENTLY POSTED AT KANGO PANCHRUKHI, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.

....RESPONDENTS.

(BY MR. ASHOK KUMAR, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL & MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENTS NO.1 AND 2.)

(M/S ONKAR JAIRATH & SHUBHAM SOOD, ADVOCATES, FOR RESPONDENTS NO.3 TO 5)

(MS. SEEMA GULERIA, ADVOCATE, FOR THE APPLICANTS/PROPOSED RESPONDENTS IN CMP NOs. 7296 AND 7297 OF 2022)

CIVIL WRIT PETITION
No.1393 of 2020
Reserved on:08.08.2022
Decided on: 22.08.2022

Constitution of India, 1950- Article 226**- Himachal Pradesh Revenue Department (Mohal Class-III, Non- Gazetted) Recruitment & Promotion Rules, 1992**. **-** Petition filed to quash letter dated 20.2.2020 and to order the respondents not to disturb the seniority of petitioners as kanungo of district Una and at the same time to quash the executive instructions dated 30.6.1997 and the seniority list issued on 08.05.2020.- **Held-** Petition allowed. Before the 2009 Rules came into force, the seniority of Patwaris was not to be determined on the basis of Patwar Examination and practical training and it was to be determined solely on the basis of merit obtained in the selection test as prescribed in Rule 15(A) (1) for Patwari candidate. The Executive Instructions dated 10.07.1997 are held to be bad in law and ordered to be quashed as they supplant the provisions of 1992 Recruitment & Promotion Rules and not supplement the same. The seniority list subsequently issued on the basis of said Executive Instructions are also ordered to be set aside with a direction to the respondents to redraw the fresh seniority as was being done earlier without referring to the annulled Executive Instructions.(Paras no. 20 & 28)

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

J U D G M E N T

By way of this petition, the petitioners have prayed for the following reliefs:-

> "*i) That in view of the above mentioned facts and circumstances, the impugned letter dated 20.2.2020 (annexure P-4) may kindly be quashed and set aside and the respondents may kindly be directed not to disturb the seniority of the petitioners as kanungo in District Una, in the interest of justice and fair play.*
>
> *ii) That the executive instructions dated 30.6.1997 being in contravention to the statutory service rules of 1992, may also kindly be quashed and set aside as the said instructions have overruled the statutory rules notified in the year 1992.*
>
> *iii) issue a writ of mandamus directing respondents not to implement Annexure P-5 i.e. seniority list issued on 08.05.2020: and /or*
>
> *iv) Issue a writ of cretiorari quashing and setting aside Annexure P-5 i.e. seniority list issued on 08.05.2020.*"

2. The case of the petitioners is that they were appointed as Patwaris in the respondent-Department in the year 1998 in terms of Recruitment & Promotion Rules, 1992. Thereafter, the seniority of the petitioners was maintained by the respondent-authorities as per the said Rules more so in terms of Rules 15 (A) and 15 (B) thereof. According to the petitioners, the procedure for maintaining seniority in the 1992 Rules clearly postulates that a register is required to be maintained on the basis of merit selection test for the post of Patwari from amongst the candidates sponsored by the Employment Exchange. Rule 15 (B) provides that after completion of Patwari training and passing of Patwari examination and practical training, the appointments will be given to the incumbents in accordance with the

merit selection test and roster formed by the respondent-authorities. According to the petitioners, the relevant procedure was duly followed by the Department and the petitioners were also promoted to the post of Kanungo in between December, 2016 to May, 2019. It is further the case of the petitioners that the Revenue Department of the Government of Himachal Pradesh has issued Executive Instructions dated 30.06.1997. As per these Executive Instructions, the procedure prescribed in the 1992 Recruitment & Promotion Rules for determining seniority of Patwaris was altered. These Executive Instructions are not sustainable in law for the reason that the same cannot supplant the Recruitment & Promotion Rules. The 1992 Rules were repealed vide notification dated 10.08.2009. Appointment of the petitioners was as per the 1992 Rules. Since, the appointment of the petitioners till December, 2016, the seniority of the petitioners was duly maintained as per the 1992 Rules. Impugned instructions were not implemented earlier. However, vide Annexure P-4, i.e. communication dated 20.02.2020, issued from the office of respondent No.1, addressed to respondent No.2, direction was issued that seniority of Patwaris/Kanungos of District Una be maintained as per the Executive Instructions dated 30.06.1997. According to the petitioners, communication issued to this effect vide Annexure P-4, as well as Executive Instructions dated 30.06.1997 are bad in law and not sustainable for the reason that the seniority of the petitioners vis-a-vis their initial recruitment has to be determined as per the 1992 Recruitment & Promotion Rules and the same cannot be determined in terms of the Executive Instructions or subsequent directions dated 20.02.2020.

3. It is pertinent to mention that during the pendency of the Writ Petition, CMP No.3925 of 2020 was filed by the petitioners, seeking amendment of the petition, which was duly allowed by the Court in terms of order dated 21.05.2020.

4. The petition is opposed by the State, who as per its reply has taken the stand that instructions dated 30.06.1997 are not contrary to the 1992 Recruitment & Promotion Rules as alleged and these instructions are supplementary and only clarificatory and explanatory in nature. It is also mentioned in the reply that the revised final seniority list of Patwaris as on 12.03.2020 and revised final seniority list of Kanungos as on 08.05.2020 have been issued to rectify and to bring the previously issued defective seniority lists inconformity with the mandate of the 1992 Recruitment & Promotion Rules, read with instructions dated 30.06.1997. It is further the stand of the State that the issue being raised in the present Writ Petition is no more *res integra* and the same has already been decided by the State Administrative Tribunal in terms of order dated 24.10.2018, passed in OAD No.391 of 2017, titled as Rajesh Kumar and others Versus State of Himachal Pradesh.

5. During the pendency of the petition, private respondents were impleaded. They were also given due opportunity to put forth their stand before the Court. Proposed respondents in CMPs No.7296 and 7297 of 2022 were also heard. Formally, these applications are allowed by impleading the applicants as party respondents.

6. Learned counsel for the petitioners has argued that the initial selection of the petitioners as Patwari candidates and their subsequent appointment as such was as per the Recruitment & Promotion Rules issued by the Revenue Department to the Government of Himachal Pradesh dated 03.03.1992, i.e. the Recruitment & Promotion Rules, 1992, for the post of Patwari, Mohal (Class-III Non Gazetted), copy whereof is appended with the petition as Annexure P1. Learned counsel argued that these Rules were framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India. Rules 15 (A) and 15 (B) of the Rules which deal with the selection for training of Patwari candidates and direct recruitment for the post of Patwari clearly provide as to how the seniority of a Patwari candidate

and of a Patwari upon his direct recruitment has to be maintained and there is no ambiguity or grey areas in the Rules in this regard. Learned counsel further argued that the Executive Instructions (Annexure P2) dated 30.06.1997, issued by the Financial Commissioner-cum-Secretary (Revenue) to the Government of Himachal Pradesh on the subject "appointment of Patwaris from the executive Patwari candidates" are bad in law as the same supplant the provisions of 1992 Recruitment & Promotion Rules with regard to determination of the seniority of Patwaris, which is not permissible in law. Learned counsel argued that as the said Executive Instructions, overreached and annuled the provisions of the Recruitment & Promotion Rules with regard to the determination of seniority, therefore, these instructions are *per se* void and are liable to be declared as such and quashed. He has further argued that the impugned seniority lists which have been now issued by the respondent-Department by placing reliance upon the said Executive Instructions are also thus not sustainable in the eyes of law and are liable to be quashed and set aside.

7. Mr. Ashok Sharma, learned Advocate General, while opposing the petition and defending the act of the respondent-Department, argued that the Recruitment & Promotion Rules, 1992 only governed the recruitment of a Patwari candidate as well as the appointment of a Patwari candidate, but neither Rules 15 (A) nor Rule 15 (B) of the said Rules governs or provides as to how the seniority of a Patwari, who is freshly recruited, is to be determined. Learned Advocate General thus argued that in the absence of their being any mechanism in the Recruitment & Promotion Rules for determining the seniority of the newly recruited Patwaris, Executive Instructions dated 30.06.1997 only supplement the 1992 Recruitment & Promotion Rules. He submitted that these instructions do not supplant the Recruitment & Promotion Rules as has been argued by the learned counsel for the petitioners and further as they only filled up the vacuum, which exists in the

Recruitment & Promotion Rules, therefore, there is nothing wrong either in the issuance of the Executive Instructions or in the issuance of the subsequent seniority lists which were so issued on the basis of the objections which were received from the aggrieved parties. No other argument was raised on behalf of the State in defence of the impugned Executive Instructions.

8. Mr. Onkar Jairath, learned counsel appearing for respondents No.3 to 5 and other learned counsel appearing for the private respondents while adopting the arguments of learned Advocate General argued that the subject matter being argued by the petitioners is no more *res integra* and the same is squarely covered by the judgments of this Court passed in *CWP No.1906 of 2009*, titled *Praveen Kumar and others* Versus *State of H.P. & others alongwith other connected matters*, decided on *26.11.2010*; *LPA No.345 of 2010*, titled *Prakash Chand and others* Versus *State of H.P. and others and other connected matters*, decided on *06.10.2015*; *CWP No.295 of 2001*, titled *Shri Karan Singh and others* Versus *State of H.P. and another*, decided on *06.01.2010* and thus argued that the matter being mo more *res integra*, the present petition be dismissed.

9. I have heard learned counsel for the petitioners as well as learned Advocate General and also learned counsel for the private respondents. I have also carefully gone through the pleadings as well as documents appended therewith and the case law cited.

10. It is not in dispute that the petitioners herein have been recruited against the posts of Patwaris in the year 1998. It is also not in dispute that the Recruitment & Promotion Rules which were in vogue at the time when they the petitioners were initially appointed for training as Patwari candidates and then as Patwaris, were the Himachal Pradesh Revenue Department (Mohal Class-III, Non- Gazetted) Recruitment & Promotion Rules, 1992. The moot issue which this Court thus has to answer is as to whether Rule 15 (A) and Rule 15 (B) provided for the determination of the seniority of

Patwaris post their initial selection for training as Patwari candidates and thereafter their direct recruitment for the post of Patwari or not? It is relevant to mention at this stage that whereas as per the petitioners, the mechanism of determining the seniority available in Rules 15 (A) and 15 (B) of the 1992 Rules, according to the State, this mechanism is not provided in Rules 15 (A) and 15 (B) and therefore, the instructions dated 30.06.1997 supplement the Rules to this effect.

11. Before proceeding further, I will like to refer to the 1992 Rules, at this stage. In terms of the 1992 Rules, Annexure P-1, the post of Patwari is a Class-III (Non- Gazetted) post. The minimum educational qualification required for direct recruits in terms of 1992 Rules is matriculation or Higher Secondary Part-I or its equivalent from a recognized University. Clause-10 thereof, which deals of method of recruitment provides that the post is to be filled in 100% by direct recruitment from qualified Patwar candidates. Rule 15 (A) deals with the selection for training of Patwari candidates and Rule 15 (B) thereof deals with direct recruitment for the post of Patwari. The same are quoted hereinbelow:-

" **15(A) Selection for training of Patwari candidate**:-

> *(1) Selection for training to Patwari from amongst the candidates sponsored by the Employment Exchanges in HP. shall be made on the basis of written test and Viva-Voce test, the standard/ syllabus etc. of which shall be prescribed by the F.C. (Revenue).*
> *(2) The maximum number of persons to, be selected by each District Collector, as Patwari candidates shall be 2S% of the cadre strength or vacancies likely to occure in the next five years within the District which ever is less.*
> *(3) The District Collector shall maintain a register of Patwari candidates selected for training in accordance with merit obtained in the selection test as prescribed in sub-rule (1) supra. (4) Selected candidates shall have to undergo Patwari training as laid down in the Land Records Manual at their own expenses. On the completion of training. the candidates shall have to qualify the Patwari*

examination by such standard and syllabus as may be prescribed by F.C.(Revenue) from time to time.

(5) A candidate who for reasons to be recorded in writing by the Distt. Collector for. not being able to successfully complete the patwari training, the District Collector with the approval of the F.C. (Revenue) may allow him to undergo fresh training in the same Distt. in the next batch and in case there is not training for the next batch during the next year in the same Distt., the F.C. (Revenue) may allow him to undergo the patwari training as a fresh candidate in other districts.

(6) On passing of Patwari Examination. the candidate will be considered as "Qualified Patwari Candidate."

Provided that a candidate who does not qualify the patwar examination in the first attempt, he can qualify the same in two subsequent successive examinations, which shall be held for the purpose as prescribed by F.C.(Revenue).

Provided further that the candidate who do not qualify in the first attempt, their names will appear in the patwari candidates register below the candidates who have qualified in the first attempt in their own original order after, striking off their names from previous original place.

Provided further that the candidates who do not qualify in the second attempt, their names shall appear in the patwari candidates register below the candidates who have qualified in the second attempt in their own original order after striking off their names from the previous original places assigned to the candidates passing the said examination in second attempt:

*Provided further that the candidates who fail to qualify the examination in third attempt, their names shall be struck off from the register maintained by the concerned District Collector***."**

15(B) Direct Recruitment for the post of Patwari:-

A "Qualified Patwari Candidate" shall be offered the post of Patwari strictly in accordance with the seniority maintained in the patwari candidate register under role 15 (A) as per roster prescribed by the State Government for filling up of vacancies reserved for the candidates belonging to Scheduled Castes/Scheduled Tribes/ Backward Classes/other categories of persons from time to time.

*Provided that if a qualified candidate does not accept the offer of appointment excepting the cases where the reasons are given to the satisfaction of the Appointing Authority, his name shall be struck off from the aforesaid register***."**

12. A perusal of Rule 15 (A) demonstrates that selection for training to Patwari from amongst the candidates sponsored by the Employment Exchange is to be made on the basis of written test and viva voce. The District Collector is to maintain a register of Patwari candidates selected for training in accordance with merit obtained in the section test as prescribed in sub-rule (1) of Rule 15 (A). Rule 15(A) (4) further provides that selected candidates have to undergo Patwari training and on completion of training, the candidates have to qualify Patwari examination by such standard in syllabus as may be prescribed from time to time. In terms of sub-rule (5), a candidate who is not able to successfully complete the Patwari training may be allowed to undergo fresh training in the same district in the next batch and in case there is no training in the next batch during the next year in the same district, then the F.C. (Revenue) may allow him to undergo Patwari training as a fresh candidate in other district. Sub-rule (6) thereof says that on passing of Patwari examination the candidate will be considered as '**qualified Patwari candidate**'. Rule 15 (B) provides that a '**qualified Patwari candidate**' shall be **offered the post of Patwari strictly in accordance with seniority maintained in the Patwari candidate register under Rule 15 (A)** as per the Roster prescribed by the State Government for filling up the vacancies reserved for various categories from time to time.

13. Thus, this Court is of the considered view that there is no ambiguity in the language of Rule 15 (B) that offer of post to the Patwari has to be strictly in accordance with **seniority maintained in the Patwari Candidate Register under Rule 15 (A) from amongst qualified Patwari candidates**. Now, sub-rule (3) of Rule 15 (A) clearly lays down that District

Collector shall maintain a register of Patwari candidates selected for training in accordance with merit obtained in the selection test as prescribed in sub-rule (1) (supra). This, according to me is the seniority maintained in the Patwari Candidate Register under Rule 15 (A) and thus, after a Patwari candidate becomes a qualified Patwari candidate, he has to be offered the post of Patwari strictly in accordance with the seniority maintained in the Patwari Candidate Register under Rule 15 (A). Rightly or wrongly, in terms of the provisions of Rules 15 (A) and 15(B) of the 1992 Rules, read together harmoniously the appointment to the post of Patwari of a qualified Patwari candidate is not dependent upon the merit gained by a Patwari candidate in the process of his undertaking Patwari examination, but the same is determined on the basis of seniority maintained in the Patwari Candidate Register, i.e. Rule 15 (A) (3) to be precise. Therefore, in view of above, there is merit in the contention of the petitioners that Rules 15 (A) and 15 (B) of the 1992 Rules, clearly provide as to how the seniority of Patwari is to be determined once they are offered the said post after becoming a qualified Patwari candidate.

14. Now, in this backdrop, let us peruse the impugned instructions (Annexure P2), dated 30.06.1997. The substituted Clause lays down that the seniority of the appointed Patwari candidate from accepted Patwari candidates is to be determined in the order of merit determined on the basis of Patwar Examination and practical training. Before proceeding further, it is necessary to juxtapose the amended Para 3.6 of the H.P. Land Records Manual, 1996-1997 with the unamended one. The Para as it stood before amendment reads as under:-

> "*Appointment of Patwaris:-*
> *3.6 The Deputy Commissioner, Settlement Officer and Director, Consolidation of Holdings, shall appoint Patwari candidates in accordance with the Rules contained in Appendix 1, III and V of*

this Manual and instructions issued by the H.P. Government in this behalf from time to time."

The Para after amendment reads as under:-

"Appointment of Patwaris:-

3.6 The Deputy Commissioner/Settlement Officers/ Director of Consolidation of Holdings, shall appoint Patwari candidates from the accepted Patwari candidates in order of merit determined on the basis of patwar examination and practical training prescribed under the Rules contained in Appendix, 1, III and V of the H.P. Land Records Manual and instructions issued by the Govt. of Himachal Pradesh from time to time."

15. At this state, it is also necessary to take into consideration the scope of the H.P. Land Record Manual. The purpose of this Manual is to explain the laws and practices with reference to making and maintenance of record-of-rights and other related records in land. The manual itself has been divided into 5 Sections with 21 Appendices. First Section, deals with duties and functions of various revenue functionaries right from village Chowkidar to the Director of Land Records. Second Section, deals with the maintenance and updating of land records. New Chapters on Consolidation of Holdings, Demarcation of Boundaries, Land Revenue Assignments, Prevention of Encroachments on Government Lands and Computerisation of Land Records have been added in this Section. Third Section, relates to Revenue Statistics. Fourth Section, deals with Agricultural Census and Live Stock Census. Fifth Section, contains miscellaneous topics. In this Section, new Chapters on 'Procedure for Issuing of Various Certificates, and 'Training and Refresher Courses' have been added.

16. Incidently, the H.P. Land Record Manual has nothing to do with the recruitment of Patwaris *per se*, because said recruitment obviously cannot be governed by the Land Record Manual as the recruitment is to be governed by the relevant Recruitment & Promotion Rules framed under the proviso to

Article 309 of the Constitution of India by the Government of Himachal Pradesh. Once, recruitment to the posts of Patwari is governed by the relevant Recruitment & Promotion Rules, it is not understood as to how the seniority of the newly appointed Patwaris can be governed by some Para of the H.P. Land Record Manual, 1997.

17. Now, if one again peruses the unamended Para 3.6 of the H.P. Land Record Manual, the same simply provided that the concerned Revenue Officer shall appoint Patwari candidates in accordance with the Rules contained in appendix 1, 3 and 5 of the said Manual and instructions issued by H.P. Government in this behalf from time to time. Qua this, there cannot be any dispute. However, when one peruses the amended Para 3.6, the same provided that the concerned Revenue Officer shall appoint Patwari candidate from the accepted Patwari candidates in order or merit determined on the basis of Patwar examination and practical training prescribed under the Rules contained in appendix 1,3 and 5 of H.P. Land Record Manual and instructions issued by the Government of Himachal Pradesh from time to time.

18. This Court is of the considered view that the amendment which has been carried out in Para 3.6, to the effect that the concerned Appointing Authority has been called upon to appoint Patwari from amongst Patwari candidates in order or merit determined on the basis of Patwar Examination an practical training prescribed under the Rules, is not the spirit of the relevant Recruitment & Promotion Rules with regard to determination of seniority. This amendment is bad in the eyes of law as the same not only supplants the 1992 Recruitment & Promotion Rules, but, otherwise also it adds something in Para 3.6 of H.P. Land Records Manual, which cannot be put in the Land Record Manual. This is for the reason that the Court again reiterates that recruitment to the post of Patwari is not done as per the H.P. Land Record Manual, but is done as per the Recruitment & Promotion Rules in vague at the relevant time.

19. At this stage, it is also relevant to refer to the 2009 Recruitment & Promotion Rules appended with the petition as Annexure P3, i.e. Recruitment and Promotion Rules for the post of Patwari Mohal (Class-III, Non-Gazetted) in the Department of Revenue, Himachal Pradesh, which repealed the 1992 Rules. Rule 15 (6) of the 2009 Rules provides as under:-

> *"15 (6) On passing of Patwari Examination. the candidate will be considered as "Qualified Patwari Candidate."*
>
> *Provided that a candidate who does not qualify the patwar examination in the first attempt, he can qualify the same in two subsequent successive examinations, which shall be held for the purpose as prescribed by F.C.(Revenue).*
>
> *Provided further that the candidate who do not qualify in the first attempt, their names will appear in the patwari candidates register below the candidates who have qualified in the first attempt in their own original order after, striking off their names from previous original place.*
>
> *Provided further that the candidates who do not qualify in the second attempt, their names shall appear in the patwari candidates register below the candidates who have qualified in the second attempt in their own original order after striking off their names from the previous original places assigned to the candidates passing the said examination in second attempt:*
>
> *Provided further that the candidates who fail to qualify the examination in third attempt, their names shall be struck off from the register maintained by the concerned District Collector***."**

20. Now, when one juxtaposes the provisions of Rules 15 (A) and 15 (B) of the 1992 Rules against Rule 15 (6) of the 2009 Rules, it can be made out from the e*x facie* reading of the 2009 Rules itself that in terms of this Rule, the offer of the post of Patwari from amongst qualified Patwari candidate has to be made strictly in accordance with the seniority maintained in the qualified Patwari Candidate Register, in which seniority of the qualified Patwari candidate is fixed in accordance with the merit determined on the

basis of Patwari training and practical training. This demonstrates that what was intended to be done by instructions Annexure P-2, has now become a part of the Recruitment & Promotion Rules since the year 2009. In other words, after the coming into force of the 2009 Rules, but obvious the seniority of Patwaris has to be determined as per Rule 15 (6), in which both the merit determined on the basis of Patwar examination and practical training gain prominence. But, fact of the matter remains that before the 2009 Rules came into force, the seniority of Patwaris was not to be determined on the basis of Patwar Examination and practical training and it was to be determined solely on the basis of merit obtained in the selection test as prescribed in Rule 15(A) (1) for Patwari candidate.

21. Hon'ble Supreme Court of India in *K. Kuppusamy and Another* Versus *State of T.N. and Others, (1998) 8 Supreme Court Cases 469* has held that rules framed under the proviso to Article 309 of the Constitution are statutory rules and statutory rules cannot be overridden by Executive Instructions or Executive practice. Hon'ble Supreme Court held that till the rule is amended the rule applies.

22. In *Bimlesh Tanwar* Versus *State of Haryana and others (2003) 5 Supreme Court Cases 604*, Hon'ble Supreme Court held that seniority is not a fundamental right and is merely a civil right. *Inter se* the seniority of the candidates who are appointed on the same day would be dependent on the rules governing the same and only in the absence of any statutory rules, the general principles may be held to be applicable.

23. In *Dhananjay Malik and others* Versus *State of Utrranchal and others, 2008) 4 Supreme Court Cases 171*, Hon'ble Supreme Court after placing reliance upon the Constitutional Bench judgment of the Hon'ble Supreme Court in Sant Ram Sharma Versus State of Rajasthan, AIR 1967 Supreme Court 1910 reiterated that the Government cannot amend or supersede statutory rules by Administrative Instructions, but if the rules are

silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

24. Hon'ble Division Bench of this Court in *CWPOA No.51 of 2019*, titled *Jitender Singh Rangta and others* Versus *State of Himachal Pradesh and another*, decided on *10.07.2020*, after relying upon the judgments of the Hon'ble Supreme Court held that corrigendum issued by an Executive Authority cannot substitute the provisions contained in the Recruitment & Promotion Rules framed under provision to Article 309 of the Constitution of India.

25. In *CWP No.1906 of 2009*, titled *Praveen Kumar & others* Versus *State of HP & Others and other connected matters*, decided on *26.11.2010*, the vires of the Executive Instructions dated 30.06.1997 was neither a subject matter of the Writ Petition nor the same has been answered by this Court. A careful perusal of the judgment demonstrates that in the above mentioned judgment no finding has been returned by this Court holding that the Executive Instructions under challenge in the present Writ Petition were 'intra vires'.

26. Similarly, in *LPA No.345 of 2010*, titled *Prakash Chand & Ors.* Versus *State of H.P. & anr. and other connected matters*, decided on *06.10.2015*, which LPA arose out of the judgment passed by this Court in *CWP No.1906 of 2009*, titled *Praveen Kumar & others* Versus *State of HP & Others and other connected matters*, again there was neither any challenge nor any discussion or nor any adjudication on the legality of the Executive Instructions dated 30.06.1997. In fact, it is pertinent to mention that primarily the prayer of the petitioners in *CWP No.1906 of 2009*, titled *Praveen Kumar & others* Versus *State of HP & Others and other connected matters*, as it appears from the record, was for declaration that the amendment of the Rules in the year 2009 was ultra vires and as the petitioners had been selected as

Patwari candidates in the year 2005, therefore, their service conditions are to be governed after their recruitment as Patwaris in terms of the Rules under which they were appointed and not under the 2009 amended Rules. Therefore, this Court is of the considered view that these judgments relied upon by the respondents have not decided the issue which has been urged by way of present Writ Petition by the petitioners.

27. Coming to *CWP No.295 of 2001*, titled *Shri Karan Singh and Ors.* Versus *State of H.P. & anr*, decided on *06.01.2010*, wherein this Court was dealing with the recruitment of Patwari candidates and their appointment under the Himachal Pradesh Patwar Service Rules, 1949 and in the said Writ Petition also, there was no challenge to the Executive Instructions subject matter of the present Writ Petition.

28. Therefore, in view of the above discussion, this Writ Petition is allowed and disposed of. The Executive Instructions dated 10.07.1997 are held to be bad in law and ordered to be quashed as they supplant the provisions of 1992 Recruitment & Promotion Rules and not supplement the same. The seniority list subsequently issued on the basis of said Executive Instructions are also ordered to be set aside with direction to the respondents to redraw the fresh seniority as was being done earlier without referring to the annulled Executive Instructions. The promotions which have been conferred upon the private respondents etc. on the basis of their seniority as determined on the basis of the Executive Instructions which have been struck down by this Court are also ordered to be quashed and set aside with direction to the respondents to hold Review Departmental Promotion Committee, if so required and make promotions after determining the seniority in terms of this judgment. No order as to cost. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Between:-

1. SH. CHET RAM SON OF SH. JAMIR DEV, R/O VILLAGE KARANA, GRAM PANCHAYAT, KARANA, TEHSIL ANI, DISTRICT KULLU,HP.

2. CHAMAN BHARTI S/O SH. DHOLU RAM, R/O VILLAGE TESHAN, GRAM PANCHAYAT, KUNGASS, TEHSIL ANI, DISTRICT KULLU, HP.

3. SH. GIAN CHAND SON OF SHRI TANKU RAM, R/O VILLAGE DOGHARI, GRAM PANCHAYAT: BAKHNAO, TEHSIL: ANI, DISTRICT KULLU, HP.

4. SH. NITYA NAND, S/O SH. KATHU RAM, R/O VILLAGE NALDEHRA, GRAM PANCHAYAT: NAMHOG, TEHSIL ANI, DISTRICT KULLU,HP.

5. SH. PREM CHAND S/O SH. BARNWAS, R/O ANI, PO ANI, GRAM PANCHAYAT, ANI, DISTRICT KULLU, HP.

.....PETITIONERS.

(BY SH. G.D.VERMA, SENIOR ADVOCATE WITH SH. B.C. VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH THE SECRETARY (URBAN DEVELOPMENT) TO HP GOVT., SHIMLA-2.

2. THE SECRETARY (PANCHAYATI RAJ) TO THE GOVT. OF HP, SHIMLA-171002.

3. THE DEPUTY COMMISSIONER, KULLU, DISTRICT AT KULLU, HP.

.....RESPONDENTS.

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE

GENERAL, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERAL, SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL AND SH. RAJAT CHAUHAN, LAW OFFICER)

CIVIL WRIT PETITION
NO.1610 OF 2021
Reserved on: 12.10.2022
Decided on: 15.10.2022

Constitution of India, 1950 -Article 226 - **Himachal Pradesh Municipal Act, 1994** - Present petition filed against the final Notification dated 27.10.2020 whereby the Nagar Panchayat, Ani, has been created out of the different revenue estates - **Held** - Petition allowed and notification quashed. In terms of Section 4, the State Government is required to issue a Notification whereby it proposes any local area to be a municipal area under the Act. The Notification so issued under sub-section (1) of Section 4 is to define the limits of the local area to which it relates, in case, the statutory provisions are not complied with as is the case in hand, then obviously the establishment and declaration of the Nagar Panchayat by a Notification cannot be countenanced and is thus liable to be set aside. Record reveals that the aforesaid procedure has not at all been followed.(Paras 13-18).

Cases referred:

Chandra Kishore Jha vs. Mahavir Prasad and others (1999) 8 SCC 266;
Cherukuri Mani vs. Chief Secretary, Government of Andhra Pradesh and others (2015) 13 SCC 722;
Municipal Corporation of Greater Mumbai (NCGM) vs. Abhilash Lal and others (2020) 13 SCC 234;
Nazir Ahmad vs. King Emperor AIR 1936 PC 253;
Opto Circuit India Limited vs. Axis Bank and others (2021) 6 SCC 707;
State of Rajasthan vs. Ashok Khetoliya & Another 2022 (4) Scale 580;
Sundarjas Kanyalal Bhatija and others vs. Collector, Thane, Maharashtra and others (1989) 3 SCC 396;

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

O R D E R

Aggrieved by the final Notification dated 27.10.2020 whereby the Nagar Panchayat, Ani, has been created out of the different revenue estates, the petitioners, who are the permanent residents of villages of Tehsil Ani, have filed the instant petition for grant of the following substantive reliefs:-

> "i). That the respondents be directed to produce total record of the case for the perusal of this Hon'ble Court right from the day when the proceedings were initiated for creation of Nagar Panchayat, Ani till final Notification dated 27.10.2020.
> ii) That final Notification dated 27.10.2020 whereby Nagar Panchayat Ani has been created out of the different revenue estates out of the total area of aforesaid Panchayats vide Annexure P-4 may be set aside and quashed."

2. According to the petitioners, the State of Himachal Pradesh had on the demand of the inhabitants of the different villages created various Gram Panchayats, which are functioning properly and being more beneficial and desirable, the respondents could not have illegally created Nagar Panchayat, Ani by taking out the following villages:-

i) Muhal Manjhadesh from Gram Panchayat, Bakhnao.

ii) Muhal Franali from Gram Panchayat, Ani.

iii) Muhal Karana from Gram Panchayat, Karana.

iv) Muhal Kungas from Gram Panchayat, Kungas.

v) Muhal Jaban from Gram Panchayat Namhog.

3. It is further contended that the Deputy Commissioner, Kullu of his own and in absence of any resolution on behalf of any of the panchayats

for creation of Nagar Panchayat, Ani, recommended the matter to the Director, Urban Development vide his letter dated 13.08.2020. Respondent No.1, in turn, issued a Notification dated 25.08.2020 whereby a proposal was made for constitution of the Nagar Panchayat, Nirmand, consisting of Muhal Manjhadesh of Gram Panchayat Bakhnao, Muhal Franali of Gram Panchayat, Ani, Muhal Karana of Gram Panchayat, Karana, Muhal Kungas of Gram Panchayat, Kungas and Muhal Jaban of Gram Panchayat, Namhog, and not for Ani. Though at the end of the Notification, it is mentioned that Nagar Panchayat was proposed to be created for Ani.

4. In terms of the Notification, objections/ suggestions were invited to be filed within six weeks from the date of publication of the Notification which was published on 14.09.2020. Various objections were filed, but, according to the petitioners, the same were not considered and despite this the final Notification creating Nagar Panchayat, Ani was issued vide Notification dated 27.10.2020, which is illegal for not only excluding the five villages as mentioned aforesaid, but also because there is no compliance of the mandatory provisions of the Himachal Pradesh Municipal Act, 1994 (for short 'Act') inasmuch as wrong publication of Notification dated 25.08.2020.

5. It is further averred that as per proposal in Notification dated 25.08.2020, area of Muhal Majhadesh in Gram Panchayat, Bakhnao was proposed to be taken from Khasra No. 2300 to 2850, but, as per Notification dated 27.10.2020, additional area of Khasra Nos. 8284 and 8285 has been taken for creation of Nagar Panchayat, Ani. In Muhal Karana, there was proposal for taking Khasra Nos.2191 to 2460, however, additional area of Khasra No. 2184 to 2190 has been taken in the final Notification though there was no such proposal. As regards Muhal Kungas, there was a proposal to put area of Khasra Nos. 2807 to 2841 in Nagar Panchayat, but all these khasra numbers have been given up and areas of Khasra Nos. 1171 to 1187, 2747, 2801, 2876 and 2877 have been taken up for inclusion of Nagar

Panchayat. In the absence of any proposal in the Notification under Section 4 of the Act, these areas could not be taken out of respective Gram Panchayats for inclusion in Nagar Panchayat.

6. In addition to the above, it has also been averred that the inhabitants of the Gram Panchayat, who belong to the backward area, were entitled to an opportunity of hearing before issuing the final Notification dated 27.10.2020. Having failed to do so, the entire exercise, as undertaken by the respondents, was bad in law.

7. The respondents have opposed the petition by filing reply wherein it has been submitted that the Sub Divisional Officer (Civil) Ani, District Kullu, submitted a proposal for the composition of Nagar Panchayat, Ani, for a transitional area of 4,64,411 square metres with the population of 5,840 as reported by the Census Department, Government of India, held in the year 2011, to replying respondent No.3 i.e. Deputy Commissioner, Kullu. The proposal as submitted fulfilled the requirement of law, more particularly, the legal propositions and conditions for formation of the Nagar Panchayat as envisaged under Chapter-II, Section 3 thereof.

8. Accordingly, on the basis of the proposal and in view of the demographic conditions of Ani Town, population density of the said area and also for the better development and improved arrangements in the said area, the State Government vide Notification dated 25.08.2020 classified the proposed area as Nagar Panchayat, Ani under Section 3(2) of the Act. Vide this notification, objections/suggestions were invited from the local inhabitants within a prescribed time frame of six weeks. Total 12 objections/suggestions were received from the local inhabitants including present petitioner Nos. 3 and 5 which were further communicated to the State Government by respondent No.3 with detailed comments and report after adopting due procedure.

9. Taking into consideration these objections/ suggestions, the justified demands, objections and suggestions were accordingly considered and some populated commercial area was included in this newly formed Nagar Panchayat. On the other hand, the areas which were quite far away from the headquarter with less population were accordingly excluded from the Urban Local Body in the final Notification. It has been averred that it is for the better development of the area that Nagar Panchayat has been constituted to which no exception can be taken by the petitioners.

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

11. At the outset, in order to appreciate the issue, we need to refer to the relevant provisions of the Act which deal with the procedure for declaring the municipal area under Section 4, notification of intention to include a local area in a municipal area under Section 5, notification of intention to exclude local area from a municipal area under Section 6 and exclusion of local area from a municipal area under Section 7 and the same read as under:-

> "**4. Procedure for declaring municipal area.-**(1) The State Government may, by notification, propose any local area to be a municipal area under this Act.
> (2) Every such notification under sub-section (1) shall define the limits of the local area to which it relates.
> (3) A copy of every notification under this section, with a translation thereof in such language as the State Government may direct shall be affixed at some conspicuous place in the office of the Deputy Commissioner, within whose jurisdiction the local area to which the notification relates lies, and at one or more conspicuous places in that local area.
> (4) The Deputy Commissioner shall certify to the State Government the date on which the copy and translation were so affixed and the date so certified shall be deemed to be the date of publication of the notification.

(5) If any inhabitant desires to object to a notification issued under sub-section (1), he may, within six weeks from the date of its publication submit his objection in writing through the Deputy Commissioner to the State Government and the State Government shall take his objection into consideration.

(6) When six weeks from the date of publication have expired, and the State Government has considered and passed orders on such objections as may have been submitted to it, the State Government may, by notification, declare the local area for the purposes of this Act, to be a municipal area.

(7) The State Government may, by notification, direct that all or any of the rules which are in force in any municipal area shall, with such exceptions and adaptations as may be considered necessary, apply to the local area declared to be a municipal area under this section, and such rules shall forthwith apply to such municipal area without further publication.

(8) When a local area, the whole or part of which was a notified area under the Himachal Pradesh Municipal Act, 1968 (19 of 1968) or a Nagar Panchayat under this Act, is declared to be municipal council under this section, the municipal council shall be deemed to be a perpetual successor of such notified area committee or of Nagar Panchayat, as the case may be, and in respect of all its rules, bye-laws, taxes, and all other matters, whatsoever and the Nagar Panchayat shall continue in office and shall notwithstanding anything contained in this Act be deemed to be the municipal council until
the appointment and election of members is notified by the State Government under section 27.

(9) A municipality shall come into existence on such day as the State Government may, by notification, appoint in this behalf."

"**5. Notification of intention to include a local area in a municipal area.-** (1) The State Government may, by notification, and in such other manner as it may determine, declare its intention to include within a municipal area any local area in the vicinity of the same and specified in the notification.

(2) Any inhabitant of a municipal area or local area in respect of which a notification has been published under sub-section (1)

may, if he objects to the alteration proposed, submit his objection in writing through the Deputy Commissioner to the State Government within six weeks from the publication of the notification; and the State Government shall take such objection into consideration.

(3) When six weeks from the publication of the notification have expired, and the State Government has considered the objections, if any, which have been submitted under sub-section (2) the State Government may, by notification, include the local area in the municipal area.

(4) When any local area has been included in a municipal area under sub-section (3) of this Act, and, except as the State Government may, by notification, direct otherwise, all notifications, rules, bye-laws, orders directions and powers issued, made, or conferred under this Act and in force throughout whole of the municipal area at the time shall apply to such area."

"**6. Notification of intention to exclude local area from a municipal area**.- The State Government may, by notification and in such other manner as it may deem fit, declare its intention to exclude from a municipal area any local area comprised therein and specified in the notification."

"**7. Exclusion of local area from a municipal area**.- (1) Any inhabitant of a municipal area or local area in respect of which a notification has been published under section 6 may, if he objects to the exclusion proposed, submit his objection in writing through the Deputy Commissioner to the State Government within six weeks from the publication of the notification and the State Government shall take his objection into consideration.

(2) When six weeks from the publication of the notification have expired and the State Government has considered the objections, if any, which have been submitted under sub-section (1), the State Government may, by notification, exclude the local area from the municipal area."

12. It would be noticed that in terms of Section 4, the State Government is required to issue a Notification whereby it proposes any local area to be a municipal area under the Act. The Notification so issued under sub-section (1) of Section 4 is to define the limits of the local area to which it relates. In case, further area is to be included, then procedure as prescribed under Section 5(supra) is required to be followed whereby the State by a Notification has to declare its intention to include within a municipal area any local area in the vicinity of the same and specified in the Notification.

13. Record reveals that the aforesaid procedure has not at all been followed and despite that additional areas of Khasra Nos.8284 and 8285 in Muhal Majhadesh under Gram Panchayat, Bakhnao have been included in the creation of Gram Panchayat, Ani. In addition thereto, additional areas of Khasra No.2184 to 2190 have been taken in Muhal Karana which were not there in the proposal in the notification issued under Section 4. Lastly, areas of Khasra Nos. 1171 to 1187, 2747, 2801, 2876 and 2877 which were not part of the Notification dated 25.08.2020 in Muhal Kungas have been included in the final Notification dated 27.10.2020, which is clearly in violation of the provisions of the Act.

14. It is more than settled that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden, This was so held by the Privy Council in *Nazir Ahmad vs. King Emperor* ***AIR 1936 PC 253.***

15. A Bench of three Hon'ble Judges of the Hon'ble Supreme Court in ***Chandra Kishore Jha*** *vs.* ***Mahavir Prasad and others (1999) 8 SCC 266*** held as under:-

> "17.In our opinion insofar as an election petition is concerned, proper presentation of an election petition in the Patna High Court can only be made in the manner prescribed by Rule 6 of Chapter XXI-E. No other mode of presentation of an election petition is envisaged under the Act or the Rules thereunder and,

> therefore, an election petition could, under no circumstances, be presented to the Registrar to save the period of limitation. It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage : Nazir Ahrnad v. King Emperor, 63 Indian Appeals 372=AIR 1936 PC 253; Rao Shiv Bahadw Singh & Anr. V. State of Vindhya Pndwh, 1954 SCR 1098 = AIR 1954 SC 322. State of Utter Pradesh v. Singhan Singh & Ors., AIR 1964 SC 358 = (1964) 1 SCWR 57]..”

16. The said principle has been followed and reiterated by the Hon’ble Supreme Court in ***Cherukuri Mani w/o Narendra Chowdari*** *vs.* ***Chief Secretary, Government of Andhra Pradesh and others (2015) 13 SCC 722*** wherein it was held as under:-

> “14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure. When the provisions of Section 3 of the Act clearly mandated the authorities to pass an order of detention at one time for a period not exceeding three months only, the Government Order in the present case, directing detention of the husband of the appellant for a period of twelve months at a stretch is clear violation of the prescribed manner and contrary to the provisions of law. The Government cannot direct or extend the period of detention up to the maximum period of twelve months, in one stroke, ignoring the cautious legislative intention that even the order of extension of detention must not exceed three months at any one time. One should not ignore the underlying principles while passing orders of detention or extending the detention period from time to time.”

17. Similar reiteration of law can be found in few other recent judgments of the Hon’ble Supreme Court in ***Municipal Corporation of Greater Mumbai (NCGM)*** *vs.* ***Abhilash Lal and others (2020) 13 SCC 234,***

in ***Opto Circuit India Limited*** *vs.* ***Axis Bank and others (2021) 6 SCC 707*** and in a very recent case decided by the Hon'ble Supreme Court on 25.07.2022 in ***Civil Appeal No. 4807 of 2022*** arising out of ***SLP (C) No.19886/2019*** titled ***Union of India and others*** *vs.* ***Mahendra Singh.***

18. It is more than settled that the function of the Government in establishing a Nagar Panchayat under the Act is neither executive nor administrative, but is a legislative process. Therefore, no judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with, then the Court would not interfere. However, in case, the statutory provisions are not complied with as is the case in hand, then obviously the establishment and declaration of the Nagar Panchayat by a Notification cannot be countenanced and is thus liable to be set aside. (Refer: ***Sundarjas Kanyalal Bhatija and others*** *vs.* ***Collector, Thane, Maharashtra and others (1989) 3 SCC 396*** and ***State of Rajasthan*** *vs.* ***Ashok Khetoliya & Another 2022 (4) Scale 580****).*

19. Since, the instant petition can be disposed of on this singular ground, therefore, the other grounds as raised in this petition, need not be gone into.

20. Consequently, the instant petition is allowed and the final Notification dated 27.10.2020 is quashed and set aside.

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

22. However, this order shall not come in the way of the respondents in case they intend or choose to undertake a fresh exercise after following the law for the creation of Nagar Panchayat, Ani, in future.

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

Between:

CHAUDHARY SARWAN KUMAR HIMACHAL KRISHI VISHVAVIDYALAYA, PALAMPUR, DISTRICT KANGRA, H.P. THROUGH ITS REGISTRAR.

….PETITIONER.

(MR. B.M. CHAUHAN, SENIOR ADVOCATE, WITH MR. HOMINDER GHEZTA, ADVOCATE)

AND

SHRI BIHARI LAL SON OF LATE SHRI DHARU, THROUGH SECRETARY, DISTRICT COMMITTEE, ALL INDIA TRADE UNION CONGRERSS (AITUC), C/O H.P.S.E.B. COLONY COMPLEX, SALOONI, DISTRICT CHAMBA, HIMACHAL PRAESH.

….RESPONDENT.

(NONE FOR THE RESPONDENT)

CIVIL WRIT PETITION
No. 2074 of 2017
Decided on: 29.06.2022

Constitution of India, 1950 - Writ of Mandamus- Article 226 - Service of Respondent was not regularized by Registrar- Industrial dispute was raised before the Labour Court wherein, the Court passed an order of regularization of service- Regularization of service despite completion of only 8 years of service was challenged in writ petition- **Held**- Order of regularization passed by Labour Court was not valid- Writ jurisdiction cannot be invoked to direct an employer to regularize the service of daily wage of workers or those who joined through back door. (Paras 10 and 12)

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

J U D G M E N T

Despite repeated calls, none has put in appearance on behalf of the respondent. Accordingly, the respondent is proceeded against *ex parte*.

By way of this Writ Petition, the petitioner has challenged the award, dated 16.11.2016, passed by the learned Presiding Judge, Labour Court-Cum-Industrial Tribunal, Kangra at Dharamshala, H.P., in Reference No.284 of 2015, titled as Shri Bihari Lal Versus The Registrar, C.S.K. H.P. Krishi Vishva Vidyalaya, Palampur, District Kangra, H.P.

2. Brief facts necessary for the adjudication of the present petition are that in an industrial dispute which was raised by the respondent/workman, the following reference was made by the appropriate Government to the learned Labour Court for adjudication:-

> "*Whether the action of the employer i.e. the Registrar, C.S.K. H.P. Krishi Vishva Vidyalaya, Palampur, District Kangra, H.P. not to regularize the services of Shri Bihari lal S/o Late Shri Dharu, through Secretary, District Committee, All India Trade Union Congress (AITUC) C/o H.P.S.E.B. Colony Complex Salooni, District Chamba, H.P. who is working at Research Sub-Station Salooni, on completion of continuous service of 8 years, as per policy of the Himachal Pradesh Government is legal and justified? If Not, what benefits regarding regularization, back wages, seniority, post service benefits and compensation the above worker is entitled to from the above employer*?"

3. On the basis of the pleadings of the parties, learned Labour Court framed the following issues:-

> 1. *Whether action of the employer i.e. Registrar, C.S.K. H.P. Krishi Vishva Vidyalaya, Palampur, District Kangra, H.P. not to regularize the services of petitioner who is working at Research*

Sub-Station Salooni, on completion of continuous service of 8 years as per policy of the Himachal Pradesh Govt. is/was improper and unjustified as alleged? OPP.
2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled to? OPP.
3. whether petitioner has no locus standi to file the present claim as alleged? OPR.
4. Whether the petitioner has no cause of action to file present case as alleged? OPR.
5. Whether the claim petition is time barred as alleged. If so, its effect? OPR.
6. Relief."

4. On the strength of the evidence which was led by the parties in support of their respective contentions, the issues were decided as under:-

"*Issue No. : Yes*
Issue No.2 : Discussed.
Issue No.3 : No.
Issue No.4 : No.
Issue No.5 : No.
Relief : Claim Petition is allowed per operative part of award."

5. The Reference was accordingly answered by the learned Labour Court by directing the petitioner herein to regularize the services of the workman forthwith on completion of continuous service of eight years as from the date of appointment as per the policy of the Government of Himachal Pradesh with all consequential benefits except back wages.

6. Feeling aggrieved, the University/employer has preferred the present petition.

7. Learned Senior Counsel appearing for the petitioner has argued that the award passed by the learned Labour Court *per se* is bad in law, as the direction issued by the learned Labour Court was beyond its jurisdiction under the provisions of the Industrial Disputes Act. Learned Senior Counsel

submitted that the respondent was engaged on daily wage basis by the University/employer in lieu of the land of his family being acquired for the purpose of construction of the Research Sub-Station of the respondent/University in district Chamba, H.P. He submitted that there is no policy of regularization of such like employees in vogue in respondent/University. The University had approached the State in this regard in the year 2007, however, the State turned down the request of the University qua formulation of policy of regularizing such like employees. Learned Senior Counsel relying upon the judgment of the Hon'ble Supreme Court in *Oil and Natural Gas Corporation* Versus *Krishan Gopal & others, Civil Appeal No.1878 of 2016*, decided on *07.02.2020,* submitted that it has been clearly held by Hon'ble Supreme Court in the said judgment that the Labour Court and the Industrial Court cannot extend a direction to order regularisation, where such a direction would be in the context of public employment as the same would offend the provisions contained in Article 14 of the Constitution, may be except in cases where an employer has regularized similarly situated workman either in scheme or otherwise and where regular posts are available. On these basis he submitted that the present petition be allowed by setting aside the impugned award.

8. I have heard learned Senior Counsel for the petitioner and have also carefully gone through the award passed by the learned Labour Court and also the relevant record of the case.

9. Learned Labour Court/Industrial Tribunal are statutory creations. They stand constituted under the provisions of the Industrial Disputes Act, which is both a procedural as well as a substantive law. This means that a Tribunal which owes its origin to the Industrial Disputes Act, can adjudicate only those issues as authorised by the parent Act. In other words, the forum of the Labour Court or Industrial Tribunal can be

approached by the workman in case he alleges the violation of the provisions of Industrial Disputes Act etc.

10. In the present case, the relief which was being prayed for by the workman was of regularization of his services. There is no dispute that in terms of the law which has been laid down by the Hon'ble Supreme Court of India, even the High Courts in exercise of writ jurisdiction conferred upon them under Article 226 of the Constitution of India cannot issue a writ of mandamus, directing an employer to regularize the services of daily wage workers or those persons who have joined the employer through backdoor. The law as has been laid down by the Hon'ble Supreme Court is that in case there is a policy of regularization framed by the employer, then an employee can approach to the Court, seeking his regularization in terms of the said policy in case the employer is violating the terms of the policy and is not regularizing his or her service, but independent of that regularisation of service, engagement whereof is dehors Recruitment and Promotion Rules cannot be ordered *(See: Secretary, State of Karnataka and others* Versus Uma Devi (3) and others, (2006) 4 SCC 1*).*

11. In this case, record demonstrates that the respondent/ University does not has any policy for regularisation of persons similarly situated as the petitioner. There is nothing on record to suggest that the persons similarly situated stand regularised by the respondent-University whereas the petitioner has been discriminated.

12. That being the case, this Court is of the considered view that the order of regularization of the service of the workman, passed by the learned Labour Court is not sustainable in the eyes of law in view of the decision of the Hon'ble Supreme Court in *Secretary, State of Karnataka and others* Versus Uma Devi (3) and others, (2006) 4 SCC 1 and in *Oil and Natural Gas Corporation* Versus *Krishan Gopal & others, Civil Appeal No.1878 of 2016*, decided on *07.02.2020.*

13. Accordingly, in view of what has been held hereinabove, this petition is allowed and the award, dated 16.11.2016, passed by the learned Presiding Judge, Labour Court-Cum-Industrial Tribunal, Kangra at Dharamshala, H.P., in Reference No.284 of 2015, titled as Shri Bihari Lal Versus The Registrar, C.S.K. H.P. Krishi Vishva Vidyalaya, Palampur, District Kangra, H.P., is set aside.

14. The petition is disposed of, so also the pending miscellaneous applications, if any.

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

Between:

1. SH. RAHUL S/O SH. RAJ KUMAR, AGE 32 YEARS, VILLAGE JASRATH, P.O. JHALMA, TEH & DISTRICT LAHOL SPITI, HIMACHAL PRADESH.

2. MANOJ KUMAR S/O SHRI SINGE RAM, AGED 32 YEARS, VILLAGE DAWARA, P.O. DOBHI, TEHSIL AND DISTRICT KULLU, HIMACHAL PRADESH.

3. ARUN SINGH S/O SHRI SHYAM SINGH AGE 36 YEARS, VILLAGE DIMO, P.O. SARAIN TEHSIL CHOPAL DISTRICT SHIMLA, HIMACHAL PRADESH.

4.KHEM CHAND THAKUR S/O SHRI BHADUR SINGH, AGE 35 YEARS, VILLAGE TINDER P.O. JAON, TEHSIL NIRMAND DISTRICT KULLU, HIMACHAL PRADESH.

….PETITIONERS.

(BY. MS. SUNITA SHARMA, SENIOR ADVOCATE WITH MR. DHANANJAY SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY, ANIMAL HUSBANDRY TO GOVERNMENT OF H.P.

2. DIRECTOR ANIMAL HUSBANDRY SHIMLA-5

….RESPONDENTS.

(M/S SUMESH RAJ, DINESH THAKUR, SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION
No.2320 of 2022
Reserved on: 06.09.2022
Decided on: 14.09.2022

Constitution of India, 1950 - Writ of Certiorari- Petitioner challenged the appointment process undertaken by the State- Challenged it on the basis that it is not in compliance of Recruitment and Promotion (R&P) Rules Clause 10- **Held**- As per clause 10 of R&P Rules there are three sources of recruitment. The first source is 'Panchayat Veterinary Assistants', the second source is 'open market' and the third source is 'feeder cadre', from which recruitment has to be made by way of promotion- recruitment can either be on regular basis or on contract basis- petitioners are not eligible to participate in the process of batch-wise recruitment, for the reason that they are not serving as Panchayat Veterinary Assistants- Petition was dismissed. (Paras 13 and 14)

This petition coming on for orders this day, the Court passed the following: **J U D G M E N T**

By way of this petition, the petitioners have prayed for the following reliefs:-

> "*i. the writ in the nature of Certiorari may kindly be issued an quashed the notification dated April 5th 2022, Annexure P-2, which has been issued against the rules.*
>
> *ii. That the respondents may be directed to consider the petitioners who are also of the batch of 2010-2012 on merit basis with the candidates of 2011-2012 merit list of whose already prepared by the respondents.*"

2. The case of the petitioners is that they completed two years course of Veterinary Pharmacist from Manav Bharti University after completing their 10+2 in the year 2010-12. Said University had filed CWP No.5701 of 2010, before this Court to register its students with Himachal Pradesh Para Medical Council and to consider them for the purpose of

employment. The petitioners had also filed a writ petition in this Court, praying that respondent No.1 be directed to consider the diploma obtained in Veterinary Pharmacy awarded by Manav Bharti University to be valid for all intents and purposes. It is further the contention of the petitioners that their prayer was granted favourably by the Court and direction was issued to the Himachal Pradesh Para Medical Council to register the names of the petitioners in the register maintained by it. It is further the case of the petitioners that the respondents are making appointments on batch-wise basis against the posts of Veterinary Pharmacist, but only from amongst Gram Panchayat Veterinary Assistants, who are already working with the respondents under the 'Mukya Mantry Pashudhan Yonja'. A copy of the notification, in terms thereof the recruitment is made, has been appended with the petition as Annexure P-2. The contention of the petitioners is that as per the Recruitment and Promotion (R&P) Rules, framed by the respondent/State for making appointments against the post of Veterinary Pharmacist, which is a Class-III Post, 44% of vacancies are to be filled in by way of direct recruitment on batch-wise basis from amongst the PV Assistants on regular basis or by recruitment on contract basis as the case may be. Remaining 44% of vacancies are to be filled in by way of direct recruitment, may be through the concerned recruiting agency, i.e. Himachal Pradesh Staff Selection Board, Hamirpur, on regular basis or by recruitment on contract basis, as the case may be and 12% by way of promotions. In terms of the amended Rules, the selection by batch-wise on contract basis is to be done by respondent No.2 by way of an advertisement in at least two leading newspapers after inviting applications from the eligible candidates. However, the respondents have neither advertised the posts in leading newspapers nor invited applications from eligible candidates like the petitioners and have initiated the process for selection of Veterinary Pharmacist from amongst Gram Panchayat Veterinary Assistants, which is bad in law.

3. Learned Senior Counsel appearing for the petitioners has argued that the notification for appointment of 221 posts of Gram Panchayat Veterinary Assistants on contract basis could not have been issued by the respondents without following the R&P Rules as the same is arbitrary and illegal and amounts to giving undue benefit to back-door entry and further amounts to 100% reservation. It is in this backdrop, that the petition has been filed. 4. During the course of arguments, learned Senior Counsel appearing for the petitioner, by referring to the R&P Rules, which are in vogue as of now, i.e. Himachal Pradesh Animal Husbandry Department, Veterinary Pharmacists, Class-III, (non-gazetted) Recruitment & Promotion rules, 2018, notified vide notification dated 21.12.2018, appended with the reply of respondent No.1 as Annexure R-1, argued that a perusal of Clause 10 of the said Rules demonstrates that 44% posts of Veterinary Pharmacist are to be filled in by direct recruitment on batch-wise basis from amongst Panchayat Veterinary Assistants on regular basis or by recruitment on contract basis, as the case may be. She has argued that this Clause consists of two parts. According to her, the first part is that 44% of the posts are to be filled in by direct recruitment on batch-wise basis from amongst Veterinary Assistants on regular basis and the second part is that "or by recruitment on contract basis" and this recruitment on contract basis according to her has to be made on batch-wise basis, not from amongst Panchayat Veterinary Assistants, but from amongst candidates like the petitioners. Learned Senior Counsel has based her case on this sole argument.

5. On the other hand, the petition has been resisted by the respondents, *inter alia*, on the ground that provisions of the R&P Rules are being totally misread by the petitioners. Learned Additional Advocate General has submitted that Clause 10 of the 2018 Rules demonstrates that there are three modes mentioned therein of making recruitment to the post of Veterinary Pharmacist. Mode-A is 'by way of direct recruitment on batch-wise

basis from amongst Panchayat Veterinary Assistants on regular basis or by recruitment on contract basis, as the case may be, to the extent of 44%', Mode-B is 'by way of direct recruitment through the concerned Recruiting Agency on regular basis or by recruitment on contract basis, as the case may be, to the extent of 44%' and Mode-C is 'by way of promotion by way of 12%, failing which by way of direct recruitment through the concerned Recruiting Agency on regular or contract basis'. He submitted that sub-clause (i) of Clause 10 cannot be segregated and read as the learned Senior Counsel for the petitioners has argued and harmonious interpretation of this sub-clause is that though 44% of the posts of Veterinary Pharmacist are to be filled in by way of direct recruitment on batch-wise basis from amongst Panchayat Veterinary Assistants, but this recruitment can be either on regular basis or on contract basis, as the case may be. Accordingly, he prayed that the present petition be dismissed.

6. I have heard learned Counsel for the parties and have also gone through the pleadings as well as the documents on record.

7. The factum of the petitioners being eligible for recruitment against the posts on the strength of the qualification possessed by them is not an issue of contention and therefore, this Court is not dwelling upon the same. Annexure P-2 is the notification, in terms whereof, the process of recruitment has been initiated by the respondent-Department. This annexure is dated 05.04.2022 and its subject is 'regarding filling up of 221 posts of Veterinary Pharmacist on contract basis on batch-wise merit wise basis from GPVAs. The text of the Annexure reads as under:-

> "*"It is to inform you that as per sanction received from the Government, department is going to fill up 221 post of Veterinary Pharmacist (on contract) on batch wife merit wise basis from amongst the GPVAs as per R&P Rules from the post of Veterinary Pharmacist and Departmental Roster of Veterinary Pharmacist. Counseling for this purpose has been scheduled to be held on*

19th, 20th, and 21st April, 2022 at Directorate of Animal Husbandry, Himachal Pradesh, Shimla from 10:30 A.M. onwards every day as per schedule attached.

In this context, merit list of eligible GPVAs, cut of marks list, application form and other documents required to be submitted by the GPVAs appearing for counseling are also enclosed herewith.

You are directed to inform GPVAs working under your control, whose name is included in the merit list, for appearing in the counseling on scheduled date at directorate along with all the requisite documents. GPVAs except those belonging to Ex-servicemen and sportsperson may be directed to attend the counseling as separate date for holding counseling of Ex-servicemen and sportsperson category will be communicated later on. The above detail is also available at Departmental website (http://hpagrisnet.gov.in)."

8. A perusal of this communication demonstrates that Director of Animal Husbandry, to the Government of Himachal Pradesh has sent a communication to all the Head of Offices, Animal Husbandry Department that Government has sanctioned filling up of 221 posts of Veterinary Pharmacist on contract basis on batch-wise merit wise basis from amongst GPVAs, as per the R&P Rules for the post of Veterinary Pharmacist and departmental roaster of Veterinary Pharmacist. Thereafter, the dates of counseling have been mentioned therein and the officers have been directed to submit merit list of eligible GPVAs alongwith other documents required, so that eligible candidates can be invited for counseling.

9. There are on record the 2011 R&P Rules for the post in issue and Clause 10 whereof reads as under:-

"*10. Method of recruitment whether by direct recruitment or by promotion, deputation, transfer an the percentage of posts is to be filled in by various methods.- (i) 88% by direct recruitment on a regular basis from amongst Panchayat Veterinary Sahayak or by recruitment on contract basis, from amongst the Panchayat Veterinary Sahayak as the case be.*

> *(ii) 12% by promotion failing which by direct recruitment on a regular basis or by recruitment on contract basis from amongst Panchayat Veterinary Sahayak as the case may be."*

In terms of sub-clause (i) of Clause 10 (supra), 88% posts of Veterinary Pharmacist were to be filled in by way of direct recruitment on regular basis from amongst Panchayat Veterinary Sahayak or by recruitment on contract basis from amongst Panchayat Veterinary Sahayak, as the case may be.

10. These Rules have been repealed and the 2018 Rules have been brought into force w.e.f. 21.12.2018. Clause 10 of 2018 Rules, which now governs appointment to the post of Veterinary Pharmacist read as under:-

> "*10. Method(s) of recruitment- whether by direct recruitment or by promotion/ secondment/transfer and the percentage of post(s) to be filled in by various method—(i) 44% by direct recruitment on batch-wise basis from amongst Panchayat Veterinary Assistants on a regular basis or by recruitment on contract basis, as the case may be;*
> *(ii) 44% by direct recruitment through the concerned recruiting agency i.e. Himachal Pradesh Staff Selection Commission, Hamirpur, on a regular basis or by recruitment on contract basis, as the case may be; and*
> *(iii) 12% by promotion failing which by direct recruitment through the concerned recruiting agency i.e. Himachal Pradesh Staff Selection Commission, Hamirpur, on a regular basis or by recruitment on contract basis, as the case may be.*"

11. A perusal of sub-clause (i) of Clause 10 of 2018 Rules demonstrates that in terms thereof 44% of the posts of Veterinary Pharmacist are to be filled in by way of direct recruitment on batch-wise basis from amongst Panchayat Veterinary Assistants on regular basis or by recruitment on contract basis, as the case may be.

12. This Court is of the considered view that the interpretation of the learned Senior Counsel for the petitioners that this particular sub-clause has to be segregated into two parts and it has to be read that if direct recruitment on batch-wise basis is being offered on regular basis, then the same has to be from amongst Panchayat Veterinary Assistants and if the recruitment on batch-wise basis is intended on contract basis, then the same has to be from the open market is incorrect interpretation. The Court does not concurs with the argument or the interpretation in this regard, as has been made in the Court by the learned Senior Counsel for the petitioners.

13. In fact, a perusal of Clause 10 of the R&P Rules as argued by the learned Additional Advocate General demonstrates that there are three sources of recruitment. The first source is 'Panchayat Veterinary Assistants', the second source is 'open market' and the third source is 'feeder cadre', from which recruitment has to be made by way of promotion.

14. As far as the first category of 'Panchayat Veterinary Assistant' is concerned, in terms of Clause 10 (i), 44% of the posts of Veterinary Assistants are to be filled in from amongst Panchayat Veterinary Assistants on batch-wise basis by way of direct recruitment. The recruitment can either be on regular basis or on contract basis. Any other interpretation given to this sub-clause would do both injustice and violence to the provisions of this particular sub-clause. The petitioners are not eligible to participate in the process of batch-wise recruitment, for the reason that they are not serving as Panchayat Veterinary Assistants. They have a right of consideration, if eligible under Clause 10 (ii), but not under Clause 10(i), because this particular Clause is restricted for recruitment only from the feeder category of Panchayat Veterinary Assistants.

15. In this view of the matter, this Court does not finds any infirmity in the issuance of Annexure P-2, in terms whereof, the respondent-Department is making appointments to the filling up of 221 posts of

Veterinary Pharmacist on contract basis by way of batch- wise merit wise recruitment from amongst GPVAs, as per R&P Rules, for the post of Veterinary Pharmacist.

16. In view of the above discussion, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

Between:

SHAYAMANAND S/O SHRI DILA RAM, R/O VILLAGE ALU RANDAL, POST OFFICE RAMPUR, TEHSIL NIRMAND DISTRICT KULLU, H.P.

….PETITIONER.

(BY MR. MANOHAR LAL SHARMA, ADVOCATE)

AND

1. HIMACHAL PRADESH ROAD TRANSPORT CORPORATION, SHIMLA-1, THROUGH ITS MANAGING DIRECTOR.
2. THE REGIONAL MANAGER, H.R.T.C. RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P.
3. THE PRESIDING OFFICER, LABOUR COURT CUM INDUSTRIAL TRIBUNAL AT SHIMLA, H.P.

…. RESPONDENTS.

(BY MS. MAMTA, ADVOCATE, VICE MR. B.N. SHARMA, ADVOCATE, FOR RESPONDENTS NO.1 AND 2)

(NONE FOR RESPONDENT NO.3)

CIVIL WRIT PETITION
No.2682 of 2017
Decided on: 20.06.2022

Writ Jurisdiction- Petitioner claimed that his service was terminated by respondent without compliance of the provisions of Industrial Disputes Act- Labour Court rejected the claim on the ground that claim had become stale- Decision of Labour Court was challenged in Writ petition-**Held**- In case of delay in raising the claim, Court can mold the relief but the delay must be explained- Delay was unexplained by the petitioner- Rejection of claim by Tribunal was held to be valid- Petition was dismissed. (Para 17)

Cases referred:

Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Vs Mohan Lal (2013) 14 SCC 543;

U.P. State Road Transport Corporation Vs Ram Singh and Another (2008) 17 SCC 627;

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

J U D G M E N T

By way of the present petition, the petitioner, has challenged the award passed by the Court of learned Presiding Judge, Industrial Tribunal-cum- Labour Court, Shimla, H.P., in Reference No.33 of 2016, titled as Shayamanand Versus Himachal Road Transport Corporation Shimla, H.P. & another, decided on 30.06.2017, in terms whereof the reference which was made by the appropriate Government to the said Court, has been answered by the learned Tribunal by dismissing the claim of the petitioner/ workman.

2. Brief facts necessary for the adjudication of the present petition are that the following reference was made by the appropriate Government to the learned Labour Court for adjudication:-

> "*Whether alleged termination of service of Shri Shyamamanand S/O Shri Dila Ram, R/O Village Alu Randal, P.O. Rampur, Tehsil Nirmand, District Kullu, H.P. w.e.f. 18.4.2001 by the (1) The Managing Director, Himachal Pradesh Transport Corporation, H.P. Shimla. (2) Regional Manager, H.R.T.C. Rampur, District Shimla, H.P., who had worked as Motor Mechanic only for 191 days during the year, 2000 and has raised his industrial dispute after more than 12 years vide demand notice dated 25.9.2013, without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period of 191 days during the year, 2000 and delay of more than 12 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to form the above employer/management?*"

3. The claim which was put forth by the petitioner/ workman before the learned Labour Court was that he was initially engaged by the

respondents/Himachal Road Transport Corporation as a Motor Mechanic (helper) on 06.06.2020, for a period of 89 days. After completion of 89 days, he was reengaged for further 89 days. This process continued upto 17.04.2001. Thereafter, his services were terminated without any notice. The information which was obtained by the petitioner under Right to Information Act, demonstrated that the respondents had appointed many persons as Motor Mechanic on piecemeal basis after his termination. He also came to know that services of such like persons were thereafter placed on contract basis. It was in this background that the petitioner raised industrial dispute by claiming reinstatement with consequential benefits.

4. The claim of the workman/petitioner was contested by the respondents No.1 and 2 on the ground that the workman was engaged only on day to day basis on the leave vacancy of regular staff during the year 2000, w.e.f. 06.06.2000 in Motor Mechanic Trade on monthly remuneration of Rs.2000. As per respondents No.1 and 2, the workman was not engaged for 89 days and the factum of the workman/petitioner being reengaged after 89 days period again for such period was denied. It was further the contention of respondents No.1 and 2 that the workman/petitioner had left his job without giving any notice to the Department. The petitioner, thereafter, appeared in interview for the post of Motor Mechanic, but could not qualify due to less mark. It was denied that either there were vacant posts with the respondent or that the workman/petitioner had completed more than 240 days in each calendar year.

5. On the basis of the pleadings of the parties, learned Court below framed the following issues:-

> "*1.Whether the termination of the services of the petitioner w.e.f. 18.4.2001 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? OPP…..*

2. If issue No.1 is proved in affirmative to what service benefits the petitioner is entitled to? OPP....
3. Relief."

66. On the basis of evidence led by the parties in support of their respective contentions, the issues so framed were answered as under:-

"Issue No.1	*:*	*No*
Issue No.2	*:*	*Becomes redundant.*
RELIEF	*:*	*Reference answered in favour of the respondent and against the petitioner per operative part of the award."*

7. Learned Labour Court, thus answered the reference by dismissing the claim petition, by returning the findings that scrutiny of the evidence demonstrated that the workman/petitioner had worked with the respondent as a Motor Mechanic for a period of 191 days and the workman/petitioner had raised industrial dispute after twelve years, vide demand notice dated 25.09.2013. Learned Labour Court then posed a question to itself as whether the reference was stale and highly belated? Relying upon the judgment of the Hon'ble Supreme Court reported in ***(2013) 14 Supreme Court Cases 543***, titled as ***Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota*** Versus ***Mohan Lal***; ***(2008) 17 Supreme Court Cases 627***, titled as ***U.P. State Road Transport Corporation*** **Versus** ***Ram Singh and Another***, it held that whereas the services of the petitioner were terminated w.e.f. 18.04.2001 and as there was nothing on record which demonstrated that after his termination, the petitioner approached the respondents for his reinstatement within reasonable time and further as burden was upon the petitioner to have had proved that dispute was raised within reasonable time, his having failed to discharge this burden, the claim being stale was liable to be rejected on the ground of delay in raising the

dispute. It also held that record demonstrated that the workman was engaged on day to day basis and no evidence was led by the workman to prove that persons junior to him were retained or that fresh persons were engaged. By returning these findings, the reference was answered by dismissing the claim petition by holding that the workman had failed to demonstrate that his services were terminated in violation of the provisions of the Industrial Disputes Act.

8. Feeling aggrieved, the workman has filed the present petition.

9. Mr. Manohar Lal Sharma, learned counsel appearing for the petitioner has vehemently argued that rejection of the case of the petitioner on the ground that the claim of the petitioner was stale, is not sustainable in the eyes of law, for the reason that it is well settled law that learned Labour Court can always mold the relief in the event of the workman raising an industrial dispute with some delay and latches. On this count, learned counsel for the petitioner argued that the rejection of the claim of the workman is not justified and learned Labour Court should have had allowed the claim of reinstatement, but relief thereof could have been molded accordingly by the learned Court. Learned counsel also argued that dismissal of the claim petition of the petitioner was otherwise also not sustainable for the reason that while doing so, learned Tribunal erred in not appreciating that as earlier the decision of not making the reference to the Tribunal by the appropriate Government of the industrial dispute raised by the petitioner on the ground of delay was set aside by this Court, in CWP No.4160 of 2015, decided on 15.10.2015.

10. Opposing the petition, learned counsel appearing for the respondents has argued that there is no infirmity with the award which has been passed by the learned Tribunal. She submitted that it is a matter of record that the industrial dispute was raised by the petitioner after twelve years from the alleged date of his termination, though as per her, the services

of the petitioner were never terminated, but he willfully left whatever duty he was performing with the Himachal Road Transport Corporation. She further argued that otherwise also, as the petitioner was not able to demonstrate before the learned Tribunal that there was any infringement of any of the provisions of the Industrial Disputes Act, 1947 by the employer, therefore also, the award passed by the learned Tribunal calls for no interference. On these counts, she prayed that the present petition being devoid of any merit be dismissed.

11. I have heard learned counsel for the parties and have gone through the contents of the petition as well as documents appended therewith including the award passed by the learned Tribunal.

12. In the present case, it is not in dispute that the date on which as per the petitioner his services were terminated is 17.04.2001. It is also not in dispute that the industrial dispute was raised by the petitioner for the first time on 25.09.2013. There is not even an iota of evidence on record to demonstrate that in between this period, the petitioner had raised up the issue of his alleged illegal termination with the employer and the matter, thus, was alive one way or the other. Here is a case where for the first time the issue of the alleged illegal termination of the petitioner by the respondents was raised by the petitioner after a lapse of more than twelve years.

13. In these circumstances, this Court is of the considered view that the findings returned by the learned Reference Court that the claim of the petitioner was stale, calls for no interference. It is not as if a workman can raise an industrial dispute at his will. The same has to be raised within some reasonable period as from the date when the cause of action accrued. However, in case an industrial dispute is not raised within reasonable period, but after some considerable delay, then the onus is upon the workman to demonstrate that he was not sitting over his rights, but was agitating the issue by one way or the other with the employer by either having approached

the employer by way of correspondence etc. or through some other medium. Simply because a reference has been made by the appropriate Government, may be upon a direction which might have been passed by this Court, does not means that in exercise of its judicial powers, the Industrial Tribunal/ Labour Court cannot go into the issue as to whether the claim of the workman is stale or not. This being a judicial function and a judicial duty of the Industrial Court, the authority so conferred upon said Tribunal/Labour Court to adjudicate this issue cannot be curtailed unless a Superior Court returns the findings in favour of the workman to the contrary that the dispute which stands raised by the workman is not a stale dispute and the Tribunal stands by a Superior Court to adjudicate the reference on merit.

14. Coming to the facts of this case, the judgment of this Court which was earlier passed in the petition which was filed by the petitioner, is being quoted hereinbelow:-

> " *It is contended that the case of the petitioners is squarely covered by judgment, dated 30th December, 2014, delivered by this Court in a batch of writ petitions, CWP No.9467 of 2014, titled Partap Chand Versus Himachal Pradesh State Electricity Board and others, being lead case.*
>
> *2. Issue notice. Mr. Romesh Verma, learned Additional Advocate General, waives notice on behalf of the respondents.*
>
> *3. In the given circumstances, we deem it proper to direct the respondents to consider the case of the petitioners, in terms of the judgment (supra), and make a decision within eight weeks. The said judgment shall form part of this judgment also.*
>
> *4. The writ petitions are disposed of accordingly, alongwith pending miscellaneous applications, if any.*"

15. This order was passed by the Hon'ble Division Bench in the background that as appropriate Government refused to forward the reference on the dispute raised by the petitioner therein, on the ground of delay, the petition was disposed of in terms of the order already quoted hereinabove by relying upon the earlier judgments passed by this Court, which were to the

effect that it was not for the appropriate Government to turn down an industrial dispute and not refer it to the learned Tribunal/Labour Court on the ground of delay and latches.

16. Thus, it is not as if any direction was issued by the Hon'ble Division Bench in the Writ Petition which was filed by the petitioner to the learned Labour Court *per se* that in the event of the industrial dispute being referred to it, said Court was precluded from going into the question of the staleness of the dispute.

17. Incidently, this issue otherwise is not *res integr*a and there are judgments of the Hon'ble Supreme Court to the effect that both the appropriate Government as well as the Tribunal can go into the question of staleness of the dispute and depending upon the facts of each case, an appropriate Government can reject reference of an industrial dispute to the learned Tribunal on the ground that the same is stale and similarly, even after a Reference having been made to the Tribunal, such Tribunal can reject the claim petition on the ground that the same is stale. Though, there are judgments that in matters where a workman has raised industrial dispute after some delay, learned Tribunal can mold the relief, but this law has to be understood in the facts of those cases where though delay in raising industrial dispute is there, but the delay has been explained by the workman.

18. In the present case, the delay of twelve years has gone completely unexplained as already observed hereinabove and in this view of the matter, this Court does not finds any merit in the present petition as the rejection of the claim of the workman by the learned Tribunal does not suffers from any infirmity.

19. Accordingly, this petition being devoid of any merit is dismissed, so also the pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Between:-

ROOP LAL S/O SH. HARI RAM, R/O VILLAGE KHANOT, PO BARI, TEHSIL BALDWARA, DISTT. MANDI, H.P. EX. FITTER, I&PH DIVISION SARKAGHAT, SUB-DIVISION BALDWARA, DISTT. MANDI, H.P.

……PETITIONER

(BY MR. A.K. GUPTA AND MS. BABITA CHAUHAN, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (I&PH)WITH HEADQUARTERS AT SHIMLA, H.P.

2. THE ENGINEER-IN-CHIEF, I&PH WITH HEADQUARTERS AT U.S. CLUB, SHIMLA-1

3. THE SUPERINTENDING ENGINEER, I&PH CIRCLE SUNDERNAGAR, DISTT. MANDI, H.P.

4. THE EXECUTIVE ENGINEER,I&PH DIVISION SARKAGHAT, DISTT. MANDI, H.P.

5. THE SENIOR DEPUTY ACCOUNTANT GENERAL, H.P. WITH HEADQUARTERS AT SHIMLA-3

……RESPONDENTS

(MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL, FOR R-1 TO R-4, MR. LOKENDER PAUL THAKUR, SENIOR PANEL COUNSEL, FOR R-5)

CIVIL WRIT PETITION
No.3385 of 2019
Reserved on: 14.10.2022
Decided on: 21.10.2022

Constitution of India, 1950- Service Law- Petitioner was working from 1991- His services were regularized in 2002- He superannuated in 2010- Pension was not granted to Petitioner after superannuation despite 8 years of service- Petitioner claimed that since he worked from 1991 the required criteria was met- **Held**- CCS (Pension) Rules, 1972, which governs grant of pension, do not

envisage counting of daily wage service towards pension. Period of daily wage service, therefore, cannot be computed towards qualifying service for pension- petitioner did not possess minimum required qualifying service of 10 years for grant of pension- Petition was dismissed (Para 5)

Cases referred:

Indian Bank Vs ABS Marine Products (P) Ltd., (2006) 5 SCC 72;
Kesar Chand Versus State of Punjab and others, 1988 (5) SLR 27;
Prem Singh Versus State of Uttar Pradesh and others (2019) 10 SCC 516;
Ram Pravesh Singh & others Vs State of Bihar & others (2006) 8 SCC 38;
State of Bihar Vs. Bhagwan Singh AIR 2014 Patna 208;
State of Punjab & others Vs Rafiq Masih (2014) 8 SCC 883;
Union of India & another Vs Onkar Nath Dhar (2021) 9 Scale 362;
V. Sukumaran Versus State of Kerala and another (2020) 8 SCC 106;

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

O R D E R

Petitioner, a retired Class-III employee, who has been denied pension on account of not possessing the qualifying service of 10 years, seeks applicability of a judgment rendered on 08.03.2018 by the Hon'ble Apex Court in case of Class-IV employees in Civil Appeal No.6309 of 2017 (Sunder Singh Versus The State of Himachal Pradesh &Ors.), for counting his daily waged service for grant of pension.

2. Facts:-

The petitioner was engaged as a Fitter on daily wage basis in Irrigation & Public Health (I&PH) Department on 11.02.1991. His services were regularized w.e.f. 01.02.2002. He superannuated on 31.10.2010. Having served for 8 years on regular basis, i.e. less than the required qualifying period of 10 years, the petitioner is not being paid pension. 12 years after his retirement, the petitioner filed this writ petition on 08.11.2019, seeking pension with following substantive prayer:-

> *"i. That the respondents may be ordered to process the case of the petitioner for pension and the same may be ordered to be paid*

to the petitioner from the due date with all the benefits incidental thereof."

3. Contentions:-

I have heard learned counsel on both sides.

In support of the relief claimed, Mr. A.K. Gupta, learned counsel for the petitioner advanced submissions under the following broad points:-

3(i). Judgment passed by the Hon'ble Apex Court in ***Civil Appeal No.6309 of 2017***, titled ***Sunder Singh Versus The State of Himachal Pradesh & Ors.***, decided on 8th March, 2018, is applicable to the case of the petitioner for grant of pension. In terms of this judgment, daily waged service rendered by the petitioner prior to his regularization is to be computed towards qualifying service for grant of pension in the manner prescribed in the judgment.

3(ii). Petitioner, a Class-III employee, cannot be discriminated vis-à-vis Class-IV employee in the matter of computation of daily wage service for the purpose of grant of pension. When daily waged service of Class-IV employees is being counted in the manner mandated in Sunder Singh's case, supra, towards qualifying service for grant of pension, then by drawing the same analogy, it should be counted in the same manner in case of Class-III employees as well.

3(iii). This Court should exercise its jurisdiction under Article 226 of the Constitution of India to obviate the discrimination between the similarly situated Class-III and Class-IV employees.

4. Observations:-

Before discussing the points raised by learned counsel for the petitioner, basic provisions pertaining to entitlement of an employee to pension may first be noticed.

4(I). Rule Position:-

4(I)(a). Central Civil Services (Pension) Rules, 1972 (hereinafter to be referred as 'Pension Rules') have been made applicable to the State of Himachal Pradesh vide notification dated 30.03.1974. Rule 49 of the Pension Rules provides for qualifying service of 10 years for an employee to become eligible for grant of pension. Relevant part of Rule 49 reads as under:-

> *"(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.*
>
> *(1-A) The Dearness Allowance admissible on the date of retirement shall also be treated as emoluments for the purpose of sub-rule (1);*
>
> *(2) Subject to the proviso to sub-rule (2) of Rule 38, in the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than ten years, the amount of pension shall be calculated at fifty per cent of emoluments or average emoluments, whichever is more beneficial to him, subject to a minimum of nine thousand rupees per mensem and maximum of one lakh twenty-five thousand rupees per mensem……."*

4(I)(b). Chapter-III of the Pension Rules outlines nature of qualifying service. Under Rule 13 thereof, the service that qualifies for pension commences from the date the employee takes charge of the post to which he is appointed either substantively or in an officiating/temporary capacity, provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. Relevant part of the rule reads as under:-

> *"Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:*
> *Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post."*

Rule 14 of the Pension Rules puts a rider that service of a government servant shall not qualify unless his duties and pay are regulated by the Government or under conditions determined by the Government. It is also provided in the rule that in order to qualify for pension, service must be under the Government and paid by the Government from the Consolidated Fund of India or a Local Fund administered by that Government. Service in a non-pensionable establishment is excluded from computation unless such service is treated as qualifying service by the Government. Relevant portion of Rule 14 is as under:-

> *"(1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.*
> *(2) For the purposes of sub-rule (1), the expression "Service" means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government."*

4(I)(c). Rule 2(b) of the Pension Rules excludes applicability of the rules to persons engaged in daily rated employment. This sub-rule reads as follows:-

> *"2. Application*
> *Save as otherwise provided in these rules, these rules shall apply to Government servants appointed on or before the 31st day of December, 2003 including civilian Government servants in the Defence Services, appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to-*
> *(a) ……*
> *(b) persons in casual and daily-rated employment."*

4(I)(d). Simple reading of CCS (Pension) Rules makes it obvious that daily waged service rendered by the petitioner does not qualify to be computed towards pension.

4(II). Judicial precedent leading to Sunder Singh's case:-

4(II)(a). A Division Bench of this Court in ***CWP No.180 of 2001***, titled ***State of H.P. and another Versus Ram Lal and others***, was dealing with the question whether the services rendered on daily waged basis by the employees before their regularization/grant of work charged status are to be taken into consideration for the purpose of counting their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972, and if so, to what extent. CWP No.3496/2011 (Sunder Singh Versus State of Himachal Pradesh) was one of the several petitions connected with the lead case titled State of H.P. and another Versus Ram Lal and others.

The Division Bench decided all companion writ petitionsby a common judgment passed on 31.05.2012. The Court took note of the fact that CCS (Pension) Rules were made applicable to the State of Himachal Pradesh w.e.f. 30.03.1974. The implication of Rules 2(b), 2(c), 13, 14, 49was also considered. Various precedents on the point involved were also noticed in the judgment. It was held that under the applicable rules, daily wage service cannot be counted towards the qualifying service for pension. It would be appropriate to extract hereinafter some of the relevant paragraphs from the judgment:-

> *"72. At the cost of repetition, we may state that under Rule 2, daily rated and casual employees were specifically excluded by the Rules. Rule 14 does empower the Government to include the service on a non-pensionable establishment, but some specific orders were required to be passed.....*
>
> *74. It was contended on behalf of the employees that if two views are possible, then the view favouring the employees should be taken. We have no quarrel with this proposition, but in this case, we are of the considered view that the view canvassed on behalf of the employees is not a possible view after we take into consideration Rule 89. If the Rules do not envisage counting of*

daily wage service towards qualifying service for pension, this Court cannot, by judicial fiat, direct that the daily wage service must be taken into consideration while calculating the qualifying service in terms of the Pension Rules……..

77. In view of the above discussion, we are of the considered view that the Pension Chapter of the Civil Service Regulations, which governed the employees earlier, stood repealed after the enforcement of the Central Civil Service (Pension) Rules, 1972 and the savings portion of Rule 89 of the 1972 Rules does not save the Office Memorandum No.F.12(1)E.V/68, dated 14th May, 1968. Consequently, we answer the question framed by us earlier holding that the service rendered on daily waged basis by the employees before their regularization/grant of work charged status cannot be taken into consideration for counting their qualifying service for grant of pension under the Central Civil Service (Pension) Rules, 1972. The writ petition is disposed of in the aforesaid terms."

4(II)(b). Apex Court judgment in Sunder Singh's case:-

Some of the petitioners whose writ petitions were disposed of under the Division Bench judgment dated 31.05.2012, chose to assail the said judgment before the Hon'ble Apex Court by filing Special Leave Petitions. These SLPs were connected and decided on 08.03.2018 under the lead case Civil Appeal No.6309 of 2017 (Sunder Singh Versus TheState of Himachal Pradesh &Ors.). In these cases, the appellants were retired regular Class-IV employees seeking to count the daily wage service rendered by them prior to their regularization towards qualifying service for pension. Hon'ble Apex Court disposed of the petitions with following order:-

1. *Heard learned counsel for the parties.*
2. *The appellants represent class of Class-IV employees who were recruited initially as daily wagers such as Peon/Chowkidar/Sweeper/Farrash/Malis/Rasoia etc. Their services, thereafter, were regularized pursuant to the decision of this Court in Mool Raj Upadhyaya Vs. State of H.P. and Ors. 1994 Supp(2) SCC 316 under a Scheme. Regularization was after 10 years of service.*

3. *It is undisputed that the post-regularization an employee who had served for 10 years is entitled to pension for which work charge service is counted. Earlier, in terms of O.M. dated 14.05.1998, 50% of daily-wage service was also counted for pension after regularization but the rules have undergone change.*
4. *Since the appellants have not rendered the requisite 10 years of service they have been denied pension.*
5. *Even though strictly construing the Rules, the appellants may not be entitled to pension. However, reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying the doctrine of proportionate equality, we are of the view that they are entitled to weightage of service rendered as daily wagers towards regular service for the purpose of pension.*
6. *Accordingly, we direct that w.e.f 01.01.2018, the appellants or other similarly placed Class-IV employees will be entitled to pension if they have been duly regularized and have been completed total eligible service for more than 10 years. Daily wage service of 5 years will be treated equal to one year of regular service for pension. If on that basis, their services are more than 8 years but less than 10 years, their service will be reckoned as ten years.*
7. *The appeal as well as special leave petitions are disposed of in above terms."*

4(II)(c). Implication of judgment in Sunder Singh's case:-

In Sunder Singh's case, the appellants belonged only to Class-IV category. Employees belonging to Class-III category were not the appellants therein. The directions passed by the Hon'ble Apex Court in Sunder Singh's case were specifically made applicable only to Class-IV employees. This is apparent from the following extracts from the judgment:-

"2. ***The appellants represent class of Class-IV employeeswho were recruited initially as daily wagers*** *such as Peon/Chowkidar/Sweeper/Farrash/Malis/Rasoia etc. Their services, thereafter, were regularized pursuant to the decision of this Court in Mool Raj Upadhyaya Vs. State of H.P. and Ors.*

1994 Supp(2) SCC 316 under a Scheme. Regularization was after 10 years of service.

6. *Accordingly,* ***we direct that w.e.f 01.01.2018, the appellants or other similarly placed Class-IV employees will be entitled to pension*** *if they have been duly regularized and have been completed total eligible service for more than 10 years. Daily wage service of 5 years will be treated equal to one year of regular service for pension. If on that basis, their services are more than 8 years but less than 10 years, their service will be reckoned as ten years."*

Judgment in Sunder Singh's case itself restricts its applicability to the appellants therein, who belonged to Class-IV category or other similarly placed Class-IV employees. In the judgment, Hon'ble Apex Court has observed that strictly construing the rules, the appellants may not be entitled to pension. However, reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying Doctrine of Proportionate Equality, daily wage service rendered by Class-IV employee was directed to be counted towards qualifying service for pension in the manner mandated in the judgment. Paragraph 5 of the judgment, being relevant in this regard, reads as under:-

"5. ***Even though strictly construing the Rules, the appellants may not be entitled to pension.*** *However, reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying the doctrine of proportionate equality, we are of the view that they are entitled to weightage of service rendered as daily wagers towards regular service for the purpose of pension."*

The judgment not only has been made applicable specifically to Class-IV category, but is also under Article 142 of the Constitution of India. In ***(2014) 8 SCC 883, State of Punjab and others Versus RafiqMasih***, it was held that Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions of the statute. The directions

of the Court under Article 142 of the Constitution of India that relax the application of law or exempt the case in hand from the rigour of law in view of the peculiar facts and circumstances do not compromise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. Jurisdiction under Article 136 of the Constitution of India is corrective that vests a discretion in the Hon'ble Supreme Court to settle and declare the law and make it a binding precedent for future instead of keeping it vague. Paragraphs 9 to 13 of the judgment read as under:-

> *"9. The word 'complete justice' was fraught with uncertainty until Article 142 of the Constitution received its first interpretation in Prem Chand Garg v. Excise Commr.which added a rider to the exercise of wide extraordinary powers by laying down that though the powers are wide, the same is an ancillary power and can be used when not expressly in conflict with the substantive provisions of law. This view was endorsed by a nine-Judge Bench in NareshShridharMirajkar v. State of Maharashtrareiterated by a seven-Judge Bench in A.R. Antulay v. R.S. Nayakand finally settled in Supreme Court Bar Assn. v. Union of India.*
>
> *10. Article 136 of the Constitution of India, confers a wide discretionary power on the Supreme Court to interfere in suitable cases. Article 136 is a special jurisdiction and can be best described in the words of this Court in Ramakant Rai v. Madan Rai: (SCC p.403, para 14)*
>
> > *"14. …It is a residuary power; it is extraordinary in its amplitude, its limits, when it chases injustice, is the sky itself".*
>
> *11. Article 136 of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article 136 of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in the case of Union of India v. Karnail Singh, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as under Article 141 of the Constitution.*
>
> *12. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though*

they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice oriented approach as against the strict rigors of the law. The directions issued by the court can normally be categorized into one, in the nature of moulding of relief and the other, as the declaration of law. "Declaration of Law" as contemplated in Article 141 of the Constitution: is the speech express or necessarily implied by the Highest Court of the land. This Court in Indian Bank v. ABS Marine Products (P) Ltd., Ram Pravesh Singh v. State of Biharand inState of U.P. v. NeerajAwasthi, has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are direction issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India. The Court have compartmentalized and differentiated the relief in the operative portion of the judgment by exercise of powers under Article 142 of the Constitution as against the law declared. The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case.

13. *Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment."*

In ***(2006) 5 SCC 72, Indian Bank Versus ABS Marine Products (P) Ltd.,*** it was observed that many times after declaring the law, Hon'ble Apex Court in operative part of the judgment, gives some directions,

either relaxing the application of law or exempting the case in hand from the rigour of the law in view of the peculiar facts in order to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. The Court should be very careful to ascertain and follow the ratio *decidendi* and not the relief given on the special facts, exercising power under Article 142. Paragraph 26 of the judgment reads as under:-

> *"26. One word before parting. Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should therefore be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Article 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Article 142. Be that as it may."*

The judgment in Indian Bank's case, supra, was reiterated in ***(2021) 9 Scale 362,*** titled ***Union of India & another Versus OnkarNathDhar***, and further reference was made to ***(2006) 8 SCC 38***, titled ***Ram Pravesh Singh and others Versus State of Bihar and others***, wherein it was observed that tenor of an order, which is not preceded by any reason or consideration of any principle, demonstrates that it was an order passed under Article 142 of the Constitution of India on peculiar facts of that case. Such direction is not a binding precedent.

In Sunder Singh's case, supra, Hon'ble Apex Court did not set aside the impugned common judgment passed by the Division Bench on 31.05.2012 in the writ petitions. Rather, it was observed by the Apex Court in its decision that strict construction of the rules will preclude computation of daily waged service towards pension. The Rules were also not set-aside. However, reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying the Doctrine of Proportionate Equality, the appellants and similarly placed Class-IV employees were held entitled to the weightage of service rendered by them as daily wagers towards regular service for the purpose of pension. Accordingly, a formula was worked out in para 6 of the judgment for treating 5 years of daily waged service equal to one year of regular service for pension as under:-

> *"6. .....Daily wage service of 5 years will be treated equal to one year of regular service for pension. If on that basis, their services are more than 8 years but less than 10 years, their service will be reckoned as ten years.*

The judgment rendered by the Hon'ble Apex Court in Sunder Singh's case and the directions issued therein for Class-IV employees are within the ambit of Article 142 of the Constitution of India and therefore, cannot be made applicable to the petitioner, a Class-III employee. Under the applicable Pension Rules, the daily wage service rendered by an employee is not liable to be counted towards qualifying service for pension.

4(III). Judgments in Mool Raj Upadhyaya and Sunder Singh's case vis-à-vis argument of discrimination between Class-III and Class-IV employees:-

Some employees belonging to Class-III and Class-IV categories working for a number of years on daily wage basis in I&PH Department, filed a petition under Article 32 of the Constitution of India before the Hon'ble

Supreme Court seeking regularization of their services. Taking into consideration the scheme framed by the State Government and the facts of the case, following directions were passed in the case:-

> *"4. Taking into consideration the facts and circumstances of the case, we modify the said scheme by substituting paragraphs 1 to 4 of the same by the following paragraphs:*
>
> *"(1) Daily-wage/muster-roll workers, whether skilled or unskilled, who have completed 10 years or more of continuous service with a minimum of 240 days in a calendar year on 31-12-1993, shall be appointed as work charged employees with effect from 1-1-1994 and shall be put in the time-scale of pay applicable to the corresponding lowest grade in the Government;*
>
> *(2) daily wage/muster-roll workers, whether skilled or unskilled, who have not completed 10 years of continuous service with a minimum of 240 days in a calendar year on 31-12-1993, shall be appointed as work-charged employees with effect from the date they complete the said period of 10 years of service and on such appointment they shall be put in the time-scale of pay applicable to the lowest grade in the Government;*
>
> *(3) daily-wage/muster-roll workers, whether skilled or unskilled who have not completed 10 years of service with a minimum of 240 days in a calendar year on 31-12-1993, shall be paid daily wages at the rates prescribed by the Government of Himachal Pradesh from time to time for daily-wage employees falling in Class III and Class IV till they are appointed as work-charged employees in accordance with paragraph 2;*
>
> *(4) daily-wage/muster-roll workers shall be regularised in a phased manner on the basis of seniority-cum-suitability including physical fitness. On regularisation they shall be put in the minimum of the time-scale payable to the corresponding lowest grade applicable to the Government and would be entitled to all other benefits available to regular government servants of the corresponding grade."*

The emphasis of learned counsel for the petitioner is that the scheme framed by the State for I&PH Department, as modified by the Hon'ble Apex Court, was applied equally to Class-III and Class-IV employees engaged

on daily wage basis. Under the circumstances, both sets of employees are entitled to equal treatment insofar as counting of daily wage service towards grant of pension is concerned. When weightage of daily wage service rendered by a Class-IV employee is being given for determining his eligibility for pension in terms of the judgment in Sunder Singh's case, supra, then in the similar manner, the daily wage service rendered by a Class-III employee, should also be considered while computing his qualifying service towards pension or else it would amount to discrimination between similarly situated daily wage employees engaged on Class-III and Class-IV posts.

The above argument has no appealing force. Class-III and Class-IV are different categories of posts. Under service jurisprudence, ordinarily Class-IV employees can be promoted to Class-III post subject to the concerned Recruitment & Promotion Rules. What applies to Class-III categories of posts need not necessarily be applied to Class-IV posts. In Mool Raj Upadhyaya's case, supra, the issue pertained to regularization of daily waged Class-III and Class-IV employees. Both sets of employees were before the Hon'ble Apex Court in Mool Raj Upadhyaya's case. The directions in the judgment were specifically given for both categories of employees. Entitlement to pension, interpretation and impact of CCS (Pension) Rules, 1972 on qualifying service for purpose of pension was not the issue in Mool Raj Upadhyaya's case. The directions issued in Sunder Singh's case are in exercise of jurisdiction under Article 142 of the Constitution of India and their benefit has been restricted to Class-IV employees only.

4(IV). Judgments relied upon by the petitioner:-

4(IV)(a). Learned counsel for the petitioner pressed into service a judgment dated 31.08.2010 passed by the Hon'ble Punjab & Haryana High Court in ***CWP No.2371 of 2010 (Harbans Lal Versus State of Punjab and others)***, to contend that the period spent by the daily wager cannot be excluded while calculating the qualifying service for pension. I am afraid the

judgment relied upon has no applicability to the issue involved in the instant case. In Harbans Lal's case, a New Re-structured Defined Contributory Pension Scheme was introduced by the Government of India w.e.f. 01.01.2004 for new entrants to government service. Thereafter, the Punjab Government vide circular dated 30.05.2008, clarified that the New Re-structured Defined Contributory Pension Scheme would be applicable w.e.f. 01.01.2004 in case of Punjab Government employees whose services were regularized after 01.01.2004, though they were engaged as daily wagers or on work-charge basis prior to that. The High Court quashed the circulars. The decision of the High Court was affirmed by the Hon'ble Apex Court on 30.07.2012. The point whether the service rendered on daily wage basis is liable to be counted towards qualifying service for pension was not involved in Harbans Lal's case, supra. The Court had considered the Punjab Civil Services Rules, 1970. The Pension Rules involved in the instant case were not under consideration in that case.

4(IV)(b). In ***Kesar Chand Versus State of Punjab and others, 1988 (5) SLR 27***, a Full Bench of the Punjab and Haryana High Court held that an employee is entitled to count the work charged services rendered by him for computing the qualifying service for grant of pension and gratuity. Though this judgment pertains to counting of work charge service towards qualifying service for the purpose of pension, but relying upon this decision, in some subsequent decisions from the Punjab and Haryana High Court, daily wage service has been ordered to be counted while calculating the qualifying service for the purpose of pension. However, the rule position under the Pension Rules involved in the instant case has not been discussed in the aforesaid judgments. Applicable rules involved there were the Punjab Civil Services Rules, 1970. This has been noticed by the Division Bench of this Court in Ram Lal's case, supra, as under:-

"36. In Kesar Chand versus State of Punjab and others, 1988 (5) SLR 27, a Full Bench of the Punjab and Haryana High Court held that an employee is entitled to count the service rendered by him on work charge basis for counting the whole of his service for the purpose of calculating the pension and gratuity. The State of Himachal Pradesh is admittedly counting the service rendered on work charge basis for calculating the pension. This decision does not deal with the question of counting service rendered on daily wages for calculating the qualifying service for purposes of pension.

41. A Division Bench of the Punjab and Haryana High Court in Mangat Ram versus Haryana VidyutPrasaran Nigam Ltd. and others, 2005 (5) SLR 793, following the Full Bench Decision in Kesar Chand's case held that the period spent by the daily wager cannot be excluded while calculating the qualifying service as it was followed by regular service which was continuous. In Ram Dia and others versus Uttar Haryana BijliVitran Nigam Ltd. (UHBVNL) and another, 2005 (8) SLR 765, the service rendered on work charge basis has been directed to be taken into account. In both these cases the provisions of Rule 2 of the CCS CCA Rules have not been taken into account.

42. A learned Single Judge of the Punjab and Haryana High Court in Babu Ram versus State of Haryana and others, 2009 (4) SLR 337, again held that the services rendered by employees on daily wages should be counted towards their qualifying service. However, there is no discussion on this issue and it has been decided only on the basis of the previous judgments of the Punjab and Haryana High Court.

47. The Apex Court in Union of India and others versus Rakesh Kumar supra has also clearly held that the pensionary benefit cannot be granted dehors the statutory rules. It has been laid down in unambiguous terms that the courts cannot direct payment of pension on the ground of so called hardship. A perusal of Rule 2(b) and 2(c) of the pension Rules clearly shows that the rules do not apply to persons in casual and daily rated employment and persons paid from contingencies. No doubt, Rule 13 provides that the qualifying service of a government servant shall commence from the date he takes charge of the post to which he is first appointed either substantially or in officiating or temporary capacity. The contention of the petitioners is that the phrase "officiating or temporary capacity" shall include the appointment on daily wages also. We are afraid that we cannot accept this contention. Temporary service

cannot be equated with service rendered on daily wages. We are aware that judgments of the Punjab and Haryana High Court and the Delhi High Court are to the contrary. However, as pointed out above, these courts have not taken into consideration the specific exclusion under rule 2(b) and 2(c) of the Pension Rules. In Kesar Chand's case, a Full Bench of the Punjab and Haryana High Court was only dealing with the service rendered on work charge basis. This service is being counted for purposes of pension by the State of Himachal Pradesh. However, the later judgments of the Punjab and Haryana High Court have applied the judgment in Kesar Chand's case in cases of daily wagers also, but without taking note of the specific exclusion under Rule 2(b) and 2(c) of the Pension Rules. We are of the view that Rule 13 only contemplates the counting of service which has been rendered after appointment on substantial, officiating or temporary capacity. This pre-supposes that appointment is in terms of the rules like the Temporary Civil Service Rules. Daily wagers have been specifically excluded and on a reading of the Rules, it cannot be said that the words "officiating and temporary capacity" cover the employees engaged on casual daily rated basis."

4(IV(c). Reliance placed upon ***(2019) 10 SCC 516***, titled ***Prem Singh Versus State of Uttar Pradesh and others***, is of no assistance to the petitioner. The said matter was regarding counting work charge service towards pension and revolved around Uttar Pradesh Retirement Benefits Rules, 1961 and Uttar Pradesh Civil Services Regulations. The implication of judgment in Prem Singh's case, supra, was considered by the Hon'ble Apex Court in ***Civil Appeal No.7068 of 2022,*** titled ***Sunita Burman Versus The Commissioner, M.P. Housing and Infrastructure Development Board and others***, decided on 14.10.2022, as under:-

"13. As for the decision in the case of Prem Singh (supra) cited on behalf of the appellant, the question raised in the said matter related to the validity of Rule 3(8) of the Uttar Pradesh Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulations of Uttar Pradesh. In a backdrop where this Court had earlier affirmed the decision of the High Court of

Punjab and Haryana in the case of Kesar Chand v. State of Punjab, in relation to parimateria provisions enacted in the State of Punjab which excluded computation of the period of work charged services from qualifying service for grant of pension, a three Judge Bench of this Court examined several decisions on this aspect and on perusing the Note appended to Rule 3(8) of the Uttar Pradesh Retirement Benefits Rules, 1961 and Regulation 370 of the Civil Services Regulations, held that since the service of the appellant in the said case had been regularized on a vacant post, Rule 3(8) of the U.P. Retirement Benefits Rules, 1961 ought to be read down in respect of the services rendered by him even prior to his regularization and the period spent in the capacity of a charged employee/contingency paid fund employee or non-pensionable establishment employee ought to be counted towards the qualifying service for extending the benefit of pension to such employees.

14. *The fact situation in the case in hand is entirely different. The deceased husband of the appellant had remained a work charged employee till the date of his demise on 26th April, 2016. His services had not been regularized. The Office Order dated 29th October, 1997 relied on by the appellant to urge that the services of the deceased husband of the appellant had been regularized, is being misread as can be discerned from the first para of the said order which states that daily wages Muster Roll employees working between 26th May, 1974 to 30th June, 1981 and named therein were being appointed in work charged establishments and further, that the M.P. Work Charged and Contingency Paid Employees Recruitment and Service Rules, 1977 was made applicable to them. We have noticed above that the aforesaid rules were never adopted by the respondent No.1–Housing Board or extended to its work charged employees. Being cognizant of the vacuum relating to the service conditions of the employees working in its work charged establishments, the Board of Directors of the respondent No.1–Housing Board had deliberated over the matter and decided on 6th April, 2015 to extend the benefit of pension to the said employees by bringing them within the purview of the NPS and they were given an option to become a member of the said Scheme so as to avail the benefit of pension. As her deceased husband had elected not to opt for the said Scheme, the appellant cannot claim entitlement to payment of family pension on his demise.*

> *15. We therefore hold that the deceased husband of the appellant was not a regular employee of the respondent No.1–Housing Board. He had remained a work charged employee in the establishment of the Housing Board till the date of his demise. Even while serving in the said capacity, the appellant's deceased husband could have opted for pension under the NPS that was made available to the work charged employees of the respondent No.1–Housing Board in terms of the order dated 02nd July, 2015. But he did not opt for the said Scheme. The appellant is, therefore, not entitled to receive family pension from the respondent No.1–Housing Board."*

4(IV(d). Reliance placed upon ***(2020) 8 SCC 106***, titled ***V. Sukumaran Versus State of Kerala and another,*** decided by the Apex Court on 26.08.2020, is again misplaced as Hon'ble Apex Court categorically observed in the judgment that "pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

4(IV)(e). In ***AIR 2014 Patna 208***, titled ***State of Bihar Vs. Bhagwan Singh***, a Full Bench of Patna High Court was considering the question whether the service rendered by the government servant on daily wages followed by regularization in service will be considered pensionable under the Bihar Pension Rules, 1950. The Full Bench on consideration of the applicable rules as under held that the service rendered by the employee on daily wages was not pensionable service and did not qualify for pension:-

> *"[11] We shall first consider the relevant provisions of the Pension Rules, 1950.*
>
> *Rule 56 of the Pension Rules provides that 'unless it be otherwise provided by special rule or contract, the service of every government servant qualifies from the date he takes the charge of the post to which he is first appointed'. Rule 58 thereof provides that the service of a Government servant does*

not qualify for pension unless it conforms to the following three conditions:-

(i) The service must be under Government.

(ii) The employment must be substantive and permanent.

(iii) The service must be paid by Government.

Rule 61 thereof provides, 'service does not qualify unless the Government servant holds substantively a post on a permanent establishment'. Rule 45 thereof expressly excludes certain service for computation of pension. Clause (a) thereof reads, 'when a government servant is appointed for a limited time only, or for a specified duty, on the completion of which he is to be discharged'. Clause (b) thereof reads, 'when a person is employed temporarily on monthly wages without specified limit of time or duty'.

[13] Keeping in view the above provisions, we are of the opinion that the service rendered by the petitioner as daily wage Choukidar under the Executive Engineer, Tubewell Division, Gaya cannot be said to be a service for which the petitioner was paid from the general revenue of the State Government or the service rendered on a substantive post in a permanent establishment. Such service, although was followed by absorption on regular establishment, will not qualify for pension. Therefore, the service rendered by the petitioner, as daily wage employee from April 1973 to December, 1978, was not a pensionable service or did not qualify for pension."

No other point was urged.

5. **The conclusion** of above discussion is that CCS (Pension) Rules, 1972, which govern grant of pension in the State of Himachal Pradesh, do not envisage counting of daily wage service towards pension. Period of daily waged service, therefore, cannot be computed towards qualifying service for pension. The Division Bench of this Court in its common judgment dated 31.5.2012 deciding a number of connected writ petitions including CWP No.3496/2011 (Sunder Singh Versus State of Himachal Pradesh), after threadbare discussion of the Pension Rules and judicial precedents, had categorically held that "service rendered on daily waged basis by the employees before their regularization/grant of work charged status cannot be taken into

consideration for counting their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972." In appeal against this judgment, preferred by some Class-IV category employees, Hon'ble Apex Court in its judgment dated 08.03.2018 (Sunder Singh Versus State of Himachal Pradesh &Ors.) did not set aside the Division Bench judgment of the High Court. In fact, it was observed by the Hon'ble Apex Court that strict application of the Rules may not entitle the appellants to pension. The Rules were also not quashed. It was only by reading the rules consistent with Articles 14, 38 and 39 of the Constitution of India and applying the doctrine of proportionate equality that a method was devised for giving weightage to the daily waged service towards pension in the manner mandated in the judgment. However, the judgment was specifically made applicable only to the appellants, who were Class-IV employees and similarly placed Class-IV employees. The judgment falls within the ambit of Article 142 of the Constitution of India. It has an overriding effect on CCS (Pension) Rules, 1972,but only vis-à-vis Class-IV category of employees. Its benefit cannot be extended to the petitioner, a retired Class-III employee. The argument of discrimination between Class-IV and Class-III employees vis-à-vis counting of daily waged service for the purpose of pension on the basis of applicability of judgments in Sunder Singh and Mool Raj Upadhyaya'scases is misplaced. The issue in Mool Raj Upadhyaya's case pertained to regularization of daily waged Class-III and Class-IV employees. Question of counting daily waged service or giving weightage to daily waged service towards qualifying service for grant of pension was not involved there.

The respondents have acted in terms of the CCS (Pension) Rules, 1972 and accordingly denied pension to the petitioner for the reason that he did not possess minimum required qualifying service of 10 years for grant of pension. Taking into consideration the applicable rule position, the stand of the respondents in denying pension to the petitioner cannot be faulted.

In view of the above discussion, I find no merit in the instant petition. The same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Between:

1. BISAN LAL (SINCE DECEASED) THROUGH HIS LEGAL HEIRS:-
1(a) SANJIV KUMAR S/O LATE SHRI BISHAN LAL R/O VILLAGE HAN POST OFFICE KUNHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
1 (b) KUMARI RAMA D/O LATE SHRI BISHAN LAL R/O VILLAGE HAN POST OFFICE KUNHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
1(c) KAMLA W/D SHRI BISHAN LAL R/O VILLAGE HAN POST OFFICE KUNHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.
1(d) VIDYA DEVI MOTHER OF LATE SHRI BISAN LAL R/O VILLAGE HAN POST OFFICE KUNHAR TEHSIL ARKI, DISTRICT SOLAN, H.P.

....PETITIONERS.

(BY. MR. VIRENDER THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (I & PH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. SUPERINTENDING ENGINEER, I & PH CIRCLE, SHIMLA, SHIMLA-9.
3. EXECUTIVE ENGINEER, I& PH DIVISION NO.1, SHIMLA-9, H.P.

....RESPONDENTS.

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

CIVIL WRIT PETITION
No.3837 of 2011
Reserved on: 07.04.2022
Decided on: 06.04.2022

Constitution of India, 1950- Service Law - Petitioner was terminated from service due to lodging of FIR against him for embezzlement- He challenged his termination in Writ petition- **Held**- Principles of Natural Justice were not

followed as no show cause notice was given to him before termination- Termination was held to be bad in law- Petition was allowed (Para 10)

This petition coming on for orders this day, the Court passed the following: **J U D G M E N T**

By way of the present Writ Petition, the petitioner has primarily prayed for the following reliefs:-

> "*i) That the award passed by the Ld. Labour Court may very kindly be quashed and set aside as the Ld. Labour Court has totally failed to appreciate the facts and circumstances and evidence and given undue advantage to the evidence submitted by the respondent department while rejecting the legitimate claim of the present petitioner.*
> *ii) That the respondent department may very kindly be directed to re-engage the services of the petitioner as he has completed 240 days continuously w.e.f. 1997 to 2004 with all consequently benefits including back wages along with interest.*"

2. As the original petitioner Shri Bisan Lal died during the pendency of the present proceedings, therefore, he was substituted by his legal representatives.

3. Brief facts necessary for the adjudication of the present petition are as under:-

The original petitioner joined the service of the respondent/Department as a daily wage beldar in the year 1987, i.e. on 04.12.1987, in Sub-Division Ghanahatti, District Shimla, H.P. Thereafter, w.e.f. 16.08.1993 to 18.10.2004, he served as daily wage Water Works Clerk. He worked as such continuously without any break for more than 240 days in each calendar year. On 18.10.2004, the services of the workman were terminated by the Department on the ground that a First Information Report

(FIR) was registered against him under Section 420 of the Indian Penal Code at Police Station Boiluganj, District Shimla, H.P. This FIR was converted under Sections 409 and 120(B) of the Indian Penal Code and eleven employees of the respondent-Department were named as accused therein. As per the original petitioner, only his services were terminated, but no action was initiated against any other employees. The termination of the services of the petitioner was without any notice etc. and feeling aggrieved, he raised an industrial dispute. The appropriate Government made the following reference for adjudication to the Presiding Judge, Industrial Tribunal-cum-Labour Court (hereinafter referred to as the 'Tribunal'):-

> " *Whether the action of the Superintendent Engineer, I & PH Circle, Shimla-9 (2) Executive Engineer, I & PH Division No.1, Shimla-9 to terminate the services of Shri Bishan lal S/O Late Shri Baboo Ram ex-daily wages water works clerk w.e.f. 9.11.2004 on the charge of embezzlement of government money amounting to Rs.10.77 Lacs without holding any domestic enquiry and without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to*?"

4. Vide award dated 08.04.2011, the reference was answered by the learned Court by dismissing the claim petition and this led to the filing of the present Writ Petition.

5. As already mentioned hereinabove, during the pendency of the present proceedings, the original petitioner died and his legal representatives were thereafter substituted as the petitioner.

6. I have heard learned counsel for the parties and have also gone through the pleadings as well as the award under challenge.

7. The following issues were framed by the learned Tribunal for adjudication:-

" *1. Whether the action of the respondents to terminate the services of petitioner w.e.f. 9.11.2004 on the charge of embezzlement of government money amounting to Rs.10.77 lakhs without holding any domestic enquiry and without complying the provisions of Industrial Disputes Act, 1947 is improper and unjustified as alleged? OPP……..*
2. If issue no.1 is proved, to what relief of service benefits and amount of compensation, the petitioner is entitled to? OPP……
3. Whether the petition is barred by law of lispendense as alleged? OPR……
4. Whether the present petition is not maintainable? OPR……
5. Relief."

8. These issues were answered as under:-

"*Issue no.1*	*No.*
Issue no.2	*No.*
Issue no.3	*No.*
Issue no.4	*Yes.*
Relief	*Reference answered in negative per operative part of award.*"

9. While answering issue No.1, learned Tribunal held that proper opportunity of being heard was afforded to the workman before initiating action against him and the workman had participated in the course of inquiry and a show cause notice was also issued to him before taking final decision in the matter. On these basis, learned Tribunal held that it could not be said that proper inquiry was not instituted or that the workman was condemned unheard. Learned Tribunal also took into consideration the fact that the workman had admitted that he remained in police custody w.e.f. 26.02.2004 to 03.11.2004 and that a preliminary inquiry was conducted against him and further he had filed a reply to the same and also given a statement in the course of the inquiry admitting that he had misappropriated the government money.

10. Be that as it may, as has been argued by learned counsel for the petitioner, in the present case, in the course of the trial which ensued from the lodging of the FIR, the original petitioner died and the trial stood abated against him. Further, it has also come on record and in fact this is not disputed by the respondent-Department that in the trial which was held, other accused were acquitted by the learned Trial Court. Now, incidently in the present case the record demonstrates that whereas the services of the petitioner were disengaged w.e.f. 18.10.2004, the show cause notice which was issued to the petitioner was issued on 24.11.2004, after the termination of his services. This Court fails to understand that for what purpose, a show cause notice was issued after termination of the services of the petitioner and preliminary inquiry conducted in the issue. All that can be observed is this that it was just a formality which was undertaken by the Department to demonstrate that the principles of natural justice were complied with. Reliance placed by the learned Tribunal upon the so called admission of the original petitioner about the confession of his guilt in the course of preliminary inquiry was also totally misconceived, for the reason that when a criminal case was pending with regard to the issue, then it was the adjudication of the Court concerned, which was material and it is a matter of record that the accused therein were acquitted by the Court concerned.

11. In this view of the matter, the award passed by the learned Tribunal definitely is not sustainable in the eyes of law and this Court has no hesitation in holding that the termination of the services of the petitioner by the Department was indeed bad in law, as neither the statutory provisions of the Industrial Disputes Act were followed in the matter nor any inquiry worth its name was held. Moreover, as the termination of the services of the petitioner was on the basis of FIR and the other accused therein stand acquitted, therefore also, the termination of the services of the original petitioner cannot be held to be sustainable in the eyes of law.

12. Accordingly, this petition is allowed. The award under challenge is set aside. It is ordered that termination of the services of the petitioner is held to be bad and consequences thereof including monitory benefits to ensue in favour of the present petitioners.

13. Petition is disposed of, so also the pending miscellaneous applications, if any.

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

Between:

SHRI RAMESH KUMAR VERMA S/O LATE SH. SOHAN LAL VERMA, RESIDENT OF MOHALLA SORARA, CHAMBA DISTT. CHAMBA; PRESENTLY POSTED AS EXECUTIVE ENGINEER (DESIGNS), I.P.H. CIRCLE, CHAMBA (H.P.)

….PETITIONER.

(BY MS. RANJANA PARMAR, SENIOR ADVOCATE, WITH MR. VINAY TOMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (IPH) TO THE GOVT. OF HIMACHAL PRADESH SHIMLA-171002.

2. ENGINEER-IN-CHIEF, I.P.H. US CLUB, SHIMLA

….RESPONDENTS.

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

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.188 of 2019
Decided on: 25.08.2022

Constitution of India, 1950- Service Law - Petition was filed on the ground that persons junior to him were promoted to the post of Executive Engineer despite his seniority and previous ad hoc promotion to the same position- Also claimed that ACR was not properly assessed- **Held**- No one has a

fundamental right of promotion and there is only a fundamental right of consideration for promotion – Promotions are based on merit-cum- seniority basis- Merit is the primary criteria followed by Seniority- Ad hoc promotion does not confer right to regular promotion- Assessment of ACR was held to be valid- Petition dismissed (Paras 10 and 11)

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

J U D G M E N T

By way of this petition which was originally filed as an original application, the petitioner has prayed for quashing of notification dated 09.01.2002 and rejection of Memo dated 19.10.2002, *inter alia*, on the ground that the persons who have been promoted in terms of of notification dated 09.01.2002 to the post of Executive Engineer, are juniors to the petitioner and despite the fact that the petitioner was senior to them as an Assistant Engineer and was also promoted against the post of Executive Engineer on *ad hoc* basis prior to them, yet juniors have been promoted to the post of Executive Engineer over and above him.

2. Brief facts necessary for the adjudication of this petition are that the petitioner was initially appointed as an Assistant Engineer (Civil) by way of direct recruitment as a graduate candidate on 30.05.1987. Thereafter, he was promoted on *ad hoc* basis against the post of Executive Engineer vide notification dated 13.01.1999 (Annexure A-5). The petitioner continued to serve the respondent-Department as such till the issuance of notification dated 09.01.2002, in terms whereof, on the recommendation of the Departmental Promotion Committee, he was promoted against the post of Executive Engineer on regular basis, but with effect from 31.12.2001. It is in this background that the petitioner has filed the present petition.

3. During the course of hearing of the present Writ Petition, the respondent-State was directed to produce before the Court the proceedings of

the Departmental Promotion Committee, which led to the issuance of the impugned notification. The same were duly produced before the Court and the same stand perused by the parties as well as by the Court.

4. Learned Senior Counsel appearing for the petitioner has argued that the date of promotion which has been conferred upon the petitioner in terms of the impugned notification is not sustainable in the eyes of law, for the reason that a perusal of the report of Departmental Promotion Committee would demonstrate that there is a mechanical appreciation of the Annual Confidential Reports of the persons concerned by the Departmental Promotion Committee and the appraisal has not been done as per the relevant Guidelines which have been issued in this regard by the Department of Personnel. Learned Senior Counsel has drawn the attention of the Court to Chapter 16.24 of the Handbook on Personal Matters, Volume-1 (Edition-2021), which deals with the principles for promotion to selection and non-selection posts. By referring to the said Clause as well as Clause 16.25 and also subsequent instructions applicable w.e.f. 04.11.1981 to 26.02.2016, which are available at Page Nos.466 and 467 of the Handbook on Personal Matters, learned Senior Counsel submitted that it is evident from a perusal thereof that while making assessment, the Departmental Promotion Committee has to take the record of the service of the Officer into consideration and give weightage to factors such as length of service in the feeder category, arduous nature of duties and high job responsibility. She submitted that a perusal of the mode and manner in which the Departmental Promotion Committee has been conducted, demonstrates that the above procedure has not been followed. Learned Senior Counsel also submitted that the factum of the petitioner having performed the duties against the post of Executive Engineer on *ad hoc* basis nowhere finds mentioned in the report of the Departmental Promotion Committee. Further, this fact has also not been appreciated that junior persons who have been promoted over and above the

petitioner in the impugned notification, were promoted on *ad hoc* basis after the *ad hoc* promotion of the petitioner. On these basis, learned Senior Counsel submits that the petition be allowed and the respondents be directed to hold a Review Departmental Promotion Committee and assign seniority to the petitioner from correct date. At this stage, the Court stands informed that the petitioner has since retired from the post of Chief Engineer.

5. Learned Additional Advocate General has opposed the petition, *inter alia*, on the ground that the *ad hoc* promotion which was conferred upon the petitioner was not to be taken into consideration while assessing the suitability of either the petitioner or any other candidate for promotion to the post of Executive Engineer, as suitability was to be assessed in terms of the relevant Recruitment and Promotion Rules. He further submitted that otherwise also, at the time of conferring *ad hoc* promotion, primarily seniority is taken into consideration, whereas when regular promotion is made, then merit-cum-seniority is taken into consideration, keeping in view the fact that the post in issue is a selection post. Learned Additional Advocate General also argued that herein, when the Departmental Promotion Committee met, taking into consideration the number of posts which were available to be filled up, a zone of consideration was drawn of the eligible candidates and their suitability was assessed by the Departmental Promotion Committee strictly in consonance with the Guidelines as have been laid down by the Department of Personnel governing the selection post. Learned Additional Advocate General also relied upon Chapter 16.25 of the Handbook on Personnel Matters, Volume-1 and subsequent instructions and submitted that the consideration of the candidates on the basis of their ACRs. was done by the Departmental Promotion Committee in terms of Paras-'F' and 'G'. He stated that record demonstrates that five ACRs. of all the candidates were considered by the Departmental Promotion Committee and on the basis of assessment of the Confidential Reports of the eligible officers, the same were classified separately

for each year as 'Outstanding', 'Very good', 'Good' and 'Fair', depending upon the contents of the Confidential Report and thereafter, the assessment of the classification was made by the Departmental Promotion Committee after considering the entries of a particular Confidential Report. He submitted that the contention of the learned Senior Counsel appearing for the petitioner that the assessment of the ACR. was done in a mechanical manner was totally incorrect, as the assessment of the ACR. was done after considering the entire Confidential Reports. Accordingly, he stated that as it is not the case of the petitioner that his assessment is not in-consonance with his ACRs., therefore, this petition being devoid of any merit be dismissed.

6. In rebuttal, learned Senior Counsel has reiterated that assessment of the ACRs. was done in a mechanical manner and not as per the Guidelines laid down by the Department of Personnel.

7. I have heard learned Senior Counsel for the petitioner as well as learned Additional Advocate General and have gone through the pleadings and documents on record as also the record of the Departmental Promotion Committee that was produced before the Court today.

8. The order of the *ad hoc* promotion of the petitioner is on record as Annexure A-5. A perusal of this order demonstrates that the *ad hoc* promotion was conferred upon the petitioner as well as other incumbents named therein on the specific condition that the *ad hoc* promotion shall not confer any right on these Officers for regular promotion, continuation or the seniority against the post of Executive Engineer. The impugned notification demonstrates that the orders of promotion of the incumbents named therein were issued by the competent authority on the recommendation of the Departmental Promotion Committee to the posts of Executive Engineer (Civil) in the IPH Department.

9. The post of Executive Engineer is a selection post. The same is filled in 100% by way of promotion form amongst eligible Assistant Engineers.

An Assistant Engineer is eligible for being considered for promotion to the post of Executive Engineer on completion of eight years of service as an Assistant Engineer.

10. It is settled law that no one has a fundamental right of promotion and there is only a fundamental right of consideration for promotion (See: *Ajit Singh and others (H) Versus State of Punjab and others, 1999 (7) Supreme Court Cases 209* and *Union of India & another* Versus *Hem Raj Singh Chauhan & others, (2010) 4 Supreme Court Cases 290).*

11. Coming to the facts of this case, the promotion which has been conferred upon the petitioner as well as other incumbents was on the basis of recommendation of the Departmental Promotion Committee which was held on 18.09.2001. A perusal of the record demonstrates that at the time of considering the eligible candidates for the purpose of promotion, due identification of the category in which the posts were available was done and the identification of the candidates who were eligible for being considered for promotion against those particular posts was also undertaken by the Department. Further, it is noone's case that the zone of consideration was enlarged by clubbing the posts.

12. Now, coming to the core issue, the ACRs. of the candidates including the petitioner were undertaken by the Department on the principle of 'merit-cum-seniority'. That being the case, this Court is of the considered view that the petitioner cannot have any ground in case the Departmental Promotion Committee has recommended the promotion of an Assistant Engineer junior to the petitioner but more meritorious than him. The post in issue being a selection post, it is the merit which matters first and seniority follows the merit. Further, it is not the case of the petitioner that in the course of assessment of merit of the candidates, the principles which have been laid down by the Department of Personnel have been violated and persons who are

more than two years junior to the petitioner as Assistant Engineers have also been conferred promotion over and above him.

13. As far as the contention of learned Senior Counsel that the assessment of the ACRs. has been done by the Departmental Promotion Committee in a mechanical manner, i.e., not in the mode and manner as has been laid down in the Guidelines issued by the Department of Personnel is concerned, all that this Court can observe is that in the peculiar facts of this case, when the petitioner as well as the private respondents have superannuated from service, this Court does not intent to disturb what was done by the Department in the year 2002 on the said ground, as all the incumbents in the feeder category were dealt with in a unison manner.

14. In view of the findings returned hereinabove, as this Court finds no merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

Between:

SH. DURGA RAM, S/O LATE SH. DEBU RAM, R/O VILLAGE KASHYAT (SHIV GHATI) PO BHUMATI, TEHSIL ARKI, DISTRICT SOLAN, H.P. RETIRED AS SUPERINTENDENT GRADE-II FROM HIMACHAL PRADESH UNIVERISTY, SUMMER HILL, SHIMLA, H.P.

…….PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

1.HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

2.THE STATE OF H.P. THROUGH ADDITIONAL CHIEF SECRETARY (FINANCE), GOVERNMENT OF HIMACHAL PRADESH.

RESPONDENT NO.2 IMPLEADED AS CO-RESPONDENT IN MEMO OF PARTIES VIDE HON'BLE COURT ORDER DATED 04.10.2021.

…….RESPONDENTS

(BY MR. SURENDER VERMA, ADVOCATE, FOR RESPONDENT-UNIVERSITY;

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

2. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO.107/2020

Between:

SH. WARYAM SINGH BAINS, S/O LATE SH. KIKAR SINGH, R/O FALKLAND ESTATE, LAKKAR BAZAR, SHIMLA, H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

3.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.129/2020

Between:

SH. PARMA NAND SHARMA, S/O LATE SH. JYOTI PARKASH, R/O CEDAR VIEW, THE PINE, CHHOTA SHIMLA, H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

4.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.201/2020

Between:

SH. PURAN SINGH, S/O LATE SH. RAM SARAN, R/O VILLAGE KAROG, PO BHONT, TEHSIL AND DISTRICT SHIMLA, H.P. RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

5.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 240 /2020

Between:

SH. JOGINDER SINGH THAKUR, S/O LATE SH. KALYAN SINGH, R/O THAKUR ASHIANA, KANLOG, SHIMLA, DISTRICT SHIMLA, H.P. RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

6.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.244 /2020

Between:

SH. KANWAR SINGH THAKUR, S/O SH. DEVI SINGH THAKUR, R/O VILLAGE SERI, PO ROURI, VIA TUTU SHIMLA, H.P RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

7.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.268 /2020

Between:

SH. NAROTAM RAM, S/O SH. NIKKA RAM, R/O VILLAGE TANSETA, PO JUBRI, TEHSIL ARKI, DISTT. SOLAN, H.P. RETIRED AS SUPERINTENDENT GRADE-II FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

8.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.270 /2020

Between:

DR. HITESHWAR SINGH, S/O LATE SH. HIRA SINGH, R/O IVY COTTAGE, SUNNY MEAD ESTATE, BELOW CART ROAD, SHIMLA, H.P. RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

9.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.273 /2020

Between:

SH. MOHINDER KUMAR GUPTA, S/O LATE SH. KISHORI LAL GUPTA, R/O VILLAGE AND PO SARYANJ, TEHSIL ARKI, DISTT. SOLAN, H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

10.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 275/2020

Between:

SH. NITYA NAND SHARMA, S/O SH. SHAKAT RAM SHARMA, R/O VASHISTA NIWAS, SHIV NAGAR, SHIMLA, DISTRICT SHIMLA,H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

11.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.279 /2020

Between:

SH. DES RAJ SHARMA, S/O LATE SH. LAIK RAM SHARMA, R/O KAMAL KUNJ BUILDING, SHIV NAGAR, TUTU SHIMLA, DISTRICT SHIMLA, H.P. RETIRED AS ASSISTANT REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

12.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 289 /2020

Between:

SH. MAST RAM, S/O SH. DHUNDA RAM, R/O VILLAGE BASYANA, PO CHAKHAR, TEHSIL ARKI, DISTRICT SOLAN, H.P. RETIRED AS SUPERINTENDENT GRADE-II FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

13. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.291 /2020

Between:

SH. SURESH CHAND VERMA, S/O SH. JALAP RAM VERMA, R/O VILLAGE AND PO SHOGHI, TEHSIL AND DISTRICT SHIMLA, H.P. RETIRED AS ASSISTANT REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

14.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 313 /2020

Between:

SH. PAWAN KUMAR GUPTA, S/O LATE SH. DHANI RAM GUPTA, R/O GUPTA NIWAS, OPPOSITE KANWAR NIWAS, VIKAS NAGAR, SHIMLA-9 RETIRED AS PLANNING AND DEVELOPMENT OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

15. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 319 /2020

Between:

SH. SUDERSHAN KUMAR GUPTA, S/O SH. PIARA LAL GUPTA, R/O GUPTA BUILDING, OLD BAZAR TUTU SHIMLA-11 RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

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16. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 408 /2020

Between:

SH. SOHAN SINGH THAKUR, S/O LATE SH. LACHHMI RAM THAKUR, R/O KUNDAN COTTAGE VILLAGE BAGOG, PO SUMMER HILL, LOWER SUMMER HILL, SHIMLA, RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

17. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.427 /2020

Between:

SH. JAI PRAKASH SHARMA, S/O SH. DEEP RAM SHARMA, R/O KUSH COTTAGE, VILLAGE SANGTI, PO CHAILLY, SUMMER HILL, SHIMLA, DISTRICT SHIMLA, H.P. RETIRED AS ASSISTANT REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

18.CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1511 /2020

Between:

SH. SURINDER DEV, S/O LATE SH. NIRANJAN DASS, R/O SET NO. 1, 1ST FLOOR, THE MOTHER LOWER KAITHU, SHIMLA-3 RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

19. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1519 /2020

Between:

SH. RATTAN SINGH TANWAR, S/O LATE SH. NARAIN SINGH, R/O TANWAR NIWAS, LOWER SANGTI, (UPPER SANOG) NERI ROAD, SUMMER HILL, SHIMLA-5 RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR
THE RESPONDENT-UNIVERSITY)

20. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1523 /2020

Between:

SH. KRISHAN CHAND, S/O SH. MADAN LAL, R/O RADHA KRISHAN KUNJ, MIDDLE SANGI SUMMER HILL, SHIMLA-5 RETIRED AS SECTION OFFICER RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR
THE RESPONDENT-UNIVERSITY)

21. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.1532 /2020

Between:

SH. BANSI LAL CHAUHAN, S/O LATE SH. TULSI RAM, R/O VILLAGE AND PO LANJTA, TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P. RETIRED AS SUPERINTENDENT GRADE-II

FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

22. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 1609 /2020

Between:

SH. DHARAM CHAND, S/O LATE SH. RAM KRISHAN, R/O SHANNO NIWAS, NEAR TEACHER COLONY, SHIWALIK HOUSE, SUMMER HILL, SHIMLA-5 RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR
THE RESPONDENT-UNIVERSITY)

23. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 2635 /2020

Between:

SH. KAMLA DUTT SHARMA, S/O LATE SH. DEVI DAYAL SHARMA, R/O VILLAGE GANPARI, PO SHOGHI, TEHSIL AND DISTRICT SHIMLA, H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR
THE RESPONDENT-UNIVERSITY)

24. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 2640 /2020

Between:

SH. JASPAL SINGH, S/O LATE SH. JIWAN SINGH, R/O HOUSE NO. A/64-MAMU BUILDING, SANJAULI, SHIMLA, H.P. RETIRED AS SUPERINTENDENT GRADE-II FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

25. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 2642 /2020

Between:

SH. RAVI DUTT SHARMA, S/O SH. PARMA NAND SHARMA, R/O VILLAGE NAGRI, PO SALANA, TEHSIL AND DISTT. SHIMLA, H.P. RETIRED AS SECTION OFFICER FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

26. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.2657 /2020

Between:

SH. ANANT RAM, S/O LATE SH. PARAS RAM VERMA, R/O VILLAGE RIHARA, PO KAITHLEEGHAT, TEHSIL KANDAGHAT, DISTT, SOLAN, H.P. RETIRED AS ASSISTANT REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

27. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 2982/2020

Between:

SH. PARKASH CHAND SHARMA, S/O SH. RAVI DUTT SHARMA, R/O VILLAGE KYARA, PO CHANDPUR, TEHSIL SADAR, DISTT. BIASPUR, H.P. RETIRED AS DEPUTY REGISTRAR FROM HIMACHAL PRADESH UNIVERSITY, SUMMER HILL SHIMLA, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR THE RESPONDENT-UNIVERSITY)

28. CIVIL WRIT PETITION No. 3607/2022

Between:

SH. RAKESH KUMAR, S/O LATE SH. NANAK CHAND, R/O 3RD FLOOR, NEW NANAK NIWAS, BHARARI, BAZAR SHIMLA-171003, H.P.

……..PETITIONER

(BY MR. RADHEY SHYAM GAUTAM, ADVOCATE)

AND

1.HIMACHAL PRADESH UNIVERSITY THROUGH ITS REGISTRAR, SUMMER HILL, SHIMLA-5.

2.STATE OF HIMACHAL PRADESH THROUGH ITS ADDITIONAL CHIEF SECRETARY (FINANCE) GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-02.

…….RESPONDENT

(BY MR. SURENDER VERMA, ADVOCATE, FOR RESPONDENT-1-UNIVERSITY;

Mr. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL FOR R-2.

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 208/2020 alongwith CWPOA Nos. 107, 129, 201, 240, 244, 268, 270, 273, 275, 279, 289, 291, 313, 319, 408, 427, 1511, 1519, 1523, 1532, 1609, 2635, 2640, 2642, 2657 and 2982 of 2020 and CWP No. 3607 of 2022

Reserved on:12.10.2022

Decided on: 18.10.2022

Constitution of India, 1950- Service Law- Local Audit department excluded the Secretariat Pay from calculation of petitioner's pension and other benefits- Whereas, University had decided to include such pay- It was claimed that exclusion of such pay affected their pension and retiral benefits- **Held** Secretariat Pay must be included as part of Basic pay for calculating allowances and pecuniary benefits- Executive council of University was the highest decision making body to adopt the State Govt's decision regarding Secretariat Pay- Once decision was taken to grant the service, petitioner's had a legal vested right to it. (Paras 9 and 10)

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

ORDER

All these petitions are being decided together as common questions of facts and law are involved. However, for the sake of convenience, the facts of lead case i.e CWPOA No. 208 of 2020, titled as Durga Ram Vs. H.P. University and Anr., are being taken into consideration.

2. The common grievance of the petitioners in all the petitions is against exclusion of Secretariat Pay while calculating their pension and other retiral benefits.

3. Brief facts necessary for adjudication are as under:-

(a) Petitioner is retired employee of respondent No.1. Initially, respondent No.1 allowed Secretariat allowance to the petitioner and similarly situated employees which subsequently came to be termed as Secretariat Pay.

(b) Respondent No.1-Univeristy follows the rules of the State Government for the purpose of grant of pay, allowances and other benefits including pension etc. to its employees. The Finance Committee of respondent No. 1 in its meeting held on 08.10.1971 allowed grant of pay scales and allowances to the Non-Teaching Staff on the pattern of H.P. Secretariat. The Executive Council of the University in its meetings held on 08.11.1971 and 23.04.1977 had approved the aforesaid recommendations of Finance Committee. The decision so taken by the Executive Council of University was conveyed by the Registrar of the University to the Secretary (Education) to the Government of H.P., vide communication dated 19.07.2012.

(c) The Government of H.P., vide its notification dated 23.04.2012 allowed the Secretariat Pay to its employees working in the Secretariat and equivalent offices. It was specifically notified that the Secretariat Pay would be treated as part of the basic pay for calculation of various types of allowances and pensionary benefits. Respondent No. 1 adopted the notification dated 23.04.2012 issued by Government of H.P., vide its notification dated 08.06.2012. The Executive Council of the University in its meeting held on 08.04.2013 decided that notification of Secretariat Pay dated 08.06.2012 shall be

permissible to various categories of employees/ officers of the University and shall also be applicable to the retirees so far as the retiral benefits are concerned and, in this regard, a separate notification dated 20.04.2013, was issued.

4. Respondent No.1 in its reply has admitted the entire factual position. Its specific stand is that a proposal for retiral benefits in favour of the petitioners including Secretariat Pay was moved for its concurrence/vetting by the Finance Wing of the University/ Local Audit Department of the State Government of H.P. according to the decision(s) already taken by the Executive Council, but the Local Audit Department had objected/deducted at its own a component of Secretariat Pay for grant of pension and other pensionary benefits.

5. Respondent No. 2 in its separate reply has submitted that since the matter pertains to the H.P. University and the University being an autonomous body has to take its own decisions keeping in view its resources and financial condition.

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

7. The facts detailed above restrict the controversy in a narrow compass. The relevant extract of communication dated 23.04.2012 issued by Principal Secretary (Finance) to the Government of H.P. reads as under: -

> *"The Governor, Himachal Pradesh, after careful consideration is pleased to order that the certain categories of employees working in the Himachal Pradesh Secretariat and its above stated equivalent offices will be given Secretariat Pay at the rates mentioned in Annexure "A" enclosed to this letter with effect from 01.12.2011. The Secretariat Pay admissible under these orders will be treated as part of basic pay for calculation of various types of allowances and pensionary benefits. This Secretariat Pay shall substitute the Secretariat Allowance admissible to all such categories/posts as per letter No. Fin(PR)-*

B(7)-4/98, dated 14th January 1999 and subsequent letters issued on the subject from time to time and this allowance shall stand abolished as on 30.11.2011."

8. The aforesaid decision of the State Government was adopted by respondent No.1, vide notification dated 08.06.2012 in respect of grant of Secretariat Pay for implementation in the H.P. University. The Executive Council in its meeting dated 08.04.2013 further decided that the notification of Secretariat Pay dated 08.06.2012 issued by Registrar shall be permissible to the various categories of employees/officers of the University and shall also be applicable to the retirees as far as retiral benefits are concerned.

9. Thus, undisputedly, the highest decision-making body of respondent No. 1 had taken a conscious decision to adopt the decision of State Government communicated vide communication dated 23.04.2012, as noticed above. No reservation was kept in implementation of such decision in respect of employees of respondent No.1. That being so, the Secretariat Pay was to be treated as part of basic pay for calculation of various types of allowances and pensionary benefits.

10. Once, the decision making body of respondent No. 1, in exercise of powers vested in it, had decided to grant particular service benefit to its employees, the Local Audit Department could not sit over the decision of the Executive Council that too by withholding only a part of benefit flowing from said decision. The objection of Local Audit Department could have been ignored or superseded by respondent No .1 and inaction of said respondent in this behalf needs to be remedied by intervention of this Court as the legal vested rights of the petitioners have been adversely affected thereby.

11. Resultantly, all these petitions are allowed. Respondent No. 1 is directed to include the Secretariat Pay as part of basic pay of petitioners for calculation of all types of permissible allowances and pensionary benefit and thereafter to re-fix the pension of the petitioners, accordingly. The entire

exercise including payment of arrears, if any, to the petitioners shall be done by respondent No.1-University, within three months from the date of passing of this judgment.

12. All writ petitions stand disposed of in the above terms, so also the pending miscellaneous application(s), if any.

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

Between:

RAVINDER NATH S/O SHRI AMAR NATH, R/O HOUSE NO.43/2, JUTOGH CANTT, SHIMLA-8, H.P.

.PETITIONER.

(BY MS. RANJANA PARMAR, SENIOR ADVOCATE, WITH MR.KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (LANGUAGE & CULTURE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. HIMACHAL PRADESH LANGUAGE & CULTURE ACADEMY, PRABHAT BHAWAN, SHIMLA THROUGH ITS DIRECTOR, SHIMLA.

….RESPONDENTS.

(M/S DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.1644 of 2019
Decided on:02.09.2022

Constitution of India, 1950 - Article 226 - Petitioner appointed as a Computer Instructor in the respondent-Academy in terms of the interviews, which were held by the competent authority pursuant to the advertisement-matter of regularization in service-**Held**-This Court is alive to the fact that the post of Clerk has to be filled by way of Recruitment and Promotion Rules - The

respondents are directed to appoint the petitioner against the post of Clerk lying with the respondent Academy-Petition allowed (Para 13).

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

J U D G M E N T

Learned Additional Advocate General has handed over instructions dated 01.09.2022, imparted by Secretary, Himachal Pradesh Academy of Arts Culture & Languages, Shimla. These instructions are ordered to be taken on record.

By way of present petition, the petitioner has prayed for the following relief:-

> "*i) That the respondents be directed to issue appointment letter to the petitioner as Clerk on regular basis forthwith without any further delay.*
> *ii) That the cost of writ petition may kindly be ordered to be paid.*"

2. Brief facts necessary for the adjudication of the present petition are that the petitioner was appointed as a Computer Instructor in the respondent-Academy in terms of the interviews, which were held by the competent authority pursuant to the advertisement issued in this regard in terms of order dated 25.10.1999 (Annexure P-1). He continues to be serving till date against the said post on contract basis.

3. Learned Senior Counsel appearing for the petitioner has argued thatleaving other issues aside, a perusal of Annexure P-2 would demonstrate that in the meeting of the Executive Committee of Himachal Academy of Arts Culture & Languages, dated 14.01.2009 (Annexure P-2), in which besides other members, Secretary (Finance) to the Government of Himachal Pradesh was also present, a decision was taken in the affirmative to fill the posts of

Research Assistant, Clerk and Peon. Learned Senior Counsel, thereafter, by referring to the documents appended with the rejoinder which are the Notings obtained under Right to Information Act, has submitted that a perusal of Note-73 onwards (See Page-48 of the Paper Book) would demonstrate that the case of appointing the petitioner against the post of Clerk was duly recommend by the respondent-Academy to the Worthy Chief Minister. Notes-74 and 75 as per the learned Senior Counsel demonstrate that Worthy Chief Minister was pleased to give his approval for appointing the petitioner against said post of Clerk. Thereafter, by referring to Note-76, she submitted that a perusal of this Note would demonstrate that after necessary approval was granted by the then Chief Minister for appointment of petitioner against the post of Clerk, it was mentioned in this Note that letter of appointment against the post be issued in favour of the petitioner. However, the proposal was not taken to its logical conclusion on account of Note-78, wherein it was proposed that the proposal be sent to the Finance Department, to the Government of Himachal Pradesh, ignoring the fact that the Secretary (Finance) to the Government of Himachal Pradesh was a member of the Executive Committee, which had approved the filling up of the posts of Clerk. In these circumstances, learned Senior Counsel submitted that taking into consideration the peculiar facts of this case wherein the petitioner is serving the respondent-Academy on contract basis since the year 1999, a mandamus be issued to the respondents to appoint the petitioner against the post of Clerk so that justice is done to him. Learned Senior Counsel submitted that at the time when the petitioner joined the service of the respondent-Academy, he was of twenty nine years old. Today, he is fifty two years old and in case the petitioner is not accommodated, he will not get any Government job as he has already become over age. Therefore, in this background, learned Senior Counsel submitted that taking into consideration the peculiarity of the case,

the petition be allowed and the respondents be directed to appoint the petitioner against the post of Clerk with all consequential benefits.

4. The petition is opposed by the respondents, *inter alia*, on the ground that at the time of initial engagement of the petitioner on contract basis in terms of Annexure P-1, there was no holding out by either of the respondents that with the passage of time his services would be regularized either as an Instructor or as a Clerk. Learned Additional Advocate General has further submitted that it was a conscious decision of the petitioner to accept the offer which was made to him vide Annexure P-1 and as there was no concealment at any stage by the respondents as to what were the terms on which the job was being offered to the petitioner, therefore, now the petitioner cannot pray that his service be regularized against the post of Clerk. Learned Additional Advocate General also argued that even otherwise, as there are Recruitment and Promotion Rules existing, in terms whereof a procedure stands prescribed to fill up the post of Clerk, therefore, the Department intends to fill up this post by invoking the provisions of Recruitment and Promotion Rules and the petitioner is free to apply for the post if he is otherwise eligible. But, simply because he has been serving the Department Since 1999, he does not has any superior right to claim regularization against the said post. Learned Additional Advocate General also relied upon the instructions, dated 01.09.2022, which have been so imparted to him by the Secretary of the Academy and submitted that in terms of these instructions also the petitioner cannot be adjusted against the post of the Clerk as he is an employee of 'NCPUL' and the post in issue i.e. the post of Clerk has to be filled in through Himachal Pradesh Staff Selection Commission, Hamirpur, District Hamirpur, H.P. On these points, learned Additional Advocate General has urged that the present petition be dismissed.

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

instructions which have been today handed over to the Court by learned Additional Advocate General.

6. At the very outset, this Court may observe that on facts, present is a hard case. The petitioner was engaged in October, 1999 against the post of Instructor by the respondent-Academy, as is evident from the consents of Annexure P-1. This appointment was on contract basis. The petitioner continues to serve as such against this post till date on contract basis. The post, against which the petitioner is serving in the respondent-Academy has been provided to the Academy by the Human Resource Ministry of the Government of India.

7. Be that as it may, without entering into other aspects of the matter, it is apparent and evident from the perusal of Annexure P-2, which are the Minutes of the Meeting of Executive Committee of the respondent-Academy, dated 14.01.2009, that approval was granted to fill up *inter alia* the post of Clerk in the respondent-Academy by the Committee and Secretary (Finance) to the Government of Himachal Pradesh was one of the members of the Committee.

8. This Court is of the considered view that the reason and the rational as to why the Secretary (Finance) to the Government of Himachal Pradesh is made a member of the Executive Committee of the Academy, is to assess at that stage itself the financial implications of the decision which the Committee is taking. In this view of the matter, there is indeed a question mark, as to whether the decisions of the Executive Committee of the respondent-Academy, in which concurrence of the Secretary (Finance) to the Government of Himachal Pradesh is there in his capacity as a member of the Committee can be be made subservient to any subsequent decision of the Finance Department of the Government of Himachal Pradesh. Record further demonstrates that the case of the petitioner for being regularized by way of appointment against this post of Clerk was recommended in affirmative by the

Academy and this recommendation was approved by the highest Executive Authority. This is evident from the documents which have been appended by the petitioner with the rejoinder, reference whereto has already been given in the above part of the judgment. Once that was done and that too as far back as in the year 2010, then non-implementation of the same on the ground that permission of the Finance Department is required, appears to be completely unjust and unfair to the petitioner.

9. It is reiterated that as the Secretary (Finance) was a member of the Executive Committee of the Academy, therefore, it is presumed that at the time when the approval was given by the Committee of the respondent-Academy to fill up the post of the Clerk, the financial implication thereof were taken into consideration and therefore, the same subsequently cannot be made subservient to subsequent approval of the Finance Department, more so, when the approval to appoint the petitioner against the post was granted by the highest Executive Authority.

10. Now, coming to the contention of the learned Additional Advocate General that the appointment of the petitioner was against the post of Instructor and therefore, he cannot be regularized against the post of Clerk and further that the post has now has to be filled in as per the Recruitment and Promotion Rules is concerned, this Court is of the considered view that taking into consideration the peculiar facts of this case, it will be in the interest of justice in case an exception is made in the present matter and the petitioner is regularized by way of appointment against the existing post of Clerk, more so for the reason that it is not in dispute that he possesses the requisite qualification to be appointed against the said post.

11. The Court cannot loose sight of the fact that at the time when the petitioner joined the service as an Instructor on contract basis, he was twenty nine years of age and today he is more than fifty two years old and is,

thus, ineligible to be appointed against any Government post for which the outer age limit fixed by the State is forty five years.

12. This Court is alive to the fact that the post of Clerk has to be filled in by way of Recruitment and Promotion Rules. However, it is also a matter of record that there is on record a recommendation of the respondent-Academy itself to appoint the petitioner against the said post of Clerk which has been approved by the highest Executive Authority. Besides this, the Government itself is following the policy of regularization, in terms whereof, the persons who were appointed may be on daily wage or on contract basis are regularized against the post in question without following the procedure prescribed in Recruitment and Promotion Rules.

13. Therefore, in view of the above discussion and taking into consideration the peculiar facts of the present case, this Writ Petition is allowed and the respondents are directed to appoint the petitioner against the post of Clerk lying with the respondent-Academy, prospectively within a period of thirty days from today. It is made clear that as the order is being passed in the peculiar facts of the case, therefor, the petitioner will not lay any claim with regard to his past service rendered with the respondent-Academy and he should be satisfied with the prospective appointment against the post of Clerk. The petition is disposed of in above terms. Pending miscellaneous applications, if any, also stand disposed of.

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

Between:-
SH. MANI RAM (RETD. PRINCIPAL),S/O LATE SH. BINHU RAM,
VILLAGE PANJRAT, P.O. AND TEHSIL KARSOG, DISTRICT MANDI, H.P.

...PETITIONER

(BY SH. DUSHYANT DADWAL, ADVOCATE).

AND

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

2. THE DIRECTOR OF HIGHER EDUCATION,
   GOVERNMENT OF HIMACHAL PRADESH.

....RESPONDENTS

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

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 1763 of 2019
Reserved on: 12.10.2022
Decided on: 18.10.2022

Constitution of India, 1950-Article 226-**F.R -** F.R. 22 (1) (a)(i)-petitioner an Ex-serviceman- After discharge of petitioner from Armed Forces, got himself registered with Ex-Servicemen Cell, Hamirpur for the purpose of re-employment-Matter of re-fixation of the pay and pension of the petitioner after his retirement-**Held**-Respondents are directed to re-fix the pay of the petitioner by granting him the benefit of F.R. 22 (1) (a) (i) from 01.01.2-also directed to consequently re-fix the pension of the petitioner-Petition allowed (Para 17).

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

O R D E R

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

> "It is therefore, respectfully prayed that keeping in view the facts and circumstances of the case and in view of the averments made hereinabove the present petition may kindly be allowed and the respondents may kindly be directed to re-fix the pay and pension of the petitioner after his retirement strictly as per Rule 22 (1) (a) (i), which has not been done due to the fact that option exercised by the petitioner has not been sent to the Director office by the officials of the office of Deputy Director of Education Mandi, District Mandi, where the same was submitted well in time immediately at the time of promotion of petitioner, as a result of which the petitioner had to suffer a huge loss and till date is suffering the same and in the interest of justice."

2. Brief facts necessary for adjudication of petition are that the petitioner is an Ex-serviceman. After discharge of petitioner from Armed Forces, he got himself registered with Ex-Servicemen Cell, Hamirpur for the purpose of re-employment. Petitioner was offered appointment as Lecturer (School Cadre) against the Ex-serviceman quota vide office order dated January, 2001 and was posted at GSSS, Garli, District Kangra. The earlier order of appointment of petitioner was partially modified in March, 2001 and petitioner was ordered to be posted at GSSS, PolianPurohita, District Una against vacancy.

3. Petitioner was promoted as Principal on *ad-hoc* basis vide notification dated 29.09.2005 and was posted at GSSS, Ropa, District Mandi, H.P. Petitioner joined as Principal at GSSS, Ropa, District Mandi on 05.10.2005. Petitioner superannuated on 31.05.2010.

4. The grievance of the petitioner is that on his *ad-hoc* promotion as Principal, vide notification dated 29.09.2005, he had opted for promotion

increment within one month and sought the next increment w.e.f. 01.04.2006 on the basis of date of increment in the lower cadre. Respondents, however, fixed the pay of the petitioner vide office order issued in March, 2006 and his next increment was shown to be applicable w.e.f. 01.10.2006.

5. Petitioner continuously represented to the respondents against the date of fixation of increment in his case, but his grievance remained un-redressed till his superannuation. It was only on 20.07.2013 that an order was passed by respondent No.2, whereby the claim of the petitioner was rejected onthe ground that the *ad-hoc* promotion of petitioner was regularized on 25.08.2007 and he was required to exercise an option as per the provisions of F.R. 22 (1) (a) (i) within one month from the date of regular promotion orders, which he had failed. The claim of the petitioner was also rejected on the ground that,since, the Government had again regularized the *ad-hoc* promotion of 345 Principals (School), on the basis of Review DPC dated 31.12.2012, and the case of petitioner was included therein, hence, the petitioner should have exercised a fresh option to get his pay fixed before the Controlling Officer within stipulated period. Having failed to get justice, petitioner has approached this Court by way of instant petition.

6. The respondents have filed their reply. In reply, the respondents took the stand that petitioner had exercised his option on 07.11.2009. The earlier option exercised by petitioner after his *ad-hoc* promotion was not admissible. In such view of the matter, the respondents tried to justify their action.

7. During the pendency of the petition, respondent No.2 in pursuance to orders passed by this Court placed on record an order of regularization of petitioner issued vide notification dated 31.12.2012. The name of the petitioner was included at serial No. 316 of the list attached to the said notification and the date of *ad-hoc* as well as regular promotion was

shown as 29.09.2005. Respondent No.2 vide written instructions dated 01.08.2022, tried to take another stand that the petitioner was regularized as Principal vide notification dated 31.12.2012 and the notification dated 25.08.2007 wherein at serial No. 516 the name of Mani Ram was reflected, was in respect of some other incumbent and not the petitioner. This was stated to be the reason of not conveying the regularization order dated 25.08.2007 to the petitioner. Respondent No.2 filed yet another affidavit dated 20.09.2022 during the proceedings of this case, this time taking a different stand in following terms:

> *"2. That the Govt. regularized the ad-hoc promotion of Principal vide notification dated 1.1.2008. The order dated 1.1.2008 was also endorsed to the concerned. The petitioner was also asked to exercise the option within a month but he failed to do so. The ad-hoc promotion of Principals were again regularized by the Govt. vide notification dated 31.12.2012 and petitioner was asked to submit the option for his pay fixation retrospectively from the date of his joining on ad-hoc basis i.e. 5.10.2005. The petitioner submitted his option and his pay was fixed accordingly vide office order dated 30.07.2013."*

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

9. The respondents have given different versions with respect to the date of regularization of *ad-hoc* promotion of petitioner to the post of Principal (School). While rejecting the representation of the petitioner, respondent No.2 vide order dated 20.07.2013 specifically mentioned that petitioner was regularized on 25.08.2007 and he was to exercise the option on or before 24.09.2007. The version of petitioner that he was not aware about his regularization order till his personal hearing on 22.12.2012 in the Directorate of Higher Education was also considered to be correct. The regularization of *ad-hoc* promotion of petitioner was then said to have been made vide order dated 31.12.2012, as a result of Review DPC. As against

the above stand, respondents made deviation while submitting its reply. Whereas, the date of regularization of *ad-hoc* promotion of petitioner was maintained as 25.08.2007 and it was submitted that petitioner had given his option for pay fixation on 6.11.2009. Such option being time barred, could not be considered.

10. As noticed above, the regularization order dated 31.12.2012 issued by respondent No.1 in respect of Principals promoted on *ad-hoc* basis, petitioner was shown at serial No. 316 with date of *ad-hoc* and regular promotion as 29.09.2005. In communication dated 01.08.2022 issued by respondent No.2 to the office of learned Advocate General, it was stated that the petitioner was promoted on regular basis on 25.08.2007 and was in fact regularized vide order dated 31.12.2012 and the person named Mani Ram reflected in regularization order dated 25.08.2007 was some other incumbent. Strangely, in affidavit dated 20.09.2022 of respondent No.2, it was mentioned that the *ad-hoc* promotion of Principals were regularized by the Government on 01.01.2008 and the orders were endorsed to the concerned Principals. The petitioner was also asked to exercise the option within a month, but he failed to do so and the *ad-hoc* promotion of Principals were again regularized by the Government vide notification dated 31.12.2012.

11. There is no dispute regarding the fact that *ad-hoc* promotion was granted to the petitioner on 29.09.2005 and in pursuance thereto the petitioner had joined as Principal, GSSS, Ropa, District Mandi on 05.10.2005. There is also no specific denial to the fact averred by petitioner that he had opted for grant of increment from the date on which he was getting the increment in lower cadre and not from the date of promotion and such communication was made within one month from the *ad-hoc* promotion of petitioner.

12. Though the respondents initially maintained that the *ad-hoc* promotion of petitioner was regularized on 25.8.2007, but later it was suggested by way of communication dated 01.08.2022 addressed by respondent No.2 to the office of the learned Advocate General, as placed on record, that the *ad-hoc* promotion regularized on 25.08.2007 was in respect of some other Mani Ram and not the petitioner.

13. Respondent No.2 then filed an affidavit dated 20.09.2022 and stated therein that the *ad-hoc* promotion of Principal was regularized vide notification dated 01.01.2008 and such order was endorsed to all concerned. However, nothing has been placed on record to substantiate the fact that the regularization order allegedly issued on 01.01.2008 included the name of petitioner was communicated to him. The contradictory stand taken by the respondents, fortify the plea of petitioner that he was never communicated the order of regularization. That being so, the petitioner could not be expected to extend his option under F.R. 22 (1) (a) (i) within stipulated period of one month.

14. Last but not least, respondents took the stand that the *ad-hoc* promotion of petitioner was regularized on 31.12.2012 and he should have raised his option within stipulated period thereafter. Such contention is also misconceived. Petitioner had retired on 31.05.2010 and in such view of the matter, there was no occasion for him to have addressed any option after his retirement.

15. In any case the purpose of option under F.R. 22 (1) (a) (i) is to communicate the intent so as to facilitate the completion of formalities regarding fixation/re-fixation of pay. In the instant case, the intent of petitioner was well known to the respondents. He had communicated such intent by giving his option immediately after his *ad-hoc* promotion. Even on various subsequent dates, the petitioner had been making representations to the respondents and communicating his clear intent.

16. The respondents have tried to defend their action by saying that the petitioner had exercised the option on 06.11.2009 and same being belated could not have been considered. The communication dated 06.11.2009 addressed by petitioner to Deputy Director of Higher Education, Mandi, has been placed on record, which reveals that the said correspondence was in response to letter dated 30.09.2009 issued by the Deputy Director of Higher Education, Mandi regarding the fixation of pay and the petitioner had contested such fixation on the ground that he had already exercised the option within one month from his *ad-hoc* promotion. In this view of the matter, the objection raised by the respondents is baseless.

17. In view of the above discussion, the petition is allowed and the respondents are directed to re-fix the pay of the petitioner by granting him the benefit of F.R. 22 (1) (a) (i) from 01.01.2008 on which date the *ad-hoc* promotion of petitioner was regularized as per latest affidavit dated 20.09.2022 filed by respondent No.2. The respondents are also directed to consequently re-fix the pension of the petitioner accordingly. The needful shall be done by respondent No.2 within two months from the date of passing of this judgment and the arrears, if any, payable to the petitioner, shall also to be paid to him within the aforesaid period.

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

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

Between:-

UPASANA DEVI W/O SH. YASHWANT KUMAR, RESIDENT OF VILLAGE & POST OFFICE DHAROGRA, TEHSIL SUNNI, DISTRICT SHIMLA, HIMACHAL PRADESH.

…….PETITIONER

(BY MR. SURENDER SHARMA, ADVOCATE)

AND

HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR, THROUGH ITS SECRETARY, DISTRICT HAMIRPUR, HIMACHAL PRADESH.

…….RESPONDENT

(BY MR. ANGREZ KAPOOR, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6339 of 2020
Decided on: 15.06.2022

Constitution of India, 1950-Article 226-Invitation for the posts of Drawing Master in the Department of Elementary Education-Online applications were invited for direct recruitment for the categories mentioned in the advertisement-Matter of consideration of the candidature of the applicant for the post of Drawing Master against General (BPL) category in District Shimla-**Held**- that eligibility of a candidate or applicant for a public post or service, is to be adjudged as on the last date of receipt of applications for such post or service, in terms of the relevant advertisement, and the prevailing service rules-Petition allowed(Para 22).

Cases referred:

Ashok Kumar Sharma and others Vs Chander Shekhar and another (1997) 4 SCC 18;

Suman Devi and others Vs State of Uttarakhand and others (2021) 6 SCC 163;

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

J U D G E M E N T

By way of present petition, the petitioner has prayed for the following relief:-

> "I*t is, therefore, most respectfully prayed that keeping in view the facts and circumstances narrated hereinabove, the respondent may kindly be directed to consider the candidature of the applicant for the post of Drawing Master, Post code:637, against General (BPL) category in District Shimla, or in the alternative, the respondent may kindly be directed to not to fill up one post of Drawing Master, Post code: 637, in District Shimla against General (BPL) category, during the pendency of the present original application, in the interest of justice.*"

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

The respondent-Commission invited applications vide advertisement No.33-2/2017 (Annexure A1) for various posts including the posts of Drawing Master in the Department of Elementary Education, in terms whereof, Online applications were invited for direct recruitment for the categories mentioned in the advertisement. As per the advertisement, the Online applications were to be filled up from 16.09.2017 to 15.10.2017, till 11:59 p.m. Under the heading "**Essential Qualification(s) and Experience etc.**" it was mentioned that the date for determining eligibility of all the candidates in respect of essential qualifications and experience, if any, etc. shall be the prescribed closing date for submission of Online Recruitment Application Form (ORA), i.e. 15.10.2017. The essential qualifications for being eligible to apply for the post of Drawing Master as were mentioned in the advertisement were as under:-

637 Drawing Master	10+2 with 50% marks with two years diploma in Art & Craft Teacher or its equivalent from a University/Institution recognized by the HP Govt. OR Bachelor of Arts with Fine Arts/Visual Arts(Painting or sculpture or applied Arts) as an elective subject with 50% marks in Fine Arts or its equivalent from a recognized University. OR Master Degree in Fine Arts/Visual Arts (Painting and Sculpture) or its equivalent from University/Institution recognized by the HP Govt.

3. Further, in terms of the advertisement, for the Department of Elementary Education, the applications were invited for the post of Drawing Master on contract basis and in all ninety six posts were offered to eligible candidates which were falling under ten districts mentioned in the advertisement. The number of posts which were available in each district alongwith the category under which the posts were available were spelled out in the advertisement. As the present case pertains to district Shimla, therefore, it is pertinent to mention that as far as district Shimla is concerned, therein six posts in all were advertised which included two posts of General (unreserved) category, one post of General (IRDP) category, one post of Scheduled Caste (unreserved) category and two posts of OBC (unreserved) category.

4. The petitioner being eligible to apply for the post in issue, applied for the same in district Shimla, falling in General (IRDP) category. As per the petitioner, as on the last date of submitting the Online application, she was fulfilling the eligibility criteria for being considered against the post reserved for General (IRDP) category, i.e. educational qualifications as well as her belonging to BPL category.

5. At this stage, it is pertinent to mention that Clause-9 and Clause-10 of the advertisement which dealt with the 'Category Claimed' and 'Eligibility Conditions'. The same are reproduced as under:-

> " *9. CATEGORY CLAIMS:-*
> *The category once claimed by the candidate(s) will not be allowed to be changed at any stage. The S.C. of Himachal Pradesh/S.T. of Himachal Pradesh/O.B.C. of Himachal Pradesh/WFF of Himachal Pradesh/Ex-Servicemen of Himachal Pradesh and Physically Disabled of Himachal Pradesh candidates must possess such certificate(s) in support of their claim made in the Online Recruitment Application(s) (ORA) while applying for the concerned post(s). The benefit of reservation will be admissible on parental basis only. All the candidates belonging to reserved categories are also required to go through the relevant instructions of the government of Himachal Pradesh issued from time to time in order to ensure that they are eligible under a particular category and submit the application certificates only on the prescribed formats at the time of evaluation.*
> *10. ELIGIBILITY CONDITIONS:-*
> *(i) The date of determining the eligibility of all candidates in terms of Essential qualifications, experience etc. shall be reckoned as on the closing date for submitting the Online Recruitment Applications (ORA).*
> *(ii) The decision of the Commission regarding eligibility etc. of a candidate will be final.*
> *(iii) Onus of proving that a candidate has acquired requisite degree/essential qualifications by the stipulated date is on the candidate and in the absence of proof the date as mentioned on the face of certificate/degree or the date of issue of certificate/degree shall be taken as date of acquiring essential qualification.*
> *(iv) In respect of equivalent clause in Essential Qualifications, if a candidate is claiming a particular qualification as equivalent qualification as per the recruitment of advertisement, then the candidate is required to produce order/ letter in this regard, indicating the Authority (with number and date) under which it*

has been so treated otherwise the Online Recruitment Application is liable to be rejected."

6. The BPL Certificate which was issued in favour of the petitioner at the relevant time is appended with the petition as Annexure A-3 and perusal thereof demonstrates that it was issued by the competent authority on 22.05.2017 and it was specifically mentioned upon the same that said certificate was valid for a period of six months.

7. The petitioner participated in the process of selection as was initiated by the respondent/Commission and as she successfully cleared the written objective test, her name was short listed for evaluation on prescribed parameters in terms of the criteria mentioned in the advertisement and for this purpose the petitioner was directed to appear for evaluation on 18.10.2018 at 9;00 a.m. in the office of Himachal Pradesh Staff Selection Commission, Hamirpur.

8. The grievance of the petitioner is that though in terms of the result of the screening evaluation as was declared by the respondent/ Commission, the cut-off marks for General (BPL) category were 56.41% , as is evident from Annexure A-8 and despite the petitioner having scored 59.30% marks, as is evident from Annexure A-6, yet she was not recommended for appointment under the General (BPL) category, but was considered under General (unreserved) category, which has resulted in great injustice to her as she was wrongfully denied appointment against the post reserved for General (IRDP) category. It is in this background that this petition stands filed.

9. The petition is resisted by the respondent/Commission, on the ground that though the petitioner was successful in the initial screening test which was conducted by the respondent/Commission for recruitment to the post in issue, but the petitioner failed to produce a valid certificate to the effect that she belonged to BPL category as on 18.10.2018. As per the Commission, as per conditions laid down in the Instructions which were part and parcel of

the advertisement itself in general and condition No.16 in particular, the validity of the IRDP/BPL Certificate was stated to be six months from the date of its issuance and the candidate was required to furnish a valid certificate in support of his/her claim and the validity of the certificate which was to be seen at the time of evaluation of the same. Commission had justified its act of not considering the petitioner under the General (BPL) category by stating that the petitioner was not possessing a valid BPL Certificate as on the date of evaluation.

10. In addition, as per the respondent/Commiseration, on the date of evaluation, i.e. 18.10.2018, the petitioner in terms of Annexure R-2 gave in writing that she no more belonged to General (BPL) category and she be treated as a candidate under the General (unreserved) category. Further, as per the respondent/Commission, the last date of submission of the Online applications was relevant only for the purpose of ascertaining as to whether a candidate was fulfilling the eligibility criteria with regard to educational qualifications, but with regard to other conditions, i.e. whether a candidate was belonging to the category under which he or she was seeking appointment, the relevant date was the date of evaluation.

11. I have heard learned counsel for the parties and have gone through the pleadings and documents appended with the petition.

12. The relevant Clauses of the advertisement have already been quoted by me hereinabove and the important instructions which were issued to the candidates alongwith the advertisement for filling up the Online applications are also on record as Annexure R-1 appended with the reply by the respondent-Commission.

13. There is no dispute with regard to the fact that as on the date when the petitioner applied for the post or to be more precise, as on the last date of submission of the Online applications, the petitioner was fulfilling the eligibility criteria for being considered for the post as far as educational

qualifications are concerned and in addition she was also possessing a BPL Certificate issued by the competent authority, which was not more than six months old as on 15.10.2017.

14. The moot issue is as to whether the eligibility of the petitioner of her belonging to General (BPL) category was to be seen as on 15.10.2017, as is the contention of the petitioner or as on 18.10.2018, as is the contention of the respondent/Commission.

15. This Court is of the considered view that when the posts are advertised and candidates are called upon to apply for the posts in issue with a clear cut rider that they should be fulfilling the eligibility conditions as on the closing date for submitting the applications, then all the eligibility conditions have to be assessed on the touch stone of the said closing date. The words "eligibility conditions" cannot be construed myopically so as to include only educational qualifications. If there are any other eligibility conditions which are to be fulfilled by a candidate including the condition of furnishing a certificate if a candidate applies under a particular category, say SC/ST/BPL etc., then in order to assess as to whether the candidate fulfills the eligibility condition of belonging to that particular category, the cut-off date has to be the said closing date. This is for the reason that here is a case where the petitioner who admittedly was having a valid certificate of belonging to BPL category as on the closing date for submitting the Recruitment Applications has been denied consideration under that category on the ground that as on the date of evaluation, the petitioner was not possessing a valid certificate as the certificate on the strength of which the petitioner had applied had lost its efficacy because the same was more than six months old.

16. If eligibility of such like candidates has to be assessed as on the date of evaluation, then the Court poses a question to itself whether a candidate who as on the last date of submitting the application was not belonging to the BPL category could have had participated in the process in

anticipation that may be by the date of evaluation he may fall under the BPL category? The answer is in negative. Only those candidates could have had participated in the process by submitting their applications for the post which was reserved for the General (BPL) category who were fulfilling the eligibility criteria as on the last date of applying for the post.

17. That being the case, what ought to have been examined on the date of evaluation was as to whether the certificate on the strength of which the petitioner had applied was valid as on the last date of submission of application or not. This extremely important aspect of the matter was thrown to wind by the respondent-Commission while rejecting the candidature of the petitioner. The advertisement nowhere expressly mentioned that a candidate who was applying under General (BPL) category mandatorily had to produce one certificate valid as on the last date for applying for the post in issue and the other valid at the time of evaluation. In fact, the condition contained in Clause-9 of the 'Category Claimed' was that all candidates belonging to reserve category were required to ensure that they are eligible under a particular category and were to submit applicable certificates on the prescribed format at the time of evaluation has to be read harmoniously with the other conditions contained in the advertisement that date of determining the eligibility shall be reckoned as on the closing date for submitting the Online Recruitment Applications.

18. In other words, the assessment of the eligibility though was to be finally done on the date of evaluation on the basis of the certificates which were to be produced by the candidate on the said date, however, the same was relatable to the closing date for submitting the Online Recruitment Applications, which was the date fixed in the advertisement for determining the eligibility. The advertisement nowhere mentioned that the eligibility of a candidate who was appearing under General (BPL) category was not to be

determined on the date of submission of the Online Recruitment Application Form, but on the date of evaluation.

19. It is settled law that a candidate may be belonging to a reserve category if found meritorious, has a right to be considered under the General category seats. Therefore, the petitioner otherwise was having a vested right to be considered as a candidate under the General category, *dehors* the fact that she had applied under the General (BPL) category, though the converse may not be true and Clause-9 of the advertisement has to be understood in this manner. The consent which was given by the petitioner vide Annexure R-2 that she be considered as a General category candidate, has to be treated as a dotted line consent, otherwise also taking into consideration the bargaining power of the petitioner vis-a-vis the Commission.

20. At this stage, this Court would like to refer to the judgment of the Hon'ble Supreme Court of India in ***(2021) 6 Supreme Court Cases 163***, titled as ***Suman Devi and others*** Versus ***State of Uttarakhand and others***, in which Hon'ble Supreme Court has been pleased to reiterate the well settled principle that eligibility of a candidate or applicant for a public post or service, is to be adjudged as on the last date of receipt of applications for such post or service, in terms of the relevant advertisement, and the prevailing service rules. Hon'ble Supreme Court in the said judgment relied upon its earlier judgment in ***(1997) 4 Supreme Court Cases 18***, titled as ***Ashok Kumar Sharma and others Versus Chander Shekhar and another*** (which is a three Judge Bench judgment), in Para-6 whereof Hon'ble Supreme Court held as under:-

> " *6. The Review petitions came up for final hearing on March 3, 1997. We heard the learned counsel for the review petitioners, for the State of Jammu and Kashmir and for the 33 respondent So far as the first issue referred to in our order dated Ist September, 1995 is concerned, we are of the respectful opinion that majority judgment (rendered by the Dr. T.K. Thommen and V. Ramaswami,*

JJ) is unsustainable in law,. the proposition that where applications are called for prescribing a particular date as the last date for fling the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their application ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgement. This is also the proposition affirmed in Rekha Chaturvedi (Smt.) v. University of Rajasthan and others [1993 Suppl. (3) S.C.C 168]. The reasoning in majority opinion that by allowing the 33 respondents to appear for the interview, the Recruiting Authority was able to get the bests talent available and that such course was in furtherence of public interest is, with respect, an impermissible Justification It is, in our considered opinion, a clear error of low and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have allowed to appear for interview."

21. Accordingly, in view of what has been discussed hereinabove, this Court has no hesitation in holding that the act of the respondent-Commission of not considering the candidature of the petitioner under the BPL category is arbitrary and not sustainable in the eyes of law. By no stretch of imagination, the eligibility of the petitioner as to whether she belonged to

the General (BPL) category could have been assessed by the respondent-Commission as on 18.10.2018. This date ought to have been taken to be as 15.10.2017. As far as the contention of the respondent-Commission that the petitioner herself had given in writing that she be treated as a General category candidate as she was no more belonging to the BPL category is concerned, this Court is of the view that same is of no consequence in view of reasons already assigned hereinabove.

22. Accordingly, in view of what has been discussed hereinabove, this petition is allowed. The act of the respondent-Commission of not treating the petitioner as a candidate under the General (BPL) category is held to be bad in law. The Commission is directed to recommend the name of the petitioner for appointment under the General (BPL) category for the post of Drawing Master in district Shimla. This direction is being issued by the Court, for the reason that record demonstrates that the marks scored by the petitioner were higher than the cut-off which was arrived at by the respondent-Commission with regard to the General (BPL) category. Appointment be offered to the petitioner prospectively by the employer. However, it is made clear that as the candidate who was selected under the General (BPL) category is not before the Court, therefore, the Court is not interfering with the appointment of any such candidate. Needful be done by the respondent/Commission within a period of two months from today.

23. The petition stands disposed of accordingly, so also the pending miscellaneous applications, if any.

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

Between:

KRISHNU RAM S/O SH. JIWANU RAM,
R/O VILLAGE JOHAR DHYEMI, POST OFFICE ZADU-KATAIR, TEHSIL ZHANDUTTA DISTRICT BILASPUR (HP)

....PETITIONER.

(BY. MR. SHUBHAM SHARMA, ADVOCATE)

AND

1. THE HIMACHAL PRADESH BOARD OF SCHOOL EDUCATION THROUGH ITS SECRETARY DHAAMSHALA.
2. THE CHAIRMAN, HP BOARD OF SCHOOL EDUCATION DHARAMSHALA.

....RESPONDENTS.

(BY. MR. DIWAKAR DEV SHARMA, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.4194 of 2019
Decided on: 12.09.2022

CCS(CCA) Rules, 1965- Rule 14- Rule 15- **Constitution of India, 1950-** Article 226 - Petition filed against order of Disciplinary Authority ordering de-novo inquiry under CCS(CCA) Rules against the petitioner on submission of inquiry report- Said order assailed as impermissible by law- **Held**- As per Rule 15 (2) no power conferred upon the Disciplinary Authority to order the holding of a de-novo inquiry, if the report of the Inquiring Officer is not

satisfactory- can direct for recording of further evidence in such cases- no power to set aside the inquiry- Petition allowed as action taken by Disciplinary Authority is not proper- Directions issued not to proceed with inquiry against the petitioner as he has already superannuated (Paras 9-11, 13-15)

This petition coming on for hearing this day, the Court passed the following: **J U D G M E N T**

By way of this petition, the petitioner has challenged Office Orders dated 05.01.2012 and 02.03.2012, appended with this petition as Annexures P-10 and P-11, respectively, in terms whereof the Disciplinary Authority has ordered 'de-novo inquiry' against the petitioner on the charges which were framed against the petitioner.

2. Brief facts necessary for the adjudication of the present petition are that vide Office Order dated 30.09.2010 (Annexure P-1), the petitioner, who at the relevant time was serving as Manager, Himachal Pradesh Board of School Education, Sale Book Depot, Bilaspur, District Bilaspur, H.P., was placed under suspension for gross irregularities during the spot evaluation of the annual examination conducted in March, 2010, at Spot Evaluation Centre, GGSSS Bilaspur, District Bilaspur, H.P., in lieu of the Departmental Proceedings being contemplated against him. Thereafter, vide Memorandum dated 13.12.2010 (Annexure P2), the petitioner was called upon to show cause as to why disciplinary proceedings be not initiated against him on the Article of Charges appended therewith. As the Disciplinary Authority was not satisfied with the response which was filed by the petitioner thereto, accordingly, Disciplinary Proceedings were initiated and an Inquiry Officer was appointed to inquire into the matter. After the completion of the inquiry, Inquiry Officer submitted Inquiry Report, to the Disciplinary Authority. After receipt of the Inquiry Report, the Disciplinary Authority passed order dated 05.01.2012 (Annexure P10), which reads as under:-

"*WHEREAS an inquiry (de-novo inquiry) was under Rule-14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 is being held against Sh. Krishnu Ram, Distt. Manager (Under Suspension).*

AND WHEREAS Sh. Sohan Singh, Assistant Secretary was appointed as Inquiry Officer to inquire into the charges framed against the above said Officer vide order No.HB (1) Estt. GF-93 (259/146)/2010-8206-8210 dated 11.5.2011. The Inquiry Officer had submitted his inquiry report on dated 20.9.2011. The inquiry report which is incomplete itself cannot be treated as final for reaching at any conclusion. The Inquiry Officer has failed to conduct the inquiry as per the provision of Rule-14 of CCS (CCA) Rules, 1965 and he has failed to appreciate the documentary evidence present in this case and failed to give his assessment of the evidence in respect of each charge and also the reasons for his findings on each charge so that the inquiry report is not satisfactory. Hence the ***de-novo inquiry*** *is necessary to inquire into the charges framed against the above said officer.*

AND WHEREAS the undersigned considers that the another Inquiring authority should be appointed to inquire into the charges framed against the said Officer.

NOW THEREFORE, the undersigned in exercise of the powers delegated by the Board in its 77th meeting held on 19.6.2001 and in exercise of the powers conferred by sub-rule (2) of CCS (CCA) Rule-1965, Rule-14, hereby appoints ***Sh. Girdhari Lal Verma, Asstt. Secretary*** *as the Inquiring Authority*."

3. This was followed by issuance of Annexure P-11, I.e. order dated 02.03.2012, in terms whereof one Shri Ravinder Singh Thakur, Section Officer was appointed as a Presenting Officer. It is in this background that the present writ petition stands filed.

4. Learned counsel for the petitioner has argued that the order passed by the Disciplinary Authority (Annexure P-10), dated 05.01.2012 is *void ab initio*, for the reason that Rule 14 and 15 of the CCS (CCA) Rules, 1965 do not confer any power upon the Disciplinary Authority to hold a *de-novo* inquiry. While drawing the attention of the Court to the provisions of Rule 14 and also Rule 15 of the CCS (CCA) Rules, learned counsel argued that

the act of the Disciplinary Authority, ordering holding of de-novo inquiry in fact is contrary to the law declared by the Hon'ble Supreme Court of India, reported in *K.R. Deb* Versus *The Collector of Central Excise, Shillong AIR 1971 SC 1447*, in which Hon'ble Supreme Court while interpreting Rule 15 of CCS (CCA) Rules, held that Rule 15 on the face of it really provides for one inquiry but it may be possible if in a particular case there has been no proper inquiry because some serious defect has crept into the inquiry or such important witnesses were not available at the time of inquiry or were not examined for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. However, there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that report of the Inquiring Officer or officers does not appeals to the Disciplinary Authority. Learned counsel has also relied upon the judgment of Hon'ble Coordinate Bench of this Court in *CWP No.3998 of 2019*, titled *Smt. Indira Thakur and another* Versus *State of H.P. and another*, decided on *31.12.2019*, in which Hon'ble Coordinate Bench after taking note of the judgment of Hon'ble Supreme Court in *K.R. Deb* Versus *The Collector of Central Excise, Shillong AIR 1971 SC 1447*, was pleased to quash and set aside the order of de-novo inquiry with further direction to the respondent therein to take the Inquiry Report submitted by the Inquiry Officer to its logical conclusion as expeditiously as possible. Learned counsel for the petitioner has also relied upon the judgment of the Hon'ble Supreme Court in *Allahabad Bank and others* Versus *Krishna Narayan Tewari (2017) 2 Supreme Court Cases 308*. On the strength of the said judgment, learned counsel has submitted that taking into consideration the fact that the petitioner has now superannuated from service, therefore, besides allowing this writ petition, it be ordered that the proceedings which were initiated against the petitioner, be put to a quietus.

5. The petition is opposed by learned counsel for the respondents, who has submitted that there is no infirmity in the passing of Annexure P-10,

because in given circumstances, the Disciplinary Authority has the power to order de-novo inquiry. Learned counsel argued that after perusal of the Inquiry Report, as the Disciplinary Authority came to the conclusion that the Inquiring Authority had failed to appreciate the documentary evidence and also failed to give his assessment of the evidence in respect of each charge and further reasons for findings recorded for each charge were not satisfactory, the Disciplinary Authority was having no option, but to order de-novo inquiry, as was rightly done by the officer concerned. Learned counsel also argued that otherwise also, no prejudice was caused or is going to be caused to the petitioner, for the reason that in the event of a de-novo inquiry being conducted, the petitioner will again get a right to put forth all his contentions before the Inquiring Authority and in case his version is found to be satisfactory, then but obvious, the proceedings will be quashed. Accordingly, he prayed that this writ petition be dismissed. Learned counsel also relied upon the judgment of the Hon'ble Supreme Court in *Union of India and others* Versus *P. Thayagarajan (1999) 1 SCC 733*, in Para-8 of this judgment, Hon'ble Supreme Court has been pleased to hold as under:-

> "*A careful reading of this passage will make it clear that this court notices that if in a particular case where there has been no proper enquiry because of some serious defect having crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined, the Disclpinary Authority may ask the Inquiry Officer to record further evidence but that provision would not enable the Disciplinary Authority to set aside the previous enquiries on the ground that the report of the Enquiry Officer does not appeal to the Disciplinary Authority. In the present case the basis upon which the Disciplinary Authority set aside the enquiry is that the procedure adopted by the Enquiry Officer was contrary to the relevant rules and affects the rights of the parties and not that the report does not appeal to him. When important evidence, either to be relied upon by the department or by the delinquent official, is shut out, this would not result in any advancement of any justice but on the other hand resuit in a miscarriage thereof. Therefore we are of the view that Rule 27(c)*

> *enables the Disciplinary Authority to record his findings on the report and to pass an appropriate order including ordering a de novo enquiry in a case of present nature.*"

6. I have heard learned counsel for the parties and have also carefully gone through the pleadings as well as evidence on record.

7. Rules 14 and 15 of the CCS (CCA) Rules, 1965 deal with procedure for imposing major penalties and action on the Inquiry Report. Rule 15(2) of the CCS (CCA) Rules reads as under:-

> "*(2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.*"

8. A perusal of the said Rule thus demonstrates that in a case where the Disciplinary Authority is not the Inquiring Authority, then on receipt of the Inquiry Report, the Disciplinary Authority shall forward or cause to be forwarded a copy of the report with its own together with its own tentative reasons for disagreement, if any, with the findings of the Inquiring Authority or any article of charge to the Government servant who shall be required to submit, if he so desires his representation or submission to the Disciplinary Authority.

9. Thus, careful perusal of Rule 15 (2) demonstrates that there is no power conferred upon the Disciplinary Authority that upon receipt of the Inquiry Report, the Authority can order the holding of a de-novo inquiry, if the report of the Inquiring Officer does not appeals to the Disciplinary Authority.

10. Now in this backdrop, this Court would first refer to the impugned order, in terms whereof the Disciplinary Authority has ordered the de-novo inquiry. The order has already been quoted in *extensio* hereinabove. A perusal of the order demonstrates that the reasons which weighed with the Disciplinary Authority while ordering de-novo inquiry were (a) Inquiry Officer failed to appreciate the documentary evidence present in the case, (b) Inquiry Officer failed to give his assessment of evidence in respect of each charge, (c) Inquiry Officer failed to give reasons for his findings on each charge. It is on the premises of these three principles that the Disciplinary Authority held that there should be a de-novo inquiry into the charges. Hon'ble Supreme Court in *K.R. Deb* (supra) has clearly held that Rule 15 of the CCS (CCA) Rules provides only for one inquiry, however, in a particular case where there has been no proper inquiry, then the Disciplinary Authority may ask the Inquiring Officer to record further evidence.

11. In *Union of India and others* Versus *P. Thayagarajan* (supra), Hon'ble Supreme Court after taking note of its judgment in *K.R. Deb* (Supra) further explains that the Disciplinary Authority may ask the Inquiring Officer to record further evidence where there has been no proper inquiry, because of some serious defects having crept into the inquiry or some important witness not being available at the time of inquiry. But, said provisions would not enable the Disciplinary Authority to set aside the previous inquiry on the ground that the report of the Inquiring Officer does not appeals to the Disciplinary Authority. Thereafter, Hon'ble Supreme Court by referring to the facts involved in the case before it went on to hold that the basis on which the Disciplinary Authority set aside the inquiry in that case was that the procedure adopted by the Inquiring Officer was contrary to the relevant Rules which affected the rights of the party.

12. Incidently, therein the Hon'ble Supreme Court was dealing with the Disciplinary Proceedings, which stood initiated under the provisions of

C.R.P.F. Act, 1949 and Rules framed thereunder and while interpreting Rule 27 (c), Hon'ble Supreme Court held that said Rule enabled the Disciplinary Authority to record his findings on the report and to pass appropriate order including ordering a de-novo inquiry in a case of the nature which was before the Hon'ble Supreme Court. Therefore, from what has been taken note of hereinabove, this Court can safely conclude that the judgment of the Hon'ble Supreme Court in *Union of India and others* Versus *P. Thayagarajan* (supra), was in the background of the facts before it, but the law which initially settled by the Hon'ble Supreme Court in *K.R. Deb* (supra) case has not been disturbed.

13. It is also relevant to refer to the judgment of the Hon'ble Coordinate Bench in *Smt. Indira Thakur and another* Versus *State of H.P. and another* (supra), in which the Hon'ble Coordinate Bench after placing reliance on *K.R. Deb* (supra) as also *Union of India and others* Versus *P. Thayagarajan* (supra), held that the holding of the de-novo inquiry was bad in law and respondents therein directed to take the Inquiry Report submitted by the Inquiry Officer to its logical conclusion.

14. Accordingly, in view of what has been observed hereinabove, this writ petition is allowed and order dated 05.01.2012 (Annexure P-10), in terms whereof the Disciplinary Authority has ordered the holding of de-novo inquiry is ordered to be quashed and set aside and so also the subsequent order of appointment of the representing officer dated 02.03.2012 (Annexure P-11), as this Court holds that the Disciplinary Authority cannot order 'de-novo inquiry'. Taking into consideration the fact that the petitioner was charge sheeted as far back as in the year 2010 and that the petitioner has now superannuated from service, in the peculiar facts of the case, this Court does not deems it proper to grant liberty to the Department concerned to proceed against the petitioner on the basis of the Inquiry Report already submitted, as the same will cause prejudice to the petitioner, more so in view of the fact that

now the petitioner being no more in service, it may be difficult for him to defend himself in the Disciplinary Proceedings.

15. With these observations, the petition is disposed of, so also the pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE VIRENDER SINGH, J.

Between:

HDFC ERGO GENERAL
INSURANCE COMPANY
LIMITED, PLOT NO. C-9,
3rd FLOOR, PERAL
BEST HIGHEST-II,
NETS SUBHASH PALACE
PITAMPURA, NORTH
WEST DELHI – 110 034
THROUGH ITS ASSISTANT
MANAGER (LEGAL)
HDFC ERGO GENERAL
INSURANCE COMPANY
LIMITED, 5th FLOOR,
TOWER-1, STELLAR
IT PARK, C-25,
SECTOR 62, NOIDA,
U.P. - 201 301.

...APPELLANT

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. SMT. KALPNA, W/O LATE
SH. SOHAN LAL,
R/O VILLAGE KALOTI,
TEHSIL CHIRGAON,
DISTRICT SHIMLA, H.P.

2. MANOJ KUMAR (MINOR),
S/O LATE SH. SOHAN LAL,

3. KAPIL (MINOR),
S/O LATE SH. SOHAN LAL,

(RESPONDENT NO. 2 AND 3
ARE MINOR, HENCE SUED
THROUGH THEIR MOTHER

AND NATURAL GUARDIAN
SMT. KALPNA, i.e.
RESPONDENT NO. 1)

BOTH R/O VILLAGE KALOTI,
TEHSIL CHIRGAON,
DISTRICT SHIMLA, H.P.

4. SH. MOHAN SINGH,
S/O NOT KNOWN,
C/O C&C COMPANY
CAMP AT PATSARI,
TEHSIL JUBBAL,
DISTRICT SHIMLA, H.P.
(DRIVER OF VEHICLE
NO. HP-72-1307)

5. THE C&C COMPANY
CAMP AT PATSARI,
TEHSIL JUBBAL,
DISTRICT SHIMLA, H.P.
(OWNER OF VEHICLE
NO. HP-72-1307) THROUGH
ITS PROJECT OFFICER,

6. THE PROJECT MANAGER,
C&C COMPANY CAMP AT
PATSARI, TEHSIL JUBBAL,
DISTRICT SHIMLA, H.P.

...RESPONDENTS

(MR. D.S. NAINTA, ADVOCATE,
FOR R-1 TO R-3,

NONE FOR R-4 TO R-6)

FIRST APPEAL FROM ORDER
No. 295 of 2021
Reserved on:09.09.2022
Decided on: 30.09.2022

Motor Vehicles Act, 1988- Section 166- Section 173 - Appeal filed by Insurance Company against the award of Motor Accident Claims Tribunal directing the appellant to pay compensation- Principal ground for assail was that the claimants could not prove rash and negligent driving as per Section 166- **Held-** Claimants have on touchstone of preponderance of probability proved that the accident in question had taken place due to the rash and negligent driving – the examination in chief and cross examination of Claimant clearly explains the manner of driving and factum of accident – no scope for adverse inference to be drawn – excessive reliance on infirmities in FIR erroneous as FIR not made on oath, informant not examined in the present case- Appeal dismissed. (Paras 31, 38-40)

This Appeal coming on for pronouncement of judgment this day, this Court delivered the following:

J U D G M E N T

Appellant-Insurance Company has filed the present appeal, under Section 173 of the Motor Vehicles Act (hereinafter referred to as the 'MV Act') against award, dated 9th March, 2018, passed by the learned Motor Accident Claims Tribunal-IV, Shimla, Camp at Rohru, H.P. (hereinafter referred to as 'learned MACT').

2. By virtue of the award, which has been assailed before this Court, the learned MACT has allowed the claim petition filed by respondents No. 1 to 3 and awarded a sum of ₹ 10,37,680/-, alongwith interest @ 7.5% per annum, from the date of filing of the claim petition, till realization of the amount.

3. For the sake of convenience, the parties to the lis are hereinafter referred to, as referred to by the learned MACT.

4. The Insurance Company (respondent No. 4) has preferred the appeal before this Court, as the ultimate liability to pay the amount of compensation, alongwith interest, has been fastened upon it.

5. Brief facts, leading to the filing of the present appeal, before this Court, may be summed up, as under:

The claimants, being widow and minor sons of Shri Sohan Lal, have filed the claim petition before the learned MACT, seeking compensation, on account of death of Shri Sohan Lal, in a road side accident, on 26th November, 2015, involving vehicle No. HP-72-1307, being driven by respondent No. 1-Mohan Singh, owned by respondent No. 2-C&C Company and insured with respondent No. 4.

6. The claim petition has been filed on the ground that on 26th November, 2015, deceased-Sohan Lal was driving motor cycle, bearing registration No. HP-10A-7225 and when he had reached a place, near Mehandali, Tehsil Rohru, District Shimla, H.P., at about 2.30 p.m., the offending vehicle, i.e. Tipper, bearing registration No. HP-72-1307, came there, being driven by respondent No. 1, in a rash and negligent manner, and crushed the motor cyclist (deceased-Sohan Lal). The matter was reported to the police of Police Station Rohru, whereupon FIR No. 119, dated 26th November, 2015, was registered.

7. The claimants have also pleaded about their bright past and bleak future.

8. On the basis of the factual position, qua the monthly earning of deceased, as ₹ 30,000/- per month, the claimants have sought the compensation to the tune of ₹ 30 Lacs, alongwith statutory interest, from the date of filing of the claim petition, till the realization of the actual amount from the respondents.

9. When put on notice, the claim petition has been contested by the respondents.

10. Respondents No. 1 to 3 have filed their reply, by taking the preliminary objections that the petition is not maintainable, whereas the factual position, which has been pleaded in the claim petition, has evasively been denied. However, in reply to para 24 of the claim petition, it has been pleaded that the deceased was driving the vehicle in question in a rash and

negligent manner and could not control the vehicle. Consequently, the motor cycle hit the tipper. According to respondents No. 1 to 3, there was no negligence on the part of respondent No. 1.

11. The Insurance Company-respondent No. 4 has taken the preliminary objections regarding the fact that the vehicle in question was being plied in violation of the terms and conditions of the Insurance Policy and that the deceased was also driving the vehicle in violation of the terms and conditions of the Insurance Policy.

12. On merit, the factual position has mainly been denied for want of knowledge.

13. Thus, the respondents have prayed to dismiss the claim petition.

14. From the pleadings of the parties, the learned MACT has framed the following issues, vide order, dated 4th July, 2017:

> *"1. Whether deceased Sohan Lal died in a motor vehicle accident on account of rash and negligent driving of driver of the vehicle bearing No. HP-72-1307 on 26.11.2015 at about 02.30 PM at place near Mehandali Tehsil Rohru, District Shimla, H.P., as alleged? OPP*
>
> *2. Whether the petitioner is entitled for grant of compensation, if so, then what should be the quantum of compensation and from whom?*
>
> *3. Whether the present petition is maintainable in its present form, as alleged? OPR*
>
> *4. Whether the present petition is bad for non-joinder of necessary parties, as alleged? OPR*
>
> *5. Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy and in contravention of provisions of M.V. Act, as alleged?*
>
> *6. Whether the driver of the vehicle was not having valid and effective driving licence at the time of accident, as alleged?*

7. Whether the petitioner has filed the present petition in collusion with the respondent No. 1, as alleged? OPR

8. Whether this Tribunal has no jurisdiction to try and entertain the present petition, as alleged? OPR

9. Relief."

15. Thereafter, the parties to the lis were directed to adduce evidence. Consequently, the claimants have examined claimant No. 1-Kalpna as PW-1, whereas, the respondents have examined Manoj Pant, HR Manager of C&C Company as RW-1 and respondent No. 1-Mohan Singh as RW-2.

16. After closure of the evidence, the learned MACT, after hearing the learned counsel appearing for the parties, has decided the claim petition and awarded the amount of compensation, as referred to above.

17. Feeling aggrieved from the said award, the Insurance Company has assailed the award, on the ground that the award is based upon the surmises and conjectures, as the documents, which have been placed on record, were not rightly appreciated by the learned MACT.

18. Issue No. 1 is stated to have been wrongly decided, as the claimants have not examined any person to prove that the accident had taken place, due to rash and negligent driving of respondent No. 1. Highlighting the fact that the only witness, who has been examined by the claimants, i.e. PW-1, has clearly stated that she was not present at the spot. As such, it has been argued that the *sine quo non* for claiming the compensation, in this case, has not been proved.

19. The award has also been assailed on the ground that it was incumbent upon the claimants to prove the negligence of the driver, which, according to the appellant, the claimants have miserably been failed to do so.

20. To buttress its contention, the Insurance Company has relied upon the decision of the Hon'ble Supreme Court in *Meenu Bhai Mehta versus Baldrishna Ramchandra Nayan and others, 1977 ACJ 118.*

21. The impugned award has also been assailed on the grounds that the best evidence has been withheld by the claimants, in this case, as they could have easily examined the pillion rider of the motor cycle. Also, that the learned MACT has not considered the FIR in the right perspective.

22. On all these grounds, Mr. Jagdish Thakur, learned counsel appearing for the Insurance Company, has prayed that the appeal may kindly be accepted, by dismissing the claim petition.

23. The prayer, so made, by the learned counsel appearing for the Insurance Company, has been opposed by the learned counsel appearing for the claimants, on the ground that the learned MACT has rightly appreciated the evidence and the award passed by the learned MACT deserves to be upheld.

24. I have heard submissions advanced by the learned counsel appearing for the parties and gone through the record carefully.

25. The Insurance Company has assailed the award mainly on the ground that the claimants have not proved the negligence of respondent No. 1 in driving the alleged offending vehicle and their failure to do so, is fatal for the case of the claimants, as there is nothing on the file to conclude that respondent No. 1 was tort feaser.

26. The entire attack, in the present appeal, is qua the fact that the claimants could not prove the *sine quo non* for claiming the compensation under Section 166 of the MV Act, i.e. negligence of respondent No. 1, while driving the offending vehicle.

27. The proceedings under the MV Act are summary in nature, where, the liability of the tort feaser is to be fixed on the principle of preponderance of the probability. The legislation, i.e. MV Act, is a beneficial piece of legislation.

Strict rules of Evidence Act are not applicable in the proceedings under MV Act. It is not incumbent upon the claimants to prove the negligence beyond reasonable doubt. While deciding the claim petition, it is to be borne in mind that strict proof of accident may not be possible to be proved by the claimants. They have to establish their case, on the touchstone of preponderance of probability.

28. The claimants, in their claim petition, have categorically pleaded that the accident in question had arisen out of the rash and negligent driving of respondent No. 1, while driving vehicle No. HP-72-1307. These facts have been pleaded in paras 10 and 24 of the claim petition. Respondents No. 1 to 3, although, have denied the contents of para 10, but, pleaded the fact in para 22, that, it was the deceased, who was driving the vehicle in a rash and negligent manner and, as such, he could not control his vehicle and, consequently, the said vehicle has hit against the tipper, which was stated to be in stationary condition.

29. Since the onus was upon the claimants to prove issue No. 1, as such, claimant No. 1 appeared as PW-1. She has categorically stated that her husband was on the way from Rohru to Hatkoti and when reached near Mehandali, respondent No. 1 came there, driving the offending vehicle, in a rash and negligent manner and the accident took place. Consequently, her husband sustained injuries and died on the spot. She has proved the copy of the post mortem report, Ex. PA, and FIR, Ex. PB. She has again stated that the accident in question has taken place due to the rash and negligent driving of respondent No. 1.

30. In her cross-examination by the learned counsel appearing for respondents No. 1 to 3, PW-1 has denied that the tipper was in a stationary condition, rather, voluntarily stated that Mohan Lal was driving the vehicle. However, in the cross-examination by the learned counsel appearing for the

Insurance Company, she has admitted that she is not aware about the fact whether the vehicle was loaded or was empty.

31. From the above deposition, the learned counsel for the Insurance Company could not satisfy the conscience of the Court as to how and in which manner, an inference could have been drawn by the Insurance Company that claimant No. 1 was not present at the spot and the claimants have failed to prove the fact that the accident in question had taken place.

32. No doubt, the contents of the FIR can be looked into as this document has been produced on the file by the claimants themselves. Admittedly, the FIR was not lodged by making a statement on oath, as such, much reliance cannot be placed on the version, as contained in the FIR, whereas, PW-1 has deposed on oath, regarding the manner, in which, the accident in question had taken place and nothing material could be elicited from her cross-examination. Rather, the tone and tenor of the cross-examination clearly shows that her deposition qua the manner, in which the accident in question had taken place, has not seriously been disputed by the respondents. Even, suggestion has not been given to her that she was not present, at the time, when the accident in question, had allegedly taken place.

33. Although, the FIR in question has been produced by claimant No. 1 herself, but, from this fact, it cannot be concluded that she was aware about the contents of the FIR. Considering the low legal literacy of the common masses, it cannot be expected from claimant No. 1 that she was aware about the contents of the FIR. Moreover, no efforts have been made by the respondents to bring the factual position, as contained in the FIR, to the knowledge of claimant No. 1, when she appeared in the witness box, as PW-1. Merely, the FIR in question has been produced by the claimants, no adverse inference could be drawn against them. There is nothing on the file, from where, any help could be derived by the appellant, to discard the direct evidence of PW-1.

34. In such situation, there is no occasion for this Court to discard the version of PW-1, qua the manner, in which, the accident in question had taken place.

35. Even otherwise, RW-2, who is the driver of the offending vehicle, when appeared in the witness box, has deposed in the cross-examination by the learned counsel appearing for the Insurance Company, that on seeing the motor cycle, being driven by the deceased in a fast speed, he has parked his vehicle on the hill side, but, in the cross-examination by the learned counsel appearing for the claimants, has again admitted that at the time of accident, his vehicle was in a moving condition.

36. The vehicle in question, as per the evidence of RW-2, was under his exclusive control and, as such, onus was upon him to probabilize the fact that the accident in question had taken place due to the rash and negligent driving of the deceased himself. His sole statement is too short to probabilize his stand. The other persons, namely, the author, who had allegedly lodged the FIR, was travelling in the offending vehicle driven by respondent No. 1, but, for the reasons, best known to respondents No. 1 to 3, neither the said material witness has been examined nor respondent No. 4 has bothered to call the said person to prove the contents of FIR.

37. From the above facts, only one inference could be drawn that had the said witness been examined by them, he would have deposed against them.

38. At the cost of repetition, not much reliance can be placed on the contents of the FIR, as the same were not recorded on the statement given on oath.

39. The FIR in question has been registered on the basis of the statement of one Upender Ram, who has, admittedly, not been examined by the respondents, in this case. As such, no benefit could be derived by the Insurance Company on the basis of this document.

40. A futile attempt has also been made by the learned counsel appearing for the Insurance Company, in this case, when he has relied upon the final report in Case FIR No. 119, dated 26th November, 2015. By virtue of this document, the police has requested the Court to drop the proceedings, in this case, but, there is nothing on the record to show whether this report has been accepted by the Court or not. There is nothing on the file to show that the police had ever associated the pillion rider of motor cycle in the investigation of the case.

41. Judging the above facts, in the light of the decision of their Lordships of Hon'ble Supreme Court in *Meenu Bhai Mehta's case (supra),* this Court is of the view that the claimants, on the touchstone of preponderance of probability, have proved that the accident in question had taken place due to the rash and negligent driving of respondent No. 1, Mohan Singh.

42. Considering all these facts, there is no occasion for this Court to differ with the findings qua the rash and negligent driving of respondent No. 1, in this case, as recorded by the learned MACT.

43. No other point has been urged or argued.

44. Consequently, the appeal is dismissed and the award passed by the learned MACT is upheld.

45. No order as to costs.

46. Record be sent back.

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

Between:

EXECUTIVE ENGINEER, HPPWD DIVISION NO.3, WINTER FIELD, SHIMLA TEHSIL AND DISTT. SHIMLA.

….APPELLANT/RESPONDENT.

(BY. MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

AND

1 SMT. POONAM DEVI, WD/ OF LATE SH. DHRU URAO, PRESENTLY RESIDING AT VILLAGE KANGNADHAR, TEHSIL AND SHIMLA, HP.

2. SH. ANISH URAO (SON)

3. SH. MUNISH URAO (SON)

BOTH THROUGH THEIR MOTHER (NATURAL GUARDIAN) PRESENTLY RESIDING AT VILLAGE KANGNADHAR, TEHSIL AND DISTRICT SHIMLA, H.P.

….RESPONDENTS/PETITIONERS.

4. JAGDISH KUMAR, S/O SH. SITA RAM, R/O VEENA COLLEGE, NEW COTTAGE, SHIMLA, HP.

….. APPELLANT/RESPONDENT NO.2

(BY. MR. H.C. SHARMA, ADVOCATE, FOR RESPONDENTS NO.1 TO 3)

(NONE FOR RESPONDENT NO.4)

FIRST APPEAL FROM ORDER
No.102 of 2022
Decided on: 29.06.2022

Workmen Compensation Act, 1923- Section 4- Section 12 – Section 22 - Appeal filed against order of Commissioner, Employees Compensation granting compensation in favour of the respondent on the ground that deceased was not an employee of the appellants- **Held-** As per Section 12 of the Act, direct employment of the deceased by principal is not necessary- if deceased was engaged through a contractor who was so engaged by the principal to execute the work in issue – he is deemed to be an employee – contention of petitioners as to absence of direct employment of deceased by appellants is meritless- Appeal dismissed.(Paras 14-17)

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

O J U D G M E N T

By way of this appeal, the State has challenged the judgment dated 06.05.2017, passed by the learned Commissioner, Employees Compensation, Court No.1, Shimla, H.P. in W.C. Petition No.14-2 of 2011/ 2008, titled as Smt. Poonam Devi & others Versus Sh. Jagdish Kumar & another, filed under Section 22 read with Section 4 of the Workmen's Compensation Act, in terms whereof the claim petition filed by respondents No.1 to 3 herein has been disposed of in the following terms:-

> "*In the light of the findings on above issues the present petition is allowed with cost whereby petitioners are held entitled for the compensation of amounting to Rs.902225.4/- paisa with interest so calculated till date from respondent No.2 who is at liberty to recover this amount from respondent No.1 who was an agent of respondent No.2. This amount of compensation shall be divided in the following proportion between the petitioners:-*
> *The petitioner No.1 Poonam Devi is the widow of deceased Dehru Urao as such she is held entitled for 50% share in the total*

> *compensation amount alongwith future interest. Whereas the respondents No.2 and 3 who are the minor children of the deceased are held entitled for 25% each in the compensation amount so awarded alongwith future interest. The amount of compensation so being paid to respondent No.2 and 3 who are minors shall be invested in the form of FDR in some nationalized bank fetching maximum rate of interest to be pledged in the name of Commissioner Employees Compensation Act whereas the share of compensation of petitioner No.1 Poonam Devi shall be released in her favour by depositing the same in her bank account as per the details which will be supplied by her*."

2. This appeal was admitted on 24.05.2022 on the following substantial question of law:-

> "*Whether the learned Commissioner erred in not appreciating that the injured was not an employee of the appellant*?"

3. Though, after the admission of the appeal, respondent No.4 could not be served, however, the appeal is being decided in his absence for the reason that no order adverse to him is being passed by the Court.

4. Brief facts necessary for the adjudication of the present appeal are that a claim petition was preferred by respondents/claimants before the learned Commissioner, Employee's Compensation*, inter alia*, on the ground that deceased Dehru Urao, who was the predecessor-in-interest of the claimants, was working with respondent (Jagdish Kumar) as a mason and on 14.10.2007, in the course of discharge of his duties he sustained grievous injuries while working at Jakhu in Shimla, H.P. The matter was reported to police and First Information Report (FIR) to this effect, i.e. FIR No.172 of 2007, under Sections 336 and 337 of the Indian Penal Code was registered. The injured was initially admitted in Indira Gandhi Medical Collecge, Shimla, from where he was referred to RMCS, Hospital Ranchi for necessary care, but unfortunately he succumbed to his injuries on 11.12.2007. It is in this background that the claim petition was filed, seeking compensation to the

tune of Rs. 4,23,280/-. According to the claimants, the monthly wages of the deceased at the time of his death was Rs. 6,000/- and his age was twenty eight years.

5. The claim was resisted by respondent No.1 therein, namely, Jagdish Kumar, *inter alia*, on the ground that there was no relationship of employer and employee between him and the deceased. He denied that Dehru Urao was ever employed by him or was working with him as a mason. He also denied that on the fateful day deceased received grievous injuries in the course of employment under him. It was further the stand taken by the said respondent that the claimants in collusion with the present appellant were implicating him for compensating the family of the deceased without any justifiable reason.

6. In the reply, which was filed by the present appellant before the learned Commissioner, the stand taken was that deceased was working with respondent Jagdish Kumar and there did not exist any relationship of employer and employee between the appellant and the deceased. For this purpose, the appellant placed reliance upon the provisions of Clauses 19(b) and 19(e) of the contract, which was entered into between the appellant and contractor Jagdish Kumar, in terms whereof it was Jagdish Kumar who was to comply with the provisions of the Workmen Compensation Act in the eventuality of any liability accruing under it.

7. On the basis of the pleadings of the parties, following issues were framed by the learned Commissioner:-

> *"1. Whether the petitioner is entitled for compensation amount to the tune of Rs. 4,23,280/- alongwith interest @ Rs. 12% per annum alongwith cost? OPP*
> *2. Whether the petition is not maintainable? OPR*
> *3. Whether there exist no relationship of employer and employees, as alleged? OPR*
> *4. Whether the applicant has concealed material facts from the Court? OPR*

5. Relief."

8. On the strength of the evidence which was led by the parties in support of their respective contentions, the issues so framed were decided as under and the compensation was allowed in the terms settled already hereinabove in this judgment:-

"*Issue No.1*	*:*	*Yes*
Issue No.2	*:*	*No*
Issue No.3	*:*	*No*
Issue No.4	*:*	*No*
Relief	*:*	*The petition is allowed as per operative part of the order.*"

9. The substantial question of law, on which appeal has been admitted, has already been quoted hereinabove.

10. Learned Additional Advocate General has strenuously argued that in view of the fact that deceased was an employee of contractor Jagdish Kumar, in terms of the agreement which was entered into between the appellant and contractor Jagdish Kumar, it was for the contractor to indemnify the workmen who were engaged for the execution of the work with Jagdish Kumar. By no stretch of imagination, it could be said that there was any relationship of employer and employee between the appellant and the deceased. This extremely important aspect of the matter was decided wrongly by the learned Commissioner while deciding issue No.3 in favour of the claimants. Accordingly, he prayed that the appeal be allowed and the judgment passed by the learned Commissioner be set aside.

11. Mr. H.C. Sharma, learned counsel for the respondents/claimants, on the other hand has supported the judgment passed by the learned Commissioner on the ground that there was no infirmity therein as the same was in-consonance with the provisions of Section 12 of the Employees Compensation Act, as amended from time to

time, because as it was the work of the Public Works Department which was being executed by the contractor, for which purpose the deceased was employed, therefore, there was relationship of employer and employee between the present appellant and the deceased. Accordingly, he prayed that the appeal being devoid of any merit be dismissed.

12. I have heard learned counsel for the parties and have gone through the order passed by the learned Commissioner as well as the record of the case.

13. Section 12 of the Employee's Compensation Act provides as under:-

> *" (12) Contracting- (1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any [employee] employed in the execution of the work any compensation which he would have been liable to pay if that [employee] had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the [employee] under the employer by whom he is immediately employed.*
> *(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor [,or any other person from whom the [employee] could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the [employee] could have recovered compensation] and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner. (3) Nothing in this section shall be construed as preventing a [an employee] from recovering compensation from the contractor instead of the principal. (4) This section shall not apply in any*

> *case where the accident occurred elsewhere that on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.*"

14. A bare perusal of the said provisions demonstrates that where any person i.e. principal, in the course of or for the purpose of his trade or business, contracts with any other person referred to as a contractor for the execution by or under the contractor of the whole or any part of any work, ordinarily part of the trade or business of the principal, then such principal shall be liable to pay to any employee employed in the execution of the work any compensation, which he would have been liable to pay if that employee had been immediately employed by him.

15. In this appeal, the appellant happens to be the Public Works Department.

16. It is the case of the claimants that death of the deceased took place in the course of employment of laying down a way side retaining wall (Danga), which work principally was to be executed by the Public Works Department, but was being executed by it through the contractor. The appellant cannot deny the fact that construction of retaining wall etc. is a part of the "trade or business", if the Court can use said term, of the Public Works Department, because the principal job of said Department is to execute such like works on behalf of the Government of Himachal Pradesh alongwith works including construction of building, roads etc.

17. In this view of the matter, *dehors* the fact as to whether the deceased was directly employed by the appellant or he was engaged in the execution of the work through a contractor who was so engaged by the principal to execute the work in issue, the relationship between the appellant and the deceased was that of an employer and employee in terms of Section 12 of the Employee's Compensation Act, 1923.

18. A perusal of the order which has been passed by the learned Commissioner also demonstrates that issue No.3 has been decided by the learned Commissioner after taking note of the provisions of Section 12 of the Act and thereafter, it has been held that the appellant was liable to pay compensation to the petitioners, because even if the deceased was the employee of contractor, then also contractor was only an agent of the present appellant who was held to be the principal employer, by the learned Commissioner. One more fact which the Court wants to clarify at this stage is that while deciding the claim petition, learned Commissioner has given liberty to the present appellant to recover this amount from the agent and incidently, this part of the order passed by the learned Commissioner has not been assailed by the agent i.e. Jagdish Kumar (contractor).

19. Accordingly, in view of what has been held hereinabove, as this Court is of the considered view that the findings which have been returned by the learned Commissioner holding that the deceased was an employee of the present appellant, do not suffer from any infirmity, therefore, this Court holds that the learned Commissioner did not err while holding that the injured/deceased was an employee of the appellant. Substantial question of law is answered accordingly.

20. In view of what has been held herinabove, present petition being devoid of any merit is dismissed. However, liberty as has been granted by the learned Commissioner still remains with the present appellant to have the money recovered from the agent. Pending miscellaneous applications, if any, stands disposed of. Interim order, if any, stands vacated.

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

Between:-

RAJESHWAR DAYAL JANARTHA, S/O SH. FAQIR CHAND, R/O SUDHA NIWAS, NEAR OLD POLICE STATION, SANJAULI, DISTRICT SHIMLA, PIN-171006.

…….PETITIONER

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATE
WITH M/S DEEPAK SHARMA AND HARSH KALTA,
ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS ADDITIONAL CHIEF SECRETARY (EXCISE AND TAXATION)), GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, CHHOTA SHIMLA-171002.
2. COMMISSIONER OF STATE, EXCISE AND TAXATION DEPARTMENT, GOVERNMENT OF HIMACHAL PRADESH, SHIMLA (H.P.)
3. DIRECTOR OF VILIGANCE, HOME (VIGILANCE) DEPARTMENT, GOVERNMENT OF HIMACHAL PRADESH, SHIMLA (H.P.).
4. TESH SHARMA S/O JAWALA PRASAD SHARMA, R/O AMRIT NIWAS, NEAR NIGAM VIHAR, SHIMLA-2 (H.P.).

…….RESPONDENTS

(BY MR. AJAY VAIDYA, SENIOR ADDL. AG FOR
RESPONDENTS NO. 1 TO 3;
NONE FOR R-4)

CIVIL WRIT PETITION
No. 3466 OF 2021
Reserved on: 26.07.2022
Decided on: 22.08.2022

Constitution of India, 1950-Artcile 226- **Code of Criminal Procedure, 1973**- Section 173-204 - Vigilance Manual of Government of Himachal Pradesh - Petition filed to quash the amendment made in Para 6.4 of Vigilance Manual of Government of Himachal Pradesh and to grant promotion to the petitioner as Additional Excise and Taxation Commissioner- **Held**- As per

amendment to the manual, Vigilance clearance certificate shall not be issued if chargesheet has been filed against the government servant-amendment to be read to mean "framing of charge" in light of settled judicial position and scheme of CrPC– adoption of sealed cover procedure by DPC impermissible, as no charges framed against petitioner - direction for sealed covers to be opened forthwith- petitioner to be granted the Clearance Certificate and to be considered for promotion. (Paras 22-23)

Cases referred:

Union of India and others Vs. K.V. Jankiraman and others, (1991) 4 SCC 109;

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

J U D G E M E N T

By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

> *"i) That the adoption of sealed cover procedure in DPC proceedings dated 25.03.2021 (Annexure P13) may be declared bad in law and consequently the sealed cover with regard to the promotion of the petition may be directed to be opened forthwith and petitioner may be granted promotion as Additional Excise and Taxation Commissioner from due date with all consequential benefits or from the date the same was illegally given to respondent No. 4 with all consequential benefits;*
> *ii) That promotion of respondent No. 4 as Additional Excise and Taxation Commissioner vide order dated 27.03.2021 (Annexure P-14) may be quashed and set aside.*
> *iii) That communication dated 27.10.2017 (Annexure P-20) amending Para 6.4 of the Vigilance Manual of Government of Himachal Pradesh to the extent it goes contrary to the law declared by KV Janakiraman case (AIR 1991 SC 2010) may be quashed and set aside as a whole or in the alternative, principle of severability may be applied qua the offending part by keeping valid part intact;*
> *(iv) That the respondents No. 1 to 3 may be restrained from adding new grounds for resorting to adoption of sealed cover in promotions other than the ground as contemplated in KV Janakiraman Case (AIR 191 SC 2010);"*

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

The petitioner joined the department of Excise and Taxation of the respondent-State as an Excise and Taxation Officer on 05.12.1997. He was promoted to the post of Assistant Excise and Taxation Commissioner on 09.12.2008. Thereafter, he was promoted to the post of Deputy Excise and Taxation, Commissioner on 14.12.2015. He remained posted as Assistant Excise and Taxation Commissioner, Sirmaur at Nahan, from August 2012 to June, 2015. On 03.04.2016, CID Department of the Government of Himachal Pradesh registered an FIR bearing No. 9/2016, under Sections 420, 468,471,406, 201, 217, 218 and 120-B of the Indian Penal Code and 13(1)(3) and 13(1)(d)(ii) of the Prevention of Corruption Act, 1988, in which, the petitioner was also named, though according to the petitioner, there was no specific allegation leveled against him in the FIR. Copy of the FIR is appended with the petition as Annexure P-1. According to the petitioner, after the Final Report was filed by the prosecution before the learned Trial Court on the basis of said FIR, he made a representation to the Principal Secretary (E&T) to the Government of Himachal Pradesh in terms of Annexure P-2, explaining in detail his stand with respect to the FIR, however, despite this representation of his, vide Annexure P-3, dated 23.09.2019, prosecution sanction was granted by the Principal Secretary concerned against the petitioner in reference to the abovementioned FIR. The petitioner was thereafter promoted to the post of Joint Excise and Taxation Commissioner on 26.10.2019.

3. The next promotional post from the post of Joint Excise and Taxation Commissioner is that of Additional Excise and Taxation Commissioner, which fell vacant w.e.f. 30.09.2020, on account of retirement of Shri Rohit Chauhan. Vide Annexure P-4, dated 07.09.2020, respondent No. 2, sent the integrity certificates of the eligible officers for promotion to the post of Additional Excise and Taxation Commissioner and this included the name of

the petitioner. However, in the certificate it was mentioned that a charge-sheet had been issued against the petitioner and disciplinary proceedings were pending against him and further prosecution for criminal charge was pending against the petitioner against whom prosecution sanction stood accorded. As per the petitioner, he was neither facing any disciplinary proceedings as on the date when the integrity certificate was issued nor any charges stood framed against him in the matter. It is further the case of the petitioner that vide letter dated 23.09.2020, respondent No. 1 called upon respondent No. 3 to issue Vigilance Clearance Certificate (VCC) in favour of eligible officers in the feeder cadre, and in response thereto vide letter dated 15.10.2020 (Annexure P-6), respondent No. 3 issued clearance certificates in favour of two officers but in respect of the petitioner, a note was appended, pointing out that VCC with respect to the petitioner was withdrawn as disciplinary proceedings were pending against him. According to the petitioner, the note in issue was based on an information, inadvertently given by respondent No. 2 to respondent No. 1, in which, it was erroneously mentioned that disciplinary proceedings were pending against the petitioner. Thereafter, vide communication dated 07.1.12.2020, addressed by respondent No. 2 to the Principal Secretary, Excise and Taxation, names of three eligible officers, including the petitioner, were forwarded and request was made to convene a DPC for filing up the post of Additional Commissioner (Excise and Taxation). The petitioner made a detailed representation (Annexure P-8), dated 10.12.2020 to respondent No. 1, requesting for consideration of his case for promotion on the basis of the averments contained therein.

4. It is further the case of the petitioner that in terms of Annexure P-9, addressed to respondent No. 1 by Deputy Inspector General of Police, State CID, dated 20.01.2021, respondent No. 1 was informed that a case was pending before Trial Court and charges against the petitioner were still not framed by the learned Court. It is further the case of the petitioner that

thereafter vide Annexure P-10, Commissioner of State Excise and Taxation Department, called upon Additional Chief Secretary (E&T) to the Government of Himachal Pradesh for modification of the integrity certificate of the petitioner on the ground that no charges ware framed by the Court against the petitioner as per information received from State CID. This was followed by Annexure P-10/2, which was a communication addressed by Additional Chief Secretary (E&T) to the Government of Himachal Pradesh to Additional Chief Secretary (Vigilance) to the Government of Himachal Pradesh, in which, Additional Chief Secretary (Vigilance) was called upon to reconsider the case of issuance of VCC in favour of the petitioner since no charge was framed against him in terms of information received from State CID by the Court. Same was followed by issuance of another communication (Annexure P-11) by Commissioner of State Taxes and Excise, Himachal Pradesh to Additional Chief Secretary (E&T), dated 23.03.2021, which reads as under:-

> *"Subject: Regarding proposal for filling up the post of the Addl. Excise & Taxation Commissioner.*
> *Sir,*
> *In continuation to this Office endorsement No. 2-45/94-EXN-H-Vig.-Part VI-22292, dated 07.09.2020 and letter No. 2-24/98-EXN-H-\Vig.-III-loose-4938 dated 25.02.2021, it is submitted that the modified integrity certificate in r/o of Sh. R.D. Janartha, JT. ETC at Sr. No. 1, for which point no. 2 may be read as: "Certificate to the effect that no charge sheet has been issued against the officer and no disciplinary proceeding is pending against him as per this office record."*
> *This is for your kind information/necessary action please."*

5. Despite this, in terms of communication dated 24.03.2021, (Annexure P-12), respondent No. 3 wrote to respondent No. 1 that Vigilance Clearance Certificate cannot be issued in favour of the petitioner as a criminal case was pending against him in the Court of law since 10.05.2019 when the charge-sheet was submitted in the learned Court. This was followed by holding of the DPC in terms of Annexure P-13, wherein respondent No. 4 was promoted against the post of Additional Excise and Taxation Commissioner,

whereas the case of the petitioner was kept in sealed cover. It is in this background that the present petition has been filed by the petitioner.

6. Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner argued that act of the respondent-Department of keeping the case of the petitioner in sealed cover in the facts of this case is totally uncalled for as the grounds on the basis of which the department could have resorted to the sealed cover procedure were not existing in the case of the petitioner. Learned Senior Counsel drew the attention of the Court to Annexure P-9, which is the relevant extract of the Vigilance Manual of the Government of Himachal Pradesh. By making reference to Clause 6.4 of the same, learned Senior Counsel submitted that Vigilance Clearance Certificate can be denied in case of the eventualities mentioned in the abovementioned Clause 6.4, whereas in the case of the petitioner, none of the said eventualities was existing as on the date when DPC met. He submitted that neither the petitioner was figuring in the list of officers of doubtful integrity nor any regular departmental action was advised against him by the Vigilance Department nor any case of vigilance nature was pending against him in the Court of law on the relevant date. Learned Senior Counsel by referring to Annexure P-20, i.e. amendment which has been carried out in para 6.4 of Chapter-II of Himachal Pradesh Vigilance Manual, argued that the denial of the Vigilance Clearance Certificate to the petitioner on the basis of said amendment is completely unjustifiable in the eyes of law for the reasons that the amendment which has been carried out by the Department is bad in law, because it is against the law declared by Hon'ble Supreme Court in ***Union of India and others*** Vs. ***K.V. Jankiraman and others,*** (1991) 4 Supreme Court Cases 109. Accordingly, it was prayed on behalf of the petitioner that the present writ petition be allowed and the amendment which has been incorporated in para 6.4 of the H.P. Vigilance Manual be declared to be bad in law to the extent that it is against the judgment of Hon'ble Supreme Court of India in K.V. Jankiraman's case (supra)

and further the respondents be directed to open the DPC sealed cover proceedings and declare the result of the DPC with regard to promotion of the petitioner and if the petitioner is found recommended for promotion, then direction be issued to the respondents to promote the petitioner from the due date, i.e. from the date when respondent No. 4 was promoted to such post with all consequential benefits.

7. The petition has been opposed by the State on the ground that the case of the petitioner has been rightly kept in sealed cover for the reason that charge sheet stood issued against the petitioner, therefore, in terms of the instructions of the Government, the case of the petitioner had to be kept in sealed cover. Mr. Ajay Vaidya, learned Senior Additional Advocate General argued that the act of the Government of keeping the case of the petitioner in sealed cover is not bad in law and it is strictly as per the judgment of the Hon'ble Supreme Court of India in K.V. Jankiraman's case supra. He argued on the basis of reply filed by the respondents that the charge sheet against the petitioner was already submitted on 10.05.2019, and the case was pending trial with the Court of learned Special Judge, Sirmaur, and therefore, VCC could not have been issued in favour of the petitioner as per the instructions till he get clearance from the Court. Learned Senior Additional Advocate General also argued that it has been consistently held that framing of charges is not a prerequisite for adopting the sealed cover procedure in case where promotion of such an officer is due, and in such kind of situation, when a charge sheet in a criminal prosecution is issued to the employee, then it can be said that criminal prosecution is initiated against the employee. Learned Senior Additional Advocate General has heavily relied upon the amendment, which has been carried out in para 6.4 of Chapter-II of Himachal Pradesh Vigilance Manual, dated 27.10.2017 (Annexure P-20). On these bases, learned Senior Additional Advocate General argued that as there is no merit in the present petition, the same be dismissed. No other point was urged.

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

9. The controversy involved in the present case is in a very narrow compass. The moot issue which is to be decided by this Court is as to whether the Vigilance Clearance Certificate (VCC) can be denied to an employee if as on the date of issuance of the VCC, no charges have been framed against such an employee by a Criminal Court or whether filing of investigation report by the Investigating Officer before the Court concerned is sufficient to deny the Vigilance Clearance Certificate. At this stage itself, it is relevant to refer to the judgment of Hon'ble Supreme Court in Union of India and others vs. K.V. Jankiraman, (1991) 4 Supreme Court Cases 109. In the said case, the question involved which stood decided by Hon'ble Supreme Court stands culled out in para-8 of the judgment, which para is reproduced herein below:-

> *"8. The common questions involved in all these matters relate to what in service jurisprudence has come to be known as "sealed cover procedure". Concisely stated, the questions are:(1) what is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee? (2) What is the course to be, adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date?' The ,'sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over'. Hence, the relevance and importance of the questions."*

10. This Court is concerned with the question No. 1 framed by Hon'ble Supreme Court, i.e. "what is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee?" The first question was decided by Hon'ble Supreme Court as under:-

"16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/ criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: (ATC p. 196, para 39)

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

*(2) * * **

*(3) * * **

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge

> *sheet filed before the criminal court and not before;" 17. There' is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.*
> *18. We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal."*

11. This Court is of the considered view that Hon'ble Supreme Court of India has clearly and in unambiguous terms laid down the law that criminal proceedings can be said to be pending against an employee only after the charges have been framed. Charges are framed by a Court. Any other interpretation of the judgment of Hon'ble Supreme Court will do violence with the judgment for the reasons that filing of the investigation report on the basis of lodging of the FIR by the Investigating Officer in terms of the provisions of Section 173 of the Code of Criminal Procedure before the Trial Court cannot be treated to be the date from which it can be said that criminal proceedings are pending against an employee. The filing of the investigation report is a statutory duty enshrined upon the Investigating Officer in terms of provisions of Section 173 of the Code of Criminal Procedure, and it is only after the Court, upon perusal of the investigation report and after hearing the accused, frames charges against the accused, then, it can be said that criminal proceedings stand initiated against the accused. In this regard, it is relevant to refer to an order passed by Central Administrative Tribunal in *O.A. Nos. 941 and 1131 of 2011, titled as Chacko Eapen Vs. Union of India and others (OA No. 941 of 2011) and Raghunathan.M.V. and others Vs. Union of India and others (OA No. 1131 of 2011)*, decided on 8th February, 2012, in para-5 whereof,

learned Tribunal, after placing reliance upon the judgment of Hon'ble Supreme Court in K.V. Jankiraman, has held as under:-

> *"5. In the light of the O.Ms cited above, in the instant case, sealed cover procedure is applicable only when prosecution for criminal charge is pending. As stated by the respondents, vigilance clearance was not granted to the applicants as a charge sheet has been filed against the applicants in the Court. As per O.M. dated 25.10.2004, a simple vigilance clearance would need to be furnished where none of the three conditions in O.M. dated 14.09.1992 has arisen. Therefore, the issue to be decided is whether a criminal case is pending against the applicants. A criminal case can be said to be pending only after issuance of a charge sheet by the competent Court to the accused. The relevant extract from the judgement of the Apex Court in Union of India vs. K.V. Janakiraman, AIR 1991 SC 2010, is reproduced as under:*
> *"On the first question, viz, as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have been commenced, the Full Bench of the Tribunal has held that it is only when a charge memo in a disciplinary proceeding or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The Sealed cover procedure is to be resorted to only after the charge memo/charge sheet is filed. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the Sealed Cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charges memo/ charge sheet, it would not be in the interest of purity of administration to reward the employee with promotions, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases."*
> *(emphasis supplied)"*

12. This Court is of the considered view that a person against whom criminal prosecution is filed can be said to be charge sheeted in those proceedings only after the framing of the charges against him. Before the

charges are framed, a person can always seek his discharge and in case the person is able to make out a case for his discharge, then, the learned Court can pass appropriate orders discharging him and by dropping the case against him. Mere filing of the investigating report by the Investigating Officer before the Court concerned, cannot be said to be the stage of initiation of prosecution. Therefore also, the denial of Vigilance Clearance Certificate to the petitioner on the ground that as on the date concerned, the charge sheet stood filed by the Investigating Officer before the Court concerned is not sustainable in law.

13. Chapter 16.24 of the Hand Book on Personnel Matters Vol-I, deals with the principles for promotion to the "Selection" and "Non-Selection" posts. Chapter 16.32 deals with consideration of cases where disciplinary/Court proceedings etc. are pending. In this Chapter, it is provided that in the following cases of Government Servants, sealed cover procedure will be applicable:-

> *"(i)* ***Cases of Government servants to whom Sealed Cover Procedure will be applicable***
> *At the time of consideration of the cases of Government servants for promotion, details of Government servants in the consideration zone for promotion falling under the following categories for whom sealed cover procedure is to be adopted should be specifically brought to the notice of the Departmental Promotion Committee:-*
> *(a) Government servants under suspension*
> *(b) Government servants in respect of whom a charge sheet has been issued and disciplinary proceedings are pending; and*
> (c) *Government servants in respect of whom prosecution for a criminal charge is pending."*

14. The Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training), in terms of office memorandum dated 02.11.2012 (Annexure P-18), on the subject "Comprehensive review of instructions pertaining to vigilance clearance for promotion-regarding", after taking into consideration the pronouncement of the judgment of Hon'ble

Supreme Court in K.V. Jankiraman's case (supra) issued the three guidelines. The three guidelines referred to in para-2 of Department's O.M. dated 14.09.1992, are as under:-

> *"(i) Government servants under suspension;*
> *(ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; and*
> *(iii) Government servants in respect of whom prosecution for a criminal charge is pending."*

15. In this office memorandum, reference has also been made to Rule 9(6)(b)(i) of CCS (Pension) Rules, 1972, which provides as under:-

> *"(b) judicial proceedings shall be deemed to be instituted-*
>
> *(i) In the case of criminal proceedings, on the date of which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made."*

16. The un-amended Clause 6.4 of the Vigilance Manual of the Government of Himachal Pradesh was as under:-

> *"6.4. The vigilance clearance certificate will not be issued by the Vigilance Department or the competent authority as the case may be in respect of a Government servant if-*
>
> *(1) His name figures in the list of officers of doubtful integrity, or*
>
> *(2) Regular department action against him has been advised by the Vigilance Department, or*
>
> *(3) A case of vigilance nature is pending against him in a court of law, or*
>
> *But the vigilance clearance certificate will be issued by the competent authority or the Vigilance Department as the case may be in respect of Government servant in all other cases."*

17. After the amendment was carried out in Clause 6.4 vide Annexure P-20, now the same reads as under:

"6.4 "The vigilance clearance certificate will not be issued by the Vigilance Department or the competent authority as the case may be in respect of a Government servant if-

1. *He/she is under suspension; or*
2. *In respect of whom a charge sheet has been issued and the disciplinary proceedings are pending; or*

3. Against whom prosecution for a criminal charge is pending.

Note:- As regards the stage when prosecution for a criminal charge can be stated to be pending, the Rule-9(6)(b)(i) of CCS(Pension) Rules, 1972 shall be followed which provides as under:

"(b) judicial proceedings shall be deemed to be instituted-

(i) In the cases of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made"

But the vigilance clearance certificate will be issued by the competent authority or the Vigilance Department as the case may be in respect of a Government servant in all other cases."

18. Clause 3 of the amended para 6.4 has to be read down to mean that a criminal charge has to be construed to be pending against an incumbent only after charges stands framed against him by the competent Court of law and thereafter charge sheet stands issued to him. By no stretch of imagination, it can be held that judicial proceedings can be deemed to be pending against an incumbent on the date on which an investigation report is submitted the officer in terms of the provisions of Section 173 of the Code of Criminal Procedure. This Court would again like to lay stress on the fact that Hon'ble Supreme Court of India in K.V. Jankiraman's case (supra) has categorically held while answering question No. 1 "as to when for the purpose of sealed cover procedure, disciplinary proceedings can be said to have commenced", that the same can be said to have been commenced only when a charge sheet in a criminal prosecution is issued to the employee. Hon'ble Supreme Court has upheld the findings of the learned Tribunal that sealed cover procedure is to be resorted to only when a charge sheet is issued.

19. Chapter-XII of the Criminal Procedure Code, 1973, deals with information to the Police and their powers to investigate. Section 173 of the

same provides for report of the Police Officer on completion of investigation. This section is reproduced herein below:-

> *"Report of police officer on completion of investigation.*
> *(1) Every investigation under this Chapter shall be completed without unnecessary delay.*
> *(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-*
> *(a) the names of the parties;*
> *(b) the nature of the information;*
> *(c) the names of the persons who appear to be acquainted with the circumstances of the case;*
> *(d) whether any offence appears to have been committed and, if so, by whom;*
> *(e) whether the accused has been arrested;*
> *(f) whether he has been released on his bond and, if so, weather with or without sureties;*
> *(g) whether he has been forwarded in custody under section 170.*
> *(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.*
> *(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,*
> *(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.*
> *(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-*
> *(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;*

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.
(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.
(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).
(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

20. Thus a carful perusal of Section 173 demonstrates that the same provides that as soon as the investigation is completed, the officer in-charge of the Police Station shall forward to the Magistrate empowered to take cognizance of the offence on a police report “a report in the form prescribed by the State Government, stating—

(a) The names of the parties;
(b) The nature of the information;
(c) The names of the persons who appears to be acquainted with the circumstances of the case;
(d) Whether any offence appears to be have been committed and, if so, by whom;
(e) Whether the accused has been arrested;
(f) Whether he has been released on his bond and, if so, whether with or without sureties;

(g) Whether he has been forwarded in custody under section 170;

(h) Whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C [Section 376D or section 376E of the Indian Penal Code (45 of 1860)]

21. Now incidentally, Section 173 nowhere uses the word 'charge sheet'. Word 'charge' finds mention in Chapter XVII of the Code of Criminal Procedure, which Chapter contains Sections 211 to 244 of the Code of Criminal Procedure. Section 211 of the Code deals with the contents of charge and the same reads as under:-

> *"**211. Contents of charge**.*
> *(1) Every charge under this Code shall state the offence with which the accused is charged.*
> *(2) If the law which creates the offence gives it any specific-name, the offence may be described in the charge by that name only.*
> *(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.*
> *(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.*
> *(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.*
> *(6) The charge shall be written in the language of the Court.*
> *(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed.*
> ***Illustrations***
> *(a) A is charged with the murder of B. This is equivalent to a statement that A' s act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code (45 of 1860); that it did not fall within any of the general exceptions of the*

> *said Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it.*
> *(b) A is charged under section 326 of the Indian Penal Code (45 of 1860), with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the said Code-, and that the general exceptions did not apply to it.*
> *(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property- mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property- mark, without reference to the definitions of those crimes contained in the Indian Penal Code (45 of 1860); but the sections under which the offence is punishable must, in each instance, be referred to in the charge.*
> *(d) A is charged under section 184 of the Indian Penal Code (45 of 1860) with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words."*

22. Chapter XVI of the Code of Criminal Procedure deals with commencement of proceedings before Magistrates and close scrutiny of the provisions of Section 204 to 210 also demonstrates that in none of these statutory provisions, the word 'çharge sheet' is used. Section 207 of the Code also provides for supply to the accused of copy of police report and other documents in any case where the proceedings have been instituted on a police report. This Section also does not the word 'çharge sheet'. Therefore, a criminal charge can be stated to be pending against an incumbent only when a charge sheet is served upon the accused and which obviously will follow the framing of the charge and thus by no stretch of imagination it can be held that a prosecution for criminal charge can be said to be pending against an employee before the charges are framed. Clause 3 of the amended para 6.4 of the Himachal Pradesh Vigilance Manual is thus read down as above. Meaning thereby that the Vigilance Clearance Certificate cannot be withheld in respect

of a government servant against whom charges have not yet been framed in a criminal case and the said certificate cannot be withheld only on the ground that the police report stands filed before the Magistrate concerned under Section 173 of the Criminal Procedure Code. If we apply the above discussion to the facts of the present case, it is abundantly clearly that adopting of sealed cover procedure in the case of the present petitioner was totally uncalled for because Vigilance Clearance Certificate could not have been denied in favour of the petitioner as it is not in dispute at all that as on the date when the Vigilance Clearance Certificate was requisitioned or when the DPC met for consideration of eligible candidates for promotion to the post of Additional Excise and Taxation Commissioner, charges had yet not been framed in the criminal case against the petitioner.

23. Accordingly, in view of above discussion, this petition is allowed. Amendment carried out in terms of Clause 3 of para 6.4 to Chapter-II of Himachal Pradesh Vigilance Manual in terms of Annexure P-20, dated 27.10.2017, to the effect that it stands mentioned therein that the Vigilance Clearance Certificate will not be issued by the Vigilance Department or the competent authority in respect of a Government servant if against him prosecution for a criminal charge is pending, is read down to mean that prosecution for a criminal charge can be construed to be pending against an employee only if charges stand framed against him by the competent Court of law and thereafter charge sheet stands issued to him and not on the basis of date of submission of the final report in terms of Section 173 of the Criminal Procedure Code. This provision is read down as mentioned herein above, in light of law declared by Hon'ble Supreme Court in K.V. Jankiraman's case (supra). Therefore, the act of the respondent-Department of denying Vigilance Clearance Certificate to the petitioner for his being considered for promotion to the post of Additional Excise and Taxation Commissioner is held to be bad in law for the reason that Vigilance Clearance Certificate could not have been

denied in favour of the petitioner until and unless charges stood framed against him on the date concerned by the Court of law in the criminal case. Further, the act of the respondent-Department of following sealed cover procedure in the case of the petitioner is also held to be bad in law and it is directed that sealed cover be opened forthwith, and in case, the name of the petitioner is found recommended for promotion to the post in issue, then, said recommendation be given effect to forthwith and the petitioner be promoted as from the date when respondent No. 4 was promoted to the post in issue, with all consequential benefits, including monetary and seniority.

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

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

Between:-

OM CHAND SON OF SHRI JAGAT RAM, RESIDENT OF VILLAGE DURAH, POST OFFICE THACHI, SUB-TEHSIL BALI-CHOWKI, DISTRICT MANDI, H.P., PRESENTLY WORKING AS JUNIOR ASSISTANT IN THE OFFICE OF DEVELOPMENT OFFICER, HIMACHAL PRADESH KHADI AND VILLAGE INDUSTRIES BOARD, KULLU, DISTRICT KULLU, H.P.

…….PETITIONER

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

AND

1. HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-4, THROUGH ITS CHIEF EXECUTIVE OFFICER.

2. SHRI GOVERDHAN SINGH, SENIOR ASSISTANT (ON DEPUTATION), R.T.O. OFFICE BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.
3. SHRI MEHAR CHAND, SENIOR ASSISTANT, IN THE OFFICE OF ASSISTANT DEVELOPMENT OFFICER, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, BILASPUR, DISTRICT BILASPUR, H.P.
4. SHRI BALDEV SINGH,SENIOR ASSISTANT, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-171004.
5. SMT. BIMLA VERMA, SENIOR ASSISTANT, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-171004.
6. SMT.ANIL KUMARI, SENIOR ASSISTANT, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-171004.
7. SMT. BIMLA THAKUR, SENIOR ASSISTANT, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-171004.
8. SMT. BIMLA KAMAL, SENIOR ASSISTANT, HIMACHAL PRADEESH KHADI AND VILLAGE INDUSTRIES BOARD, CLEAVE LAND, SHIMLA-171004.

…….RESPONDENTS

(MR. RISHI TANDON, ADVOCATE FOR R-1/ BOARD;
MS. KOMAL CHAUDHARY, ADVOCATE FOR R-2, 4, 5 AND 6)

CIVIL WRIT PETITION
No. 5730 OF 2013
Decided on: 20.10.2022

Constitution of India, 1950-Article 226- Petition filed for writ of mandamus directing regularization of services of the petitioner and for giving him seniority of Senior Assistant above respondents No. 2 to 8, with all consequential benefits- **Held-** The DPC has decided against the regularization of the petitioner in 1996- petitioner suppressed the same- he cannot be said to have come to court with clean hands- petitioner failed to challenge the order of DPC for 17 years- unexplained delay- Petition dismissed as it was sans merit (Paras 6-8)

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

J U D G E M E N T

By way of this petition, the petitioner has prayed for the following substantive reliefs:-

> *"i) That office order dated 17.05.1996, contained in Annexure p-4, office order dated 11.06.1997, contained in Annexure P-5 and office order dated 08.02.2013, contained in Annexure P-8, may kindly be quashed, after issuing writ of certiorari.*
>
> *ii) That the respondent Board may kindly be directed to correct seniority list of Junior Assistants/Clerks as it stood on 30.06.2004, contained in Annexure P-6 as well as seniority list of Junior Assistants/Clerks as it stood on 30.09.2012, contained in Annexure P-1, by issuing a writ of certiorari.*

iii) That the respondent Board may kindly be directed to regularize the services of the petitioner with effect from July, 1995 and given the seniority to the petitioner of Senior Assistant above respondents No. 2 to 8, with all consequential benefits, by issuing a writ of mandamus."

2. The case of the petitioner is that he was appointed as a Clerk, on daily wage basis, in the month of July, 1985. He was posted as such in the office of Assistant Development Officer, H.P. Khadi and Village Industries Board, Kullu, District Kullu, H.P. The petitioner alongwith other persons filed a writ petition No. 1174/1995, praying for regularization of their services after completion of 10 years. The Division Bench of this Court vide judgment dated 01.05.1996, held that the petitioner had already completed 10 years service, therefore, his case should be considered for regularization. However, respondent-Board regularized the services of the petitioner w.e.f. 01.01.1997. Private respondents filed original application No. 1560 of 1990, before the Erstwhile Himachal Pradesh Administrative Tribunal. This original application was decided on 07.03.1995. In terms of the judgment passed by the learned Tribunal, the relief being sought by the original applicants was not granted. Further as per the petitioner, respondent-Board wrongly and illegally absorbed respondents No. 2 to 4 as Clerks w.e.f. 01.08.1995, taking the advantage of the decision rendered in CWP No. 1174 of 1995. Similarly, respondents No. 5 to 8 who were the Spinning Organizers, were absorbed as Clerks over and above the petitioners. Whereas respondents No. 2 to 4 were absorbed as Clerks vide Annexure P-4, the remaining private respondents were absorbed as Clerks vide Annexure P-5. Thereafter, as per the petitioner when a tentative seniority list of the Clerks was issued in which the name of the private respondents was reflected above in seniority from the petitioner, he filed objections thereto, which stood rejected vide Annexure P-8 and it is in this background that the present petition was filed.

3. Mr. G.R. Palsra, learned Counsel for the petitioner has argued that after the decision of the High Court in CWP No. 1174 of 1995, it was incumbent upon the respondents to have had regularized the services of the petitioner post completion of 10 years of service on daily wage basis. This according to him, was not done by the department and the petitioner was wrongly regularized w.e.f. 01.01.1995. He further submitted that as the petitioner came to know of this fact only by way of tentative seniority list, therefore, the present petition be allowed as prayed for and after quashing the impugned Annexure, respondents be directed to regularize the services of the petitioner w.e.f. July, 1995, when he completed 10 years of service on daily wage basis.

4. The petition is opposed by the contesting respondents *inter alia* on the ground that the petitioner is not approached the Court with clean hands and further the petition was hit by delay and laches. Respondent No. 1 has taken the stand that after the decision of the writ petition filed by the petitioner, a DPC was duly held to consider the case of the petitioner for regularization in terms of the directions passed by the High Court in his case, as is evident from Annexure R-1 appended with the reply and as the petitioner was not found fit for regularization in terms of his prayer, accordingly, the petitioner was intimated vide Annexure R-2, dated 24.0-8.1996 that his case for regularization was considered by the DPC for regularization and he was not found fulfilling the requisite conditions for regularization. Learned Counsel for respondent No. 1 has submitted that the petitioner has concealed these facts by not disclosing these facts in the writ petition and further Annexure R-2 was not challenged by the petitioner within one year as from the date of its issuance before the learned H.P. Administrative Tribunal, which at the relevant time was functioning, keeping in view of the fact that respondent No. 1 was amenable to the jurisdiction of the learned Tribunal. Similarly, neither Annexure P-4 nor Annexure P-5, i.e.

office orders dated 17.5.1996 and 11.06.1997, in terms whereof the private respondents were absorbed as Clerks, were challenged by the petitioner before the learned Tribunal within one year or within some reasonable time thereafter. Learned Counsel has further argued that otherwise also, a perusal of the proceedings of the meeting of the DPC, dated 24.05.1996, appended with the reply as Annexure R-1, would demonstrate that rejection of the case of the petitioner for regularization was on the ground that the petitioner was not completing 10 years of service as on the date when the DPC was convened, therefore, in the absence of any challenge being there to the said decision of the DPC, the relief being sought for by the petitioner cannot be granted to him and therefore, the petition deserves to be dismissed.

5. Ms. Komal Chaudhary, learned Counsel for respondents No. 2, 4, 5 and 6 has adopted the arguments made by learned Counsel for respondent No. 1.

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

7. A perusal of the judgment passed by this Court in CWP No. 1174 of 1995 filed by the petitioner for his regularization, copy whereof is appended with the petition as Annexure P-2, demonstrates that this writ petition was disposed of by this Court with the direction to the respondent-Board that as petitioner Om Chand had already completed 10 years of service as Clerk, therefore, his case should be considered for regularization in service. Thereafter, a DPC was convened by the respondent-Board which was held on 24th May, 1996, proceedings whereof have been appended with the reply of respondent No. 1 as Annexure R-1, and in terms of the minutes of the said Committee, the petitioner was found to have had completed 8 years of service as on 01.04.1995, and therefore, his case was not found fit for regularization in terms of the government instructions prevailing at the relevant time. Annexure R-2 appended with the reply demonstrates that this decision was

duly communicated to the petitioner, yet, a perusal of the writ petition demonstrates that there is no reference of this order therein and incidentally in the rejoinder which has been filed to the reply by the petitioner, again no stand has been taken by the petitioner that this order (Annexure R-2 appended with the reply) was not communicated to him. That being the case, this Court concurs with the submissions made by learned Counsel for respondent No. 1 that the petitioner indeed has not approached the Court with clean hands and has suppressed material particulars from the Court.

8. Be that as it may, it remains a fact that as the proceedings of the DPC, in terms whereof the case of the petitioner for regularization was rejected, have not been challenged by the petitioner till date, this Court is of the considered view that the petitioner otherwise has no locus to challenge the tentative seniority list, in which, his date of regularization is the basis of reflecting his seniority. As far as Annexures P-4 and P-5 are concerned, this Court is of the considered view that there is no infirmity in the same for the reason that as the petitioner was not yet regularized as on the date when Annexures P-4 and P-5 were issued, he had no locus to challenge the said orders and assuming that he was aggrieved by the said orders, then, he ought to have had assailed the same within the period of limitation as described in the Himachal Pradesh Administrative Tribunals Act or within some reasonable time thereafter. In fact, there is no explanation in the entire petition as to why there is a delay of almost 17 years in assailing these orders, therefore, the petition sans merit.

Accordingly, in view of the findings returned hereinabove, as this Court does not find any merit in this petition, the same is accordingly dismissed being devoid of any merit. Pending miscellaneous application(s), if any, also stand disposed of.

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

Between:-

JEET RAM, S/O SH. BANSI RAM, RESIDENT OF VILLAGE DABLOG, PO MAMLIG, TEHSIL KANDAGHAT, DISTT. SOLAN, H.P.

…….APPELLANTS

(BY MR. G.D. VERMA, SENIOR ADVOCATE WITH MR. B.C. VERMA, ADVOCATE)

AND

SH. LAIQ RAM, S/O SH. BANSI RAM, RESIDENT OF VILLAGE PANJROL,, PLASTA, TEHSIL KANDAGTHAT, DISTT. SOLAN, H.P. SINCE DECEASED THROUGH HIS L.RS

1. (A) SH. VED PRAKASH SINCE DECEASED THROUGH LRS

    1(A)(I). SMT. LAJWANTI WIDOW OF LATE SH. VED PRAKASH,
    1(A)(II). REETA KUMARI D/O LATE SH. VED PRAKASH,
    1(A)(III) ANITA KUMARI D/O LATE SH. VED PRAKASH
    1(A)(IV) DEEPA KUMARI, D/O LATE SH. VED PRAKASH,
    1(A)(V) SMT. TANUJA KUMARI, D/O LATE SH. VED PRAKASH,
    1(A)(VI). SH. RAKESH KUMAR, S/O SH. LATE SH. VED PRAKASH,

    ALL RESIDENTS OF VILLAGE PLASATA- PANJROL, PO AND SUB TEHSIL MAMLIG, DISTRICT SOLAN, H.P.

1 (B). SH. RAMA NAND,
1(C). SH. RAM CHAND,

ALL SONS OF LATE SH. LAIQ RAM

1(D). SMT. GEETA DEVI, D/O LATE SH. LAIQ RAM,
1(E). SMT. PHULMA DEVI, W/O LATE SH. LAIQ RAM,

ALL RESIDENTS OF VILLAGE PANJROL-PLASATA, PO AND SUB TEHSIL MAMLIG, DISTRICT SOLAN, H.P.

.....RESPONDENTS

{MR. TEK CHAND SHARMA, ADVOCATE FOR R-1(A) TO 1(E), ADVOCATE)

REGULAR SECOND APPEAL
No. 339 OF 2004
Reserved on: 24.08.2022
Decided on: 05.9.2022

Indian Evidence Act, 1872- Section 101-Section 102-Section 106; **Code of Civil Procedure, 1908**- Section 100 - Second appeal filed against order of first appellate court reversing trial court's decision – Prayer made to set aside the gift deed executed by mother in favour of respondent-son as vitiated by fraud, undue influence and misrepresentation – **Held-** Onus to prove fraud etc lies on the party who so alleges its existence as per Section 102- reverse onus under in case of fiduciary relations – relationship between son and mother cannot be generalized as a fiduciary relation – no reverse onus in the present case- witnesses of appellants have testified as to love and affection of mother for respondent – large part of property transferred to appellant son's descendants as well- nothing on record to prove absence of free consent- Decision of first appellate court affirmed (Paras 15-17)

Cases referred:

Krishna Mohan Kul alias Nani Charan Kul and Another Vs Pratima Maity and others, (2004)9SCC 468;

This appeal coming on for pronouncement of judgment this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this regular second appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Solan, in Civil Appeal No. 12-S/13 of 2004, Laiq Ram Vs. Jeet Ram, dated 17.05.2004, in terms whereof, the learned first Appellate Court while allowing the appeal filed by the respondents herein, set aside the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Kandaghat, District Solan, H.P. in Civil Suit No. 203/1 of 1994, titled as Nanki (deceased) through L.Rs vs. Laiq Ram, dated 23.01.2004.

2. Brief facts necessary for the adjudication of this appeal are that the predecessor-in-interest of the appellant, namely, Smt. Nanki (hereinafter to be referred as the original plaintiff'), mother of both the appellant as well as the respondent, filed a suit for declaration that gift deed No. 188, dated 15.10.1994, executed in favour of the defendant by her was obtained by fraud, misrepresentation of facts and undue influence. The case of the original plaintiff was that she was an old lady who was residing with her elder son Jeet Ram at Dablog. The defendant, who was her younger son, was residing at Panjrol. Her younger son never cared about her and three months before the filing of the suit the defendant took the plaintiff to his house on the pretext that his daughter-in-law was in family way. Plaintiff was an accomplished midwife. She was taken to Kandaghat by the defendant who got a document executed by her, which she later came to know was a Will executed both in favour of Jeet Ram and the defendant. According to the plaintiff, she had no intention to execute any such Will. She continued to stay in the house of the defendant on his request who again brought her to Kandaghat in the company of some close relatives and got another document executed from her on the pretext that the land of the plaintiff was to be transferred in favour of Jeet Ram as he, as an obedient son, was performing all the duties towards his mother. According to the plaintiff, on account of her advanced age, she could not understand what was asked by the Sub Registrar Kandaghat, however, she never intended to gift the suit land to the defendant at any point of time. She later on informed plaintiff Jeet Ram that she had got transferred the suit land in his favour by way of a gift deed but on inquiry, it was revealed that defendant had got executed the gift deed in his own favour. Hence the suit.

3. The defendant resisted the suit on the ground that there was no strained relationship between the plaintiff and the defendant as alleged. According to the defendant, the plaintiff was residing with both her sons as per her free will and in fact she was living with the defendant from the

beginning of the year 1983 when Jeet Ram had refused to maintain her. Defendant stated that he had no knowledge of execution of any alleged will. According to him, it was in the month of November 1994, that Jeet Ram took the plaintiff to his house on the ground that his daughter-in-law had aborted the child and the contention of the plaintiff that the gift deed was a result of mis representation or fraud etc. were incorrect.

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

1. *Whether the Gift Deed dated 15.10.1994 is a result of fraud, undue influence and mis-representation of the fact, as alleged? OPP*
2. *Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP*
3. *Whether the plaintiff has no cause of action? OPP*
4. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? If so, what is the correct valuation? OPD*
5. *Relief.*

5. On the strength of the pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1:	*Yes.*
Issue No. 2:	*Yes.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Relief :	*The suit of the plaintiff is hereby decreed as per the operative part of the judgment.*

6. Learned Trial Court in terms of its judgment and decree held that the gift deed allegedly executed by Nanki in favour of the defendant dated 14.10.1994 and registered on 15.10.1994 (Ext. PW1/A) was invalid, inoperative and void. Learned Trial Court also restrained the defendant from transferring or alienating the suit property on the basis of gift.

7. In appeal, the judgment and decree passed by the learned Trial Court was set-aside by the learned Appellate Court by holding that that deceased Nanki had executed the gift deed in favour of the defendant (wrongly written therein as the plaintiff) voluntarily and fraud, misrepresentation and undue influence do not stand proved. Learned Appellate Court also held that it was recited in the gift deed that the possession of the suit property stood delivered to the defendant and defendant had accepted the gift deed and further plaintiff Jeet Ram had admitted that now mutation of the suit land was also attested in favour of the defendant and as possession follows the title, therefore, the presumption was that possession of the suit land was with the defendant.

8. Feeling aggrieved, the plaintiff has filed this regular second appeal.

9. It is relevant to mention at this stage that the original plaintiff, namely, Smt. Nanki died during the pendency of the civil suit itself and her son, namely, Jeet Ram, was substituted in her place as her legal representative. During the pendency of this appeal respondent/ defendant Liaq Ram has also died and his legal representatives have been brought on record.

10. This appeal was admitted by this Court on 31.03.2005 on the following substantial question of law:-

> *"6.* ***Whether before interfering with the findings of the Learned Trial Court, the lower Appellate Court, was required to record specific reasons for taking a contrary view and since this has not been done, therefore, the findings as recorded by Ld. Lower appellate Court are liable to be set aside?"***

11. Mr. G.D. Verma, learned Senior Counsel appearing for the plaintiff has taken the Court through the pleading of the parties as well as evidence on record. Learned Senior Counsel argued that the defendant did not lead any evidence whatsoever to demonstrate that the gift deed was

voluntarily executed by the original plaintiff in favour of the defendant. As per learned Senior Counsel, neither the scribe of the Will nor the attesting witnesses, nor any responsible Officer from the Office of Sub Registrar where the gift deed was registered, were examined by the defendant to substantiate that the gift deed was executed voluntarily by Smt. Nanki in favour of the defendant and this was more so necessary in view of the fact that the original plaintiff was in advanced stage of age and thus was not in a position to know what was good or bad for her or what was right or wrong. Learned Senior Counsel reiterated that the document was a void document and the transaction was a sham one**.** Consent of the plaintiff and her signatures were obtained on the document fraudulently and in a deceitful manner and therefore, the findings of the learned Trial Court were correct findings and disturbance thereof by the learned Appellate Court is totally unjustifiable. Learned Senior Counsel has further argued that no reasoning has been given by the learned Appellate Court as to why it was interfering with the judgment passed by the learned Trial Court. Learned Senior Counsel argued that as the parameters set up by the Hon'ble Supreme Court in its judgment passed in ***Krishna Mohan Kul alias Nani Charan Kul and Another*** Vs ***Pratima Maity and others***, (2004)9SCC 468, do not stand complied with by the learned Appellate Court, therefore also, the judgment and decree passed by the learned Appellate Court are liable to be quashed and set aside.

12. Mr. Tek Chand Sharma, learned counsel for the respondent-defendant argued that there was no infirmity with the judgment and decree passed by the learned Appellate Court, which rightly set aside the judgment and decree passed by the learned trial Court. Mr. Sharma, argued that as it was the allegation of the plaintiff that the gift in issue was a result of fraud and mis representation etc., the onus was squarely upon the plaintiff to prove this fact. According to him, the onus was not upon the defendant to establish that the gift was a valid gift and the onus was upon the plaintiff to prove

his/her case. Mr. Sharma also argued that the judgment of the Hon'ble Supreme Court reported in (2004) 9 SCC 468 (supra) being relied upon by the appellant had no applicability in the facts of the present case because the relationship between mother and son is not fiduciary relationship. Learned Counsel also argued that in terms of the provisions of Section 102 of the Indian Evidence Act, no evidence was led by the plaintiff to prove that the gift was a result of mis-representation or fraud and the onus therefore was not discharged by the plaintiff to prove his case. Mr. Sharma argued that the document in issue being a registered document, the presumption was attached to it in terms of Section 68 of the Evidence Act and plaintiff failed to rebut the presumption so attached with the registered document. Learned Counsel also argued that even otherwise a close scrutiny of the record demonstrates that the suit was filed by and at the behest of Jeet Ram and not Nanki and even the evidence of the witnesses of the plaintiff demonstrates that Jeet Ram was having an eye on the property of Nanki and that Nanki was having amiable relationship with the defendant. Leaned counsel also argued that gift deed Ext. PW1/A was self explanatory as to why the same was executed by the mother and the reason was that major part of the property of the Nanki already stood bequeathed by her either in the name of the plaintiff Jeet Ram or the children of Jeet Ram. Mr. Sharma also argued that the judgment passed by the learned Appellate Court was a reasoned one and a perusal thereof clearly demonstrates as to why the judgment and decree passed by the learned Trial Court was set aside in appeal. Accordingly, he prayed for dismissal of the appeal.

13. I have heard learned counsel for the parties and also carefully gone through the judgments and decrees passed by both the learned Courts below as well as record of the case.

14. The substantial question of law, on which this appeal has been admitted, has already been referred to by me hereinabove. A perusal of the

judgment passed by the learned First Appellate Court demonstrates that after narrating the facts of the issue before it learned Appellate Court in para-6 observed that appellant's grievance was that the trial Court had not appreciated the evidence with respect to the execution of the gift deed as also with respect to the possession over the suit land in the right perspective and this had resulted in wrong findings on Issues No. 1 and 2. Thereafter, the learned Appellate Court framed the following points for determination:

> *"Point No. 1 Whether the learned trial court erred in returning the finding that the gift deed, in question, is vitiated by fraud, mis-representation and undue influence?*
> *Point No. 2 Final Order."*

15. The reasons which have been given from para 10 onward in the judgment passed by learned Appellate Court are for the determination of points which were framed by it on the contentions which stood raised in appeal by the appellants. Thus, as the question for determination before learned first Appellate Court was "as to whether the Trial Court had not appreciated the evidence with regard to execution of the gift deed as also with regard to possession of the suit land in right perspective", therefore, the reasoning which has been given by the learned Appellate Court in its judgment is in the course of answering the said question. Learned first Appellate Court also being the last Court of facts, both had a right to re-appreciate evidence and also owed a duty to the parties to re-appreciate the pleadings and evidence so as to adjudicate the issue before it. This is exactly what has been done by learned first Appellate Court in light of judgment and decree passed by learned Trial Court. Learned first Appellate Court has given reasons as to why it has decreed the suit by allowing the first appeal. It is also clearly borne out from the judgment and decree passed by learned first Appellate Court as to why it has taken a view contrary to the one taken by learned Trial Court. Therefore, the judgment and decree passed by the learned first Appellate Court is not liable to set aside on the ground that the judgment

lacks specific reasoning for taking the contrary view. This Court is of the considered view that specific reasonings are there as they stand spelled out in the body of the judgment as to why a different view has been taken. Substantial question of law is answered accordingly. Hon'ble Supreme Court in (2004) 9 SCC 468 has held that when fraud, misrepresentation or undue influence is alleged by a party in suit, normally the burden is on said party to prove such fraud, undue influence or misrepresentation but when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real. In other words, that the transaction is genuine and bona fide. Hon'ble Supreme Court has held that in such a case, the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence and the person standing in the fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. These observations were made by Hon'ble Supreme Court in light of the executant of the document being an old ailing elder person and no witness being examined to prove the execution of the deed or putting of the thumb impression. In Black's Law Dictionary 6th Edition, 'fiduciary relationship' has been defined as under:-

> **"Fiduciary or confidential relation.** A very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another. One found on trust or confidence reposed by one person in the integrity and fidelity of another. Such relationship ar5ises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal.

> Heilman's Estate, matter of, 37 III. App.3d 390, 345 N.E.2d 536, 540.
>
> A relation subsisting between two persons in regard to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. Out of such as relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other, business shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relation to each other. Examples of fiduciary relations are those existing between attorney and client, guardian and ward, principal and agent, executor and heir, trustee *and cestui que trust*, landlord and tenant etc."

16. In view of the definition of fiduciary relationship as in Black's Law Dictionary, the relationship between the son and mother cannot be termed to be fiduciary relationship and therefore, that being the case, the judgment being relied upon on behalf of the appellant of the Hon'ble Supreme Court referred to hereinabove, is of no assistance to the appellant. Otherwise also, as has already been held by learned Appellate Court, the evidence on record demonstrates that even the plaintiff witnesses have stated that Nanki loved both her sons with same affection and intensity and it is further a matter of record that the deceased had executed a gift deed in respect of 54 Bighas of land in favour of son of the appellant Jeet Ram, justification qua which as given by Jeet Ram that it was in lieu of redemption of mortgage by his son does not holds water for the reason, as is also evident from the judgment of learned Appellate Court that at the time when Jeet Ram wants the Court to believe that his son had redempted the mortgage, his son was only 7 years old. In fact, it has come in the cross-examination of Jeet Ram,

who entered the witness box as PW-1, that after he came to know about a gift deed having been executed by Nanki in favour of the defendant, it is he who went to the Lawyer namely Sh. P.D. Sharma and got a plaint drafted. The line of cross-examination of said plaintiff is thus suggestive of the fact that the suit was in fact filed at the behest of Jeet Ram, though in the name of the mother.

Be that as it may, the above points have been touched by this Court as the same were argued by learned Counsel for the parties, however, in light of what has been held hereinabove and in light of the answer which has been given by this Court to substantial question of law framed, this appeal being devoid of merit is dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly. No order as to costs.

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

Between:-

1. SHRI ROSHAN LAL SON OF SHRI BARDU RAM, R/O UP-MOHALL LAKHANPUR, TEHSIL SADAR, DISTT. BILASPUR, HP.
2. SMT. RAM PYARI, WIFE OF SHRI ROSHAN LAL, R/O UP MOHALL LAKHANPUR, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

…….APPELLANTS

(BY MR. RAJIV JIWAN, SENIOR ADVOCATE WITH MR. HITENDER VERMA, ADVOCATE)

AND

1. SHRI JAGAT PAL SON OF SHRI DEVI RAM;
2. RAJINDER KUMAR SON OF SHRI DEVI RAM;
   BOTH RESIDENTS OF UP-MOHAL LAKHANPUR, TEHSIL SADAR, DISTT. BILASPUR, HP.
3. SHRI KISHAN SINGH SON OF SHRI SANT RAM;
4. OM PRAKASH SON OF SHRI SANT RAM;
5. KUMARI MEENA D/O SHRI SANT RAM;
6. SMT. PREM LATA WIDOW OF SHRI SANT RAM;
7. PARMA NAND, SON OF SHRI DAYA RAM;
   ALL RESIDENTS OF UP-MOHALL LAKHANPUR, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

…….RESPONDENTS

{MR. NEERAJ GUPTA, SENIOR ADVOCATE WITH MR. AJEET JASWAL, ADVOCATE)

REGULAR SECOND APPEAL
No. 202 OF 2011
Decided on: 13.09.2022

Code of Civil Procedure, 1908- Section 100- second appeal- **Indian Succession Act, 1925**- Section 63- plaintiff claimed possession of two rooms in a house being owners- defendant claims inheritance and adverse ownership in alternative- trial court dismissed and lower appellate court decreed the suit- **Held**- Will made was not shrouded with suspicious circumstances- bare registration of will cannot substitute the provisions of Section 63 of Indian Succession Act- execution of will duly proved by plaintiffs in accordance with

law- upheld plaintiff's entitlement to disputed property- appeal dismissed. (Paras 14, 15)

This appeal coming on for HEARING this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this appeal, the appellants assail the judgment and decree passed by the Court of learned Additional District Judge, Ghumarwin, District Bilaspur, H.P. camp at Bilaspur, in Civil Appeal No. 35/13 of 2009, titled as Jagat Pal vs. Roshan Lal and others, dated 28.02.2011, in terms whereof, the learned Appellate Court decreed the suit of the plaintiffs, after setting aside the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Bilaspur, District Bilaspur, H.P. in Civil Suit No. 14/1 of 1996, titled as Jagat Pal and another Vs. Roshan Lal and others, dated 29.06.2009, whereby the suit for possession filed by the plaintiffs was dismissed.

2. Briefs facts necessary for the adjudication of the present appeal are that the contesting respondents/plaintiffs (hereinafter to be referred as the 'plaintiffs' for convenience sake) filed a suit against the present appellants/contesting defendants for possession of two rooms in a house situated on suit land comprised in Khewat No. 31/89, Khatoni No. 90/109 min old Khasra No. 39/519 and new Khasra Nos. 845, 846, Kita 2 measuring 207-25 square desi meters, situated in Up Muhal Lakhanpur, Tehsil Sadar, District Bilaspur, H.P. on the ground that Bardu Ram was the owner in possession of the suit land and after him, the plaintiffs were in possession of the house situated on the suit land except two rooms. These two rooms were occupied by the defendants. The possession of the two rooms was given to the

contesting defendants with the permission of Bardu Ram, who happened to be the grand-father of the plaintiffs and father of contesting defendant No. 1 and father-in-law of contesting defendant No. 2. As per the plaintiffs, Bardu Ram was maltreated by contesting defendants after their marriage. They never looked after Bardu Ram till his death, yet Bardu Ram took mercy upon them and as they were not having any place to live, Bardu Ram gave two rooms in the house to the contesting defendants for a period of two years with the condition that in the meanwhile, contesting defendants would construct their own house and vacate the said premises. Bardu Ram executed a Will of the said premises as well as other land/suit land in favour of the plaintiffs and after his death, mutation of the estate of Bardu Ram was attested in favour of the plaintiffs on 22.09.1995, on the basis of this Will. Bardu Ram died on 21.08.1995 and his last rites were performed by the father of the plaintiffs and the contesting defendants did not even mourn the death of Bardu Ram nor they incurred any expenditure for his last rites. Further as per the plaintiffs, they were having a large family and in lieu thereof, defendant No. 1 was called upon to vacate the premises but he refused to do so despite notice having been served upon him. On 31.12.1995, in the presence of local persons, plaintiffs requested the contesting defendants to hand over possession of the said two rooms under their occupation but the defendants refused to do so, hence, the suit.

3. The suit was resisted by the contesting defendants *inter alia* on the ground that defendant No. 1 was the owner in possession of the property in dispute to the extent of ½ share being the legal heir/son of Bardu Ram. As per defendant No. 1, plaintiffs had no right over the half portion of the suit land which was inherited by defendant No. 1 and the same included the suit premises. As per the defendants, two rooms were given by Bardu Ram to defendant No. 1 about two decades ago with the condition that defendant No. 1 shall be residing therein with his family. It was further the case of the

contesting defendants that deceased Bardu parted with possession of the suit premises in favour of defendant No. 1 with the clear intention that defendant No. 1 was to be owner in possession thereof and other family members of the Bardu Ram were not to interfere with the enjoyment rights of defendant No. 1 in the said two rooms. Therefore, according to the contesting defendants, as they were occupying the rooms in their capacity as owners thereof, the suit was not maintainable. In the written statement, it was denied that any Will was executed by Bardu Ram in favour of the plaintiffs as alleged. It was further stated in the written statement that in case ownership of defendant No. 1 was not proved, then his title stood matured by way of adverse possession. As per defendant No. 1, defendants duly participated in the last rites of his father and no notice as alleged by the plaintiffs was ever issued to the defendants for the purpose of vacation of the suit premises.

4. In the replication, while denying the allegations raised in the written statement, the plaintiffs reiterated the averments made in the plaint.

5. On the basis of pleadings of the parties, learned Trial Court framed the following Issues:-

6. *Whether the plaintiffs are owners of the suit land property by way of Will as alleged? OPP*
7. *Whether the defendants were occupying the suit land property with the consent of Bardu Ram, for a fixed period of two years, as alleged? OPP*
8. *Issue No. 2 is proved in the affirmative, whether the plaintiffs are entitled to the relief of possession of the suit property, as alleged? OPP*
9. *Whether the suit is not maintainable in the present form, as alleged? OPD*
10. *Whether the site plan of the house is not proper? If so its effect? OPD*
11. *Whether this Court has no jurisdiction to decide the suit, as alleged? OPD*
12. *Whether Bardu Ram deceased did not execute any Will? OPD*
13. *Whether the defendants have become owners in possession of the suit property by way of adverse possession, as alleged?*

14. Relief.

6. On the strength of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1:		*No.*
Issue No. 2:		*No.*
Issue No. 3:		*No.*
Issue No. 4:		*No.*
Issue No. 5:		*No.*
Issue No. 6:		*No.*
Issue No. 7:		*Yes*
Issue No. 8:		*No.*
Relief	*:*	*The suit of the plaintiffs is dismissed as per the operative part of my judgment.*

7. Learned Trial Court dismissed the suit by holding that the plaintiffs had not become the owners of the suit property on the basis of the Will nor the defendants were occupying the suit property with the consent of Bardu Ram for a fixed period of two years as alleged. It also held that the plaintiffs were not entitled for relief of possession of the suit property. It held that the alleged Will executed by Bardu Ram in favour of the plaintiffs, was executed on 04.03.1985, whereas Bardu Ram died on 21.08.1995. It observed that it was mentioned in the plaint by the plaintiffs that Bardu Ram remained bed ridden for the last more than 10 years, and in this view of the matter, the execution of the Will was highly suspicious as how a person who was bed ridden for the last 10 years could have had executed a Will in the year 1985. Learned Trial Court also disbelieved the statements of the scribe of the Will as well as marginal witness *inter alia* by holding that their statements were not trustworthy as PW1 had stated in his cross examination that Bardu Ram had not brought anyone from his house and PW2 Brij Mohan Kundi, one of the attesting witness, though stated that he knew Bardu Ram as they were

neighbours but when confronted that what are the names of sons and daughters of Bardu Ram, he could not answer the same. Learned Court thus held that it is not understandable as to why an old person, who was bed ridden as alleged by the plaintiffs themselves, would instead of persons he knew, bring only document writer or stamp vendor to be the marginal witnesses and this shrouded the execution of the Will with suspicious circumstances. Learned Trial Court also held that at the time when the Will was scribed, even plaintiff Jagat Pal was only 20 years old and on account of his age, he was dependent on his parents, therefore, it was but the father of the plaintiffs who was looking after the deceased Bardu, yet, in the Will it was written that Devi Ram alongwith defendant Roshan Lal were not taking care of Bardu Ram which made the Will shrouded with suspicious circumstances. On these bases, learned Trial Court held that Will in question was shrouded with suspicions which could not be removed by the plaintiffs. On the basis of these findings, the suit was dismissed.

8. In appeal, learned Appellate Court reversed the findings returned by the learned Trial Court. While upholding Will Ext. PW1/A, learned Appellate Court held that the findings returned by learned Trial Court that the Will was shrouded with suspicious circumstances because plaintiffs themselves alleged in the plaint that deceased Bardu, the testator of the Will, was bed ridden for the last 10 years, were not sustainable in law for the reasons that as the Will was executed in the year 1985, and Bardu Ram died after almost a decade thereafter, therefore, it was quite possible that Bardu became bed ridden in the year 1986 or thereafter. Learned Appellate Court also held that the plaintiffs had duly proved the Will by examining the Scribe of the Will Ext. PW1/A Sh. Amar Nath (PW1) as also one of the marginal witness PW2 Brij Lal, who corroborated each other's statements and further in the cross examination of these witnesses, no suggestion was given to them that Bardu Ram was not in a position to walk at all at the time when he

executed the Will. Learned Appellate Court took note of the fact that PW1/A was a registered Will, which was presented by Bardu Ram himself before the Sub Registrar as per record, as was evident from the endorsement of Sub Registrar on it and in terms thereof, the contents of the Will were read over and explained to Bardu Ram who after admitting the same to be correct, put his thumb impression upon it. Learned Appellate Court referred to the judgment of Hon'ble Supreme Court in *Pentakota Satyanarayana Vs. Pentakota Setharatnam and others, AIR 2005 (SC) 4362*, in which Hon'ble Supreme Court has held that signatures of the Registering Officer and identifying witness affixed to the registration endorsement were sufficient attestation of the Will. Hon'ble Supreme Court has further held in the said judgment that endorsement of the Sub Registrar that the executant has acknowledged before him the execution of the Will, also amounts to attestation. With regard to findings returned by learned Trial Court that the Will was shrouded with suspicious circumstances as marginal witnesses of the Will were the persons working in the Court premises and were not known to Bardu Ram, was concerned, learned Appellate Court by relying upon the judgment of Punjab and Haryana High Court in *Tara Singh Vs. Shanti, 1988 Civil Court Cases 198 (P&H)*, held that there was no requirement in law that marginal witness should be from the same locality or from the same village and merely because the witnesses of the Will are from a different village, the same does not constitute a suspicious circumstance particularly when it was not shown that they were interested in the plaintiff or biased against the defendant. Learned Appellate Court observed that in the facts of the present case, it could not be demonstrated that the witness who had deposed in the Court on behalf of the plaintiffs, were either interested in the plaintiff or biased against the defendant. With regard to the observation made by learned Trial Court that the statement of PW2 was not trustworthy as he could not state as to who appended the signatures upon the Will first, learned Appellate

Court held that this witness was deposing after a period of 20 years of the execution of the Will, therefore, he was not supposed to remember each and every detail. Learned Appellate Court also held that in the case in hand, admittedly, defendant Roshan Lal and his sister Leela Devi never remained with deceased Bardu Ram and this fact stood duly proved on record in the statement of Leela Devi who categorically stated that at the time of death of her mother, she was four years of age and Roshan Lal was of one year old. There was no lady to look after them in the family, and therefore, they shifted to the house of their maternal grandfather where they were brought up and she also admitted that she was not in talking terms with Devi Ram for the last 25 years. This witness also stated that she had not invited Devi Ram in the marriage of her daughter and that relationship between the siblings were strained and they were not in talking terms. Learned Appellate Court also took note of the fact that copy of order Ext. PW3/O was passed by the Executive Magistrate, in terms whereof, a complaint against Roshan Lal filed by Bardu Ram under Section 107/150 of Cr.P.C. was compromised after Roshan Lal gave a statement that he will not give any further threatening to Bardu Ram. Learned Appellate Court also took note of the fact that legal notice Ext. PW3/C and Ext. PW3/E were issued by Bardu Ram to Roshan Lal for vacating the premises in his possession. On these bases, learned Appellate Court held that there was nothing unnatural in the execution of the Will Ext. PW1/A by Bardu Ram in favour of the plaintiffs, who were his grandsons.

9. Feeling aggrieved, contesting defendants have filed the present appeal, which was admitted on 13.09.2011 on the following substantial questions of law:-

> *"2. Whether bare registration of the Will can substitute the provisions of Section 63 of the Indian Succession Act?*
> *3. Whether the Ext. PW1/A can be said to be a valid Will in the face of various suspicious circumstances as pointed out by the ld. Trial Court?*

4. *Whether the judgment and decree passed by the ld. Lower Appellate Court below is the result of misreading and misinterpreting the oral as well as documentary evidence especially the oral evidence of PW2 Brij Mohan i.e. the attesting witness?*

10. I have heard learned Senior Counsel appearing for the parties and also carefully gone through the judgments and decrees passed by learned Courts below as well as record of the case.

11. As all the substantial questions of law are inter dependent, therefore, this Court would be answering all the substantial questions of law collectively.

12. Section 63 of the Indian Succession Act provides as under:-

> *"**Section 63 in The Indian Succession Act, 1925***
> *63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—*
> *(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
> *(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

13. In terms of this provision, it is provided that every testator shall execute his Will by affixing his mark to the Will or it shall be signed by some other person in his presence and by his direction. Signature or mark of the

testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator.

14. Now coming to the facts of the present case, the Will in issue Ext. PW1/A, demonstrates that it has been duly signed by the testator. The Will is also duly signed by two attesting witnesses. This Court is of the considered view that Section 63 of the Indian Succession Act, primarily lays down as to how an unprivileged will is to be executed, however, the veracity of the Will even after its execution is open for scrutiny and in case a Court of law is satisfied that despite the Will having been executed in terms of Section 63 of the Indian Succession Act, the same is shrouded with suspicious circumstances, the same can be interfered with. This is more so true in view of provisions of Section 68 of the Indian Evidence Act. Will Ext. PW1/A was proved by the plaintiffs, by examining its scribe PW1 Shri Amar Nath and one of two marginal witnesses, PW2 Brij Mohan Kundi. A perusal of the statement of PW1-Amar Nath) demonstrates that he deposed in the Court that Will in issue was scribed by him on the direction of Bardu Ram. After the same was scribed, he read over and explained the contents of the Will to Bardu Ram, who after understanding the contents thereof appended his thumb impression thereupon. It was thereafter that the two marginal witnesses appended their signatures upon the Will. This witness also deposed that when Bardu Ram had appended his signatures upon the Will, he was in his full senses. This witness also deposed that Bardu Ram was personally known to him. Similarly, PW2 who was one of the marginal witness, deposed that he personally knew Bardu Ram and that Will in issue was scribed by Amar Nath. This witness also deposed in the Court that he and Pyare Lal had appended their signatures upon the Will as attesting witnesses. He also stated that after

scribing the Will, Amar Nath had read over and explained the same to Bardu, who thereafter had appended his thumb impression upon the Will and it is thereafter that the marginal witnesses, including him, appended their signatures upon the Will. Now incidentally, a perusal of cross examination of these two witnesses demonstrates that their testimony, to the effect that both of them personally knew Bardu Ram, was not proved to the contrary. Not only this, both these witnesses, in unison, have deposed the mode and manner in which the Will was executed, i.e. that Will was scribed by the scribe on the instructions of Bardu Ram, which thereafter was read over and explained to Bardu Ram and who after understanding the same, appended his signatures upon the Will and it was thereafter that two marginal witnesses appended their signatures upon the Will. A perusal of the Will Ext. PW1/A further demonstrates that the same was registered with Sub Registrar, District Bilaspur on 11.03.1985 and the Note thereupon is to the effect that the same was registered in the presence of Sub Registrar by the executant of the Will Bardu Ram himself. Not only this, it is further endorsed on this Will that at the time of registration of the Will, the contents thereof were duly read over and explained to Bardu Ram, who acknowledged contents of the Will to be correct. This Court is of the considered view that such evidence which was placed on record by the plaintiff, duly proved the execution of valid Will by late Bardu Ram in favour of the plaintiffs who happened to be his grandsons.

15. Further, a perusal of the Will demonstrates that it is clearly mentioned therein as to why executor was bequeathing his property in favour of grandsons. It is mentioned in the Will that testator had one daughter, who was duly married and as far as his two sons are concerned, they are not looking after him and it were his grandsons who were looking after and maintaining him. The findings returned by the learned Trial Court that it could not be believed that the plaintiffs were looking after Bardu Ram because at the time when Will was executed, age of one of the plaintiff was 20 years

old, at the best can be said to be findings based on conjectures because there is nothing proved on record that the grandsons were not looking after and maintaining their grandfather. Be that as it may, from what has been observed hereinabove, as the Will in issue was proved to have been executed by late Shri Bardu Ram and further as the findings which have been returned by learned Appellate Court that the same was not shrouded with suspicious circumstances, are findings which are clearly borne out from the record of the case, therefore, substantial questions of law are answered by holding that though bare registration of the Will cannot substitute the provisions of Section 63 of the Indian Succession Act, but in the facts and circumstances of the case, execution of Will Ext. PW1/A has been duly proved by the plaintiffs beyond any suspicion, and therefore, the findings which have been arrived at by learned Appellate Court that Will was not shrouded with suspicious circumstances, are correct findings, which this Court upholds. Further this Court also holds that the findings arrived at by learned Appellate Court are not a result of misreading and misinterpreting the oral as well as documentary evidence on record, more so, the statement of PW2 Brij Mohan Kundi, i.e. one of the marginal witness of the Will because the findings returned by learned Appellate Court are borne out from the pleadings as well as evidence on record and there is no misreading or misinterpretation thereof. Substantial questions of law are answered accordingly.

In view of above discussion, as this Court finds no merit in the present appeal, the same is accordingly dismissed. In view of the adjudication on the appeal, all miscellaneous application(s) stand closed. No order as to costs.

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

Between:-

1. JEET RAM ALIAS BHOP RAM
SON OF SH. KUKAM RAM, SON OF OTTU,
RESIDENT OF VILLAGE PALJOT,
PHATI NATHAN, KOTHI NAGGAR, TEHSIL
AND DISTRICT KULLU, H.P.

2. RAM CHAND SON OF ABIR DASS,
SON OF SH. OTTU, (SINCE DECEASED)
THROUGH HEIRS AND LEGAL REPRESENTATIVES:

2(a) SMT. RAM DEI WIDOW OF LATE SH. RAM CHAND,
2(b) SH. BUDH RAM SON OF LATE SH. RAM CHAND,
2 (c)SH. DURGA DUTT SON OF LATE SH. RAM CHAND;
2(d) SMT. BHAGTI DEVI WIFE OF SH. MOHAN LAL,
RESIDENT OF VILLAGE JANA, P.O.ARCHANDI,
TEHSIL AND DISTRICT KULLU, H.P.

ALL RESIDENTS OF VILLAGE PALJOT, PHATI NATHAN,
KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.

3. KHUB RAM SON OF SH. ABIR DASS, SON OF
SH. OTTU, RESIDENT OF VILLAGE PALJOT, PHATI
NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT
KULLU, H.P.
4. GANGA RAM SON OF SH. ABIR DASS, SON OF
SH. OTTU, (SINCE DECEASED) THROUGH HEIRS
AND LEGAL REPRESENTATIVES:

4(a) SH. BUDH RAM SON OF LATE SH. RAM CHAND;
4(b) SH. DURGA DUTT SON OF LATE SH. RAM CHAND;
BOTH RESIDENTS OF VILLAGE PALJOT, PHATI
NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT
KULLU, H.P.

..APPELLANTS/PLAINTIFFS

(BY MR. K.D. SOOD, SENIOR ADVOCATE,
WITH MR. HET RAM THAKUR, ADVOCATE)

AND

1. CHHERING ANGRUP SON OF SH. URGIAN,
RESIDENT OF GOURDOR, PHATI NATHAN,
KOTHI NAGGAR, TEHSIL AND DISTICT KULLU,
H.P. DECEASED THROUGH HIS LEGAL
REPRESENTATIVES:

1(a) MS. POONAM DAUGHTER OF LATE SH. CHHERING ANGRUP
1(b) SH. VIJENDER SON OF LATE SH. CHHERING ANGRUP
1(c) MS. NIRMALA DAUGHTER OF LATE SH. CHHERING ANGRUP

ALL REIDENTS OF GOURDOR, PHATI NATHAN,
KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.

2. SMT. JOMI WIDOW OF SH. CHHAPU SON OF
SH. DEVI RAM, AT PRESENT WIDOW OF OAT RAM
SON OF SH. BALI JARGAR, RESIDENT OF VILLAGE
CHHAKI, PHATI AND KOTHI NAGGAR, TEHSIL
AND DISTRICT KULLU, H.P. SINCE DECEASED
THROUGH HEIRS AND LEGAL REPRESENTATIVES:

2 (a) SH. DAULAT RAM SON OF SMT. JOMI,
WIDOW OF CHHAPU;
2(b) SH. CHET RAM SON OF SMT. JOMI, WIDOW OF
CHHAPU

BOTH RESIDENTS OF VILLAGE CHHAKI, PHATI AND
KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.

...RESPONDENTS/DEFENDANTS

(MR. MAAN SINGH, ADVOCATE, FOR LEGAL HEIRS OF DECEASED RESPONDNT NO.1 i.e. RESPONDENTS NO. 1(a) to 1 (c).

(MR. NAVEEN K. BHARDWAJ, ADVOCATE, FOR RESPONDENTS NO. 2(a) & 2 (b).

3. SMT. NIMU WIDOW OF LATE SH. ABHIR DASS SON OF SMT. LAHULI, RESIDENT OF VILLAGE FALZOL, PHATI NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P. (DELETED VIDE COURT ORDER DATED 12.10.2018).

4. SMT. GUDI DAUGHTER OF LATE SH. ABHIR DASS, SON OF SMT. LAHULI, RESIDENT OF VILLAGE FALZOL, PHATI NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.
5. SMT. ALI DAUGHTER OF LATE SH. ABHIR DASS, SON OF SMT. LAHULI, RESIDENT OF VILLAGE FALZOL, PHATI NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.
6. SMT. KRISHANA DAUGHTER OF LATE SH. ABHIR DASS, SON OF SMT. LAHULI, RESIDENT OF VILLAGE FALZOL, PHATI NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.
7. KUMARI HIRA DAUGHTER OF LATE SH. HUKAM RAM, RESIDENT OF VILLAGE FALZOL, PHATI NATHAN, KOTHI NAGGAR, TEHSIL AND DISTRICT KULLU, H.P.

(RESPONDENTS NO. 4 TO 7 PROCEEDED AGAINST EX-PARTE VIDE ORDER DATED 02.05.2018 PASSED BY THE HIGH COURT).

...PROFORMA DEFENDANTS/RESPONDENTS.

REGULAR SECOND APPEAL
No. 16 OF 2007
Reserved on: 13.10.2022
Decided on: 18.10.2022

Code of Civil Procedure, 1908- Section 100- second appeal- **H.P. Tenancy and Land Reforms Act, 1972**- Section 104- **Hindu Succession Act, 1956**- Section 8- rights of tenant at will inherited by his wife and mother- widowed wife sold her share by sale deed after remarriage- plaintiff claimed whole suit

land based on will by widowed mother as widowed wife lost inheritance rights on remarriage- **Held**- suit land within area that was part of erstwhile Punjab and Punjab Tenancy Act, 1887 is applicable to such area- no specific provision for inheritance of non-occupancy tenancy- no restriction to right of inheritance of widow or widowed mother till life or remarriage for tenancy at will or non-occupancy tenancy- general law, i.e Hindu Succession Act, 1956 prevails in absence of special law- estate inherited absolutely irrespective of remarriage- defendants continued to be tenants at will on coming into force of H.P Tenancy and Land Reforms Act- sale deed legal and valid- plea of adverse possession lacked proof and rightly declined- appeal dismissed. (Paras 13,14)

Cases referred:

Nathi vs. Neel Chand 1997 (2) Sim. L.C. 179;

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

J U D G M E N T

By way of instant Regular Second Appeal, appellants have assailed judgment and decree dated 09.11.2006 passed by learned District Judge,Kullu, District Kullu, H.P. in Civil Appeal No. 44/2006 whereby the judgment and decree dated 31.05.2006 passed by learned Civil Judge (Sr. Divn.), Lahaul-Spiti at Kullu, H.P. in Civil Suit No. 58 of 2003 was affirmed.

2. The parties hereinafter shall be referred to by the same status as held by them before the learned trial Court.

Appellants were the plaintiffs and respondents were defendants before the learned trial Court.

3. Chhapu son of Devi Ram was tenant at Will in respect of the land comprised in Khata/Khatauni No. 1284/1, 2090/1, Khasra Nos. 3494, 3513 and 3534 measuring 4-9-0 bighas, situated in Phati Nathan, Kothi Nagar, Tehsil and District Kullu, H.P. (hereinafter referred to as the 'suit land') under the landowners S/Sh. Hari Prakash and Davinder Parkash. Chhapu died in the year 1960. The rights held by Chhapu in the suit land were

inherited by his mother Smt. Lahauli and his wife Smt. Johami in equal shares. Smt. Johami remarried on 27.1.1965.

4. Plaintiffs claimed that the rights inherited by Smt. Lahauli and Smt. Johami were limited till their livesor re-marriage. On such premise, Johami was alleged to have lost her rights in suit land on her remarriage and furtherSmt. Lahauli was stated to have acquired exclusive ownershipof the suit land under the provisions of Himachal Pradesh Tenancy and Land Reforms Act, 1972. Plaintiffs claimed right to the suit land on the basis of Will dated 26.10.1994 executed by Smt. Lahauli in their favour. Smt. Lahauli died on 29.10.1994.

5. Smt. Johami sold her share in the suit land to defendant No.1 vide sale deed dated 30.01.2003. Plaintiffs alleged the said sale deed to be illegal and without title and claimed the ownership over the entire suit land to the exclusion of Smt. Johami or her successors-in-interest in the suit land. In alternative, plaintiffs claimed ouster of Smt. Johami and her successors-in-interest from the suit land and claimed title over her share by way of adverse possession.

6. Defendant No.1 by way of written statement raised preliminary objections to the effect that he was bonafide purchaser, the suit was beyond limitation since defendant No.1 was in possession of the share of Smt. Johami, the suit for declaration without relief of possession was not maintainable, suit was bad for non-joinder of necessary parties and estoppel etc. On merits, it was submitted that defendant No.1 had purchased the land from Smt. Johami for sale consideration of Rs.1,35,000/- and the sale was absolutely legal and valid as Smt. Johami had subsisting right to transfer her share. It was also submitted that Chhapu was tenant at Will and after his death, his mother Smt. Lahauli and wife Smt. Johami inherited the rights as tenants at Will absolutely. It was further asserted that Smt. Johami was in possession of her share in the suit land and the same was delivered to defendant No.1.

7. Defendant No.2 also contested the suit. It was submitted that Smt. Lahauli and Smt. Johami were tenants at Will in respect of suit land after the death of Chhapu, who had died on 19.10.1960. After coming into force of H.P. Tenancy and Land Reforms Act, both Smt. Lahauli and Smt. Johami acquired proprietary rights under Section 104 of the Act ibid. The Will executed by Smt. Lahauli was challenged. Defendant No.2 asserted her possession on the suit land. It was also specifically averred that landlords had moved an application for resumption of the tenancy land including the suit land. The proceedings were contested by Smt. Lahauli and Smt. Johami before the Land Reforms Officer, Kullu. The suit land, as such, was allotted to Smt. Lahauli and Smt. Johami. It was specifically pleaded that Smt. Lahauli had re-married after the death of her pre-deceased son Chhapu.

8. On the basis of pleadings of the parties, learned trial Court had framed the following issues:

1. *Whether the plaintiffs are entitled to the declaration prayed for? OPP*
2. *Whether the plaintiffs are entitled to the prohibitory injunction as prayed for ?OPP.*
3. *Whether the plaintiffs are entitled to a decree for possession of the disputed land as claimed? OPP.*
4. *Whether the plaintiffs have become the owners of the suit land by way of the adverse possession of the disputed land as claimed? OPP.*
5. *Whether late Smt. Lahauli executed a valid will dated 26.10.1994 in favour of the plaintiffs as alleged. If so, its effect? OPP.*
6. *Whether the sale deed dated 30.01.2003 is wrong and illegal as alleged? OPP.*
7. *Whether the plaintiffs have a cause of action? OPP.*
8. *Whether defendant No.1 is a bonafide purchaser for consideration as alleged. If so, its effect? OPD.*
9. *Whether the suit is not maintainable in the present form? OPD.*
10. *Whether thesuit is time barred? OPD.*
11. *Whether the suit is bad because of non-joinder of the necessary parties? OPD.*

12. *Whether the plaintiffs have not come to the Court with clean hands as alleged. If so, its effects? OPD.*
13. *Whether the plaintiffs have the locus-standi to sue? OPP*
14. *Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD*
15. *Whether the suit has not been properly valued for the purposes of Court fee and jurisdiction? OPD*
16. *Relief.*

Issues No. 1 to 4, 6 and 7, 9 to 12 and 15 were answered in negative, issue No. 5, 13 and 14 were answered in affirmative, whereas issue No. 8 was held to be redundant. The suit of the plaintiffs was accordingly dismissed. It was held that Chhapu was non-occupancy tenant and after his death his tenancy rights were inherited by Smt. Lahauli and Smt. Johami. The marriage of Smt. Johami on 27.01.1965 did not make any difference in her rights as the inheritance in respect of non-occupancy tenancy at the relevant time was governed under the Hindu Succession Act. Reliance was placed upon the judgment passed by this Court in ***Nathi vs. Neel Chand*** reported in ***1997 (2) Sim. L.C. 179.***

9. Plaintiffs assailed the judgment and decree passed by learned trial Court by filing appeal under Section 96 of CPC before the learned Appellate Court, but again remained unsuccessful, hence the present appeal.

10. Learned lower Appellate Court also affirmed the findings of facts recorded by learned trial Court and by placing reliance upon the judgment passed in Nathi (*supra*), the appeal of plaintiffs was held to be without merit.

11. The instant appeal was admitted on 02.04.2008 on the following substantial questions of law:

1. *Whetheron a proper construction of provision of Punjab Tenancy Act, widow and non-occupancy tenant on remarriage lost her right of tenancy?*
2. *Whether on the evidence on record and the pleadings of the parties and assumption drawn from the documents Ext. P-*

2/D-5, Ext.D-2, Ext. D-3, Ext.D-4, Ext.D-6, Ext. D-7 and Ext.D-8 and the presumption of truth attached thereto stood rebutted in view of the admitted remarriage of Jomi with Chatru?

3. *Whether on the proper construction of the provisions of the Punjab Tenancy Act and H.P. Tenancy and Land Reforms Act, it could be held that Jomi could be continued as tenant even after remarriage and become owner thereof under the H.P. Tenancy and Land Reforms Act and the order Ext. DA is binding on the appellant?*

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

13. Both the learned Courts below have concurrently held that Chhapu was a tenant at Will in the suit land. After death of Chhapu on 19.10.1960, his rights in the suit land were inherited by his mother Smt. Lahauli and wife Smt. Johami in equal shares. Smt. Johami remarried on 27.01.1965. On coming into force of H.P. Tenancy and Land Reforms Act, the proprietary rights were conferred upon Smt. Lahauli and Smt. Johami to the extent of their respective shares. Smt. Lahauli had executed a Will Ext. PW-2/A on 26.10.1994. She died on 29.10.1994. Smt. Lahauli had bequeathed her share in the suit land in favour of the plaintiffs. Smt. Johami sold her share in the suit land in favour of defendant No.1 on 20.3.2003 through registered sale deed for sale consideration of Rs.1,35,000/-. The finding of facts recorded by learned Courts below need no interference as they are borne out from the evidence on record.

14. Admittedly, the area where the suit land is situatewas part of erstwhile State of Punjab prior to coming into force of the Punjab Re-organization Act, 1966 and Punjab Tenancy Act, 1887 (for short 'Act') was applicable to such area.

15. In the Act, there was no specific provision for inheritance of non-occupancy tenancy, whereas the inheritance in respect of occupancy tenancy was governed by Section 59 thereof. Section 59 of the Act, restricted the right

of inheritance of widow or widowed mother till her life or till she remarried or abandoned the land. No such provision was available for tenancy at Will or non-occupancy tenancies.

16. It is more than settled that in absence of contrary provisions in special law, the general law prevails. Thus, in absence of any specific provision of inheritance in respect of tenancy at Will or non-occupancy tenancy in the Punjab Tenancy Act, 1887, the Hindu Succession Act would apply and under said Act, the estate was inherited absolutely. In such view of the matter, Smt. Johami had inherited the right in respect of suit land absolutely and her re-marriage in no manner could restrict such right. Smt. Johami, thus, continued to be tenant at Will alongwith Smt. Lahauli in the suit land and on coming into force of the H.P. Tenancy and Land Reforms Act, acquired proprietary rights therein to the extent of her share. The sale made by her in favour of defendant No.1 in 2003 was a legal and valid transfer.

17. The plea of adverse possession has also been rightly declined by both the Courts below as the same was not proved on record in accordance with law.

18. Learned counsel for the appellants contended that Section 8 of the Punjab Security of Land Tenures Act, 1953 was applicable and as such Smt. Johami had no right in the suit land after her re-marriage in 1965. The contention so raised deserves to be rejected. Section 8 of the Act*ibid* read as under:

> "Continuity of tenancies. The continuity of tenancy shall not be affected by –
>
> (a) the death of the landlord, or
>
> (b) the death of the tenant, except when the tenant leaves no male lineal descendants or mother or widow, and

> (c) any change therein under the same landowner: and for the purpose of sections 17 and 18 of this Act, such tenancy shall be the last area so held."

19. The plain reading of aforesaid provision reveals that it did not have relevance with inheritance but was meant to deal with continuity of tenancies.

20. Both the Courts below while dismissing the suit of the plaintiffs, had rightly relied upon the judgment in *Nathi* (supra) as the facts situation therein was the same as involved in the instant case. While dealing with the same fact situation, it was held as under: -

> *"**34.**Admittedly, save and except section 59, Punjab Tenancy Act,1887 there is no other provision in the said Act governing succession to the tenancy rights of a tenant-at-will. In the absence of such a provision in the relevant tenancy laws as in force at the relevant time, succession to the tenancy rights of a tenant at will prior to the coming into force of the H.P. Tenancy and Land Reforms Act, 1972, in the areas to which the provisions of Punjab Tenancy Act, 1887, were applicable, would, therefore, be governed by the general law of succession, viz, Hindu Succession Act, 1956. Under section 8 of the said Act widow and son(s) succeed to the estate of the deceased in equal shares."*

21. It also becomes evident from the record that Smt. Lahauli had also remarried. In the document Ext. PW-2/A i.e. the Will executed by Smt. Lahauli, she was described as widow of late Sh. Ottu S/o Chenu, whereas, she had inherited the tenancy rights in the suit land to the extent of her share being mother of Chhapu, who was son of Devi Ram. Meaning thereby that Smt. Lahauli was earlier wife of Sh. Devi Ram, but later re-married Sh. Ottu. It being so, she otherwise could not have raised the plea of limited rights of succession in the suit property against defendant No.2 Smt. Johami.

22. Resultantly, the appeal fails and the same is dismissed. Accordingly, the judgment and decree dated 09.11.2006 passed by learned District Judge, Kullu, District Kullu, H.P. in Civil Appeal No. 44/2006 affirming judgment and

decree dated 31.05.2006 passed by learned Civil Judge (Sr. Division), Lahaul-Spiti at Kullu, H.P. in Civil Suit No. 58 of 2003, is further affirmed.

Appeal is accordingly disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Between

1 (A) SMT. KAMLA DEVI WD/O LATE SH. LUDER,

1(B) MEENA KUMARI D/O LATE SH. LUDER,

1 (C) BHAWANA D/O LATE SH. LUDER,

1 (D) SHASHI D/O LATE SH. LUDER,

1 (E) JAI DEVI D/O LATE SH. LUDER,

1 (F) PARVEEN KUMAR S/O LATE SH. LUDER,

1 (G) VIRENDER KUMAR, S/O LATE SH. LUDER.

ALL RESIDENTS OF VILLAGE CHAPROHAL, POST OFFICE KUMMI, ILLAQUA BALH, TEHSIL SADAR, DISTRICT MANDI, H.P.

….APPELLANT.

(BY LALIT KUMAR SHARMA, ADVOCATE)

AND

1. LALITA W/O SH. PURAN CHAND, S/O SH. HIRA,

2. PURAN CHAND S/O SH. HIRA.

BOTH RESIDENTS OF VILLAGE CHAPROHAL, P.O. KUMMI, ILLAQUA BALH, TEHSIL SADAR, DISTRICT MANDI, H.P.

...RESPONDENTS

(SH. BHUPINDER GUPTA, SR. ADVOCATE WITH SH. VEDANT RANTA, ADVOCATE).

REGULAR SECOND APPEAL
NO. 328 OF 2008

Decided on:13.10.2022

Code of Civil Procedure, 1908- Section 100- second appeal- **Specific Relief Act, 1963**- Section 38, 39- suit for permanent prohibitory injunction and mandatory injunction- plaintiff owned joint land with defendant and other co sharers- sought to restrain the defendants from raising construction till partition and separation and on excess land- **Held**- plaintiff could not prove that defendants raised construction after filing of suit- merely noticing some digging work cannot imply entire building was completed after filing of suit- mandatory injunction not available once failed to prove completion of construction after filing of suit and without proving construction on excess land area- on failure to show that injury cannot be compensated, relief of mandatory injunction denied- plaintiff himself has allowed other purchasers to raise construction- incomprehensible as to how defendant could be restrained without any special injury or irreparable loss- no relief of damages in absence of specific prayer for compensation/damages- substantial question of law based upon misreading, mis-appreciation and non-appraisal of evidence is negatively decided- appeal dismissed. (Paras 10,11,12)

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

J U D G M E N T

By way of instant appeal, appellants have assailed judgment and decree dated 12.5.2008, passed by the learned District Judge, Mandi, District Mandi, H.P. in Civil Appeal No. 28 of 2007, whereby judgment and decree dated 20.1.2007, passed by learned Civil Judge (Junior Division) Court No.1, Mandi, in Civil Suit No. 35 of 2004 was affirmed.

2. Parties hereafter shall be referred by the same status as they held before learned trial Court. Predecessor-in-interest of the appellants was plaintiff and respondents were the defendants.

3. The suit land comprised in khata No. 23/20, khatauni No. 34, khasra No. 3176/2688/2451, measuring 2-13-0 bighas, situated at Mohal Kummi, Illaqua Balh, Tehsil Sadar, District Mandi, H.P was joint between plaintiff, defendant No.1 and other co-sharers. Defendant No.1 had acquired a

share,in the suit land, to the extent of 0-2-2 bighas by way of purchase from plaintiff. The other co-sharers had also purchased their respective shares in the suit land from plaintiff and had raised constructions thereon.

4. Plaintiff filed a suit for permanent prohibitory injunction, seeking thereby to restrain the defendants from digging and raising construction upon any part of the suit land till its partition and separation. It was also prayed that in case defendants succeed in raising the construction during pendency of the suit, same be ordered to be demolished and suit land be restored to its original vacant position through mandatory injunction. Plaintiff filed the suit on 14.7.2004 alleging *inter-alia* that defendants without getting their share partitioned had started raising construction w.e.f 4.7.2004. It was also alleged that the construction being raised by defendants was on land which was in excess of their share.

5. Defendants contested the suit. It was submitted that defendant No.1 had purchased the land from plaintiff. As per defendants, the plaintiff had sold about fifteen biswas of land out of the suit land to various persons, who had already raised their respective buildings. The defendants further maintained that plaintiff had entered into an agreement to sell with them and had handed over the specific portion out of the suit land to them. The sale deed was finally executed and registered between the parties on 8.7.1996. Defendants had raised the construction during 1996-97, which was complete in all respects before filing of suit.

6. On the basis of pleadings of the parties, the learned trial Court framed following issues:-

> "1. Whether the defendants are raising construction over the valuable portion of joint suit land as alleged?OPP
>
> 2. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for?OPP

3. Whether the plaintiff is stopped from filing the present suit by his own act and conduct? OPD

4. Whether the suit is bad for non-joinder of necessary parties as alleged? OPD

5. Whether the suit of the plaintiff is not maintainable? OPD

6. Relief.

All the issues were decided in negative and the suit of the plaintiff was dismissed. Learned trial Court held that the plaintiff had failed to identify the land on which, the defendants had raised construction. As per learned trial Court, without demarcation, such fact could not be proved. It was also held that the plaintiff could not prove that defendants had raised construction after filing the suit. Another factor that weighed with learned trial Court was that the plaintiff had already sold different parcels of land to different persons out of the suit land and such persons had raised their respective buildings. Since the plaintiff had not objected the construction raised by other purchasers of plots of land from plaintiff without partition of land, he could not legitimately question the right of defendants to raise construction.

7. Plaintiff assailed the judgment and decree passed by learned trial Court in First Appeal under Section 96 of the Code of Civil Procedure but remained unsuccessful. Learned Lower Appellate Court though held that the demarcation was not necessary for adjudication of issues arising in the suit, still the judgment and decree passed by learned trial Court was affirmed. Learned Lower Appellate Court observed that an admission was made by learned counsel for the defendants, during course of hearing of the appeal regarding defendants having raised construction inexcess to the extent of 14 biswansies. The findings of learned trial Court, to the effect that plaintiff had failed to prove the construction of defendants to have been raised after filing of

suit, was affirmed. On such basis, learned Lower Appellate Court held that the mandatory injunction as prayed for could not be granted and the remedy available to the plaintiff was to be compensated that too after partition of entire suit land.

8. The appeal was admitted on 23.7.2008 by this Court on the following substantial question of law:

> "Whether the judgment and decree under challenge is based upon misreading, mis-appreciation and non-appraisal of spot Tatima Ex.PW-1/A, Jamabandi Ext.PW-4/A and statement of Patwari PW-1, Kanungo PW-2 and spot witness Nand Lal and PW-4?"

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

10. Both the learned courts concurrently held that the construction raised by defendants was not proved to have been raised after filing of the suit. Learned counsel for the appellantassailed such finding being perverse and relied upon the statement of PW-3 in support of his contention. Statement of PW-3 reveals that on its basis alone, the factum of defendants having raised construction after filing of suit cannot be said to have been proved. PW-3 simply stated that he had noticed the defendants carrying out digging works on the suit land in the year 2004. He did not state that no construction of defendants existed on the spot, when he had noticed the digging activity being carried by defendants. Merely, he had noticed some digging works being done cannot imply that the entire construction of the building was raised by them after filing of the suit. Thus, the findings recorded by both the learned courts below, as noticed above, cannot be said to be perverse or against the evidence on record.

11. Learned counsel for the appellant further contended with vehemence that since the excess use of land was proved against the defendants, learned Lower Appellate Court instead of dismissing the appeal of

plaintiff should have directed the defendants to compensate him. As per him, the plaintiff will be unnecessarily put to multiplicity of litigation. The contention so raised deserves to be rejected.Once the plaintiff had failed to prove that defendants had raised construction after filing of the suit, the relief of mandatory injunction was not available to him especially without proving that the area used in excess was part of the land falling in share of plaintiff. Admittedly, plaintiff had sold various plots of land from suit land to different persons. They had raised their respective buildings before filing of the suit. There is nothing on record to show the exact extent of land sold by plaintiff and the balance remaining with plaintiff. There is also nothing on record to show that to what extent other co-owners had utilized their respective shares.

12. Plaintiff was further disentitled from relief of mandatory injunction as he had failed to show that construction of defendants had subjected him to such injury which could not be compensated. When plaintiff had allowed other purchasers of the land to raise construction, it was not understandable as to how he could restrain the defendants from raising construction on the land purchased by defendant No.1 that too without proving any special injury or irreparable loss.

13. As regards excess use of suit land, it is pertinent to notice that excess only was to the extent of 14 Biswansies and plaintiff had failed to prove that such excess use of land was not in existence at the time of filing of suit. The total area of suit land is 2-13-0 Bighas. Without partition of suit land, it cannot be ascertained that which of the co-owners will be affected by excess use of land by defendants.

14. The plaintiff has further failed to prove that the excess use of land by defendants is of such a nature which will be prejudicial to his right to such an extent that he cannot be compensated.

15. Further, plaintiff has not made any prayer for compensation/damages in the plaint. He has not chosen to amend the plaint

during pendency of suit and appeal. Sub-section (2) of Section 40 of Specific Reliefs Act provides that no relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint.

16. In view of above discussion, the substantial question of law as framed in the instant appeal is decided in negative. Resultantly, the appeal is dismissed. The judgment and decree dated 12.5.2008, passed by the learned District Judge, Mandi, District Mandi, H.P. in Civil Appeal No. 28 of 2007, affirming judgment and decree dated 20.1.2007, passed by learned Civil Judge (Junior Division) Court No.1, Mandi, in Civil Suit No. 35 of 2004 is further affirmed. Pending applications, if any, also stand disposed of. Records of the learned courts below be returned forthwith.

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

Between:

1. SHRI ROSHAN LAL (DECEASED) THROUGH LEGAL REPRESENTATIVES.
   (a) GOPAL KRISHAN
   (b) SHIV PRASAD
   (c) YASH PAL
   (d) KAMLA DEVI (DELETED) VIDE ORDER DATED 07.01.2020

   ALL SONS OF LATE SH. ROSHAN LAL

2. Sh. SHIAM LAL (DECEASED) THROUGH LEGAL REPRESENTATIVES.
   (a) SMT. KESRI DEVI, W/O LATE SHRI SHIAM LAL
   (b) SH. SURESH KUMAR, S/O LAE SH. SHIAM LAL
   (c) SH. RAKESH KUMAR, S/O LATE SH. SHIAM LAL

3. JIWAN PRAKASH, S/O SH. KRIPA RAM

4. RAVINDER KUMAR, S/O SH. JHONFI RAM
   ALL ARE RESIDENT OF VILLAGE BHOTA, TAPPAL PAHLU, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P.

…….APPELLANTS

(BYMR. BHUVNESH SHARMA, ADVOCATE)

AND

SMT. RAMA DEVI, W/O LATE SH. TILAK RAJ, R/O VILLAGE BHOTA, TAPPA PAHLU, TEHSIL BARSAR, DISTRICT HAIMRPUR, H.P.

…….RESPONDENT

(BY MR. ROMESH VERMA, ADVOCATE)

REGULAR SECOND APPEAL

No. 402 OF 2008
Reserved on:13.10.2022
Decided on: 18.10.2022

Code of Civil Procedure, 1908- Section 100- second appeal- **Specific Relief Act, 1963**- Section 38, 39- suit for permanent prohibitory injunction, mandatory injunction and for fixation of boundary by way of demarcation- claimed customary right of passage through defendant's land- **Held**- difference between customary right and customary easement- the claimed passage was not the only passage available to the plaintiff- could not prove exact extent of passage so claimed, entire land cannot be used as passage- certainty of custom not pleaded and proved- site plan prepared without reference to revenue record could not be relied- no field map/village map placed on record for corroborating the site plan- maker of site plan did not associate adjoining landowners or local patwari- judgment/decree passed by lower appellate court set aside- appeal allowed. (Paras 16,17)

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

J U D G M E N T

By way of instant Regular Second Appeal, appellants have assailed the judgment and decree dated 17.06.2008, passed by learned District Judge, Hamirpur in Civil Appeal No. 50 of 2005, whereby the judgment and decree dated 01.04.2005, passed by learned Civil Judge(Junior Division),Barsar, District Hamirpur, H.P. in Civil Suit No. 63 of 1999, has been reversed.

2. Parties hereafter shall be referred by the same status as they held before learned Trial Court. Respondent herein was the plaintiff and appellants herein were the defendants before the learned Trial Court.

3. Plaintifffiled a suit against defendants for following reliefs: -

> *"It is, therefore, prayed that a decree for fixation of boundary by way of demarcation with a consequential relief of permanent prohibitory injunction restraining the defendants from raising any*

sort of construction over the suit land comprised in Khata No. 40 min, Khatauni no. 42, min, Khasra No. 215 area 1k-13M and Khata No. 41, Khatauni No. 43, Khasra No. 218 area 1 Kanal as per jamabandi 1996-97, situated in Tika Bhota, Tappa Paplu, Tehsil Barsar, District Hamipur, H.P. or blocking the passage of plaintiff to her house or to create any nuisance in the passage on the said land and interference in any manner whatsoever over the suit land and in case the defendants succeed in raising any construction over the suit land or construction of wall in such manner which create nuisance to the plaintiff for the use of her house or the passage then decree for mandatory inunction directing the defendants to restore the suit land to its original shape by way of demolition of such construction be passed in favour of the plaintiff and against the defendants within cost."

4. Plaintiff is co-owner of house and land comprised in Khasra No. 218 and exclusive owner of house and land comprised in Khasra No. 215, situate at Tika Bhota, Tappa Paplu, Tehsil Barsar, District Hamirpur, H.P.Defendants are owners of Khasra No. 219 in the same revenue village. Plaintiff filed the suit on the premise that defendants were interfering in Khasra Nos. 218 and 215. Plaintiffalso asserted her right of passage through Khasra No. 219 and alleged that defendants had threatened to obstruct said passage.

5. Defendants denied existence of any passage through Khasra No. 219. Interference in Khasra Nos. 218 and 215 was also specifically denied.

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

1. *Whether the plaintiff is the owner in possession of the suit land?*

.....OPP

2. *Whether the plaintiff is entitled to a decree for fixation of boundaries by way of demarcation of the suit and as alleged?*

.....OPP

3. *Whether the plaintiff is entitled to the prohibitory injunction, as prayed for?*

.....OPP

4. *Whether the plaintiff is entitled to the mandatory injunction as claimed?*

.....OPD

5. *Whether thereexits a path s alleged, if so, its effect?*

.....OPD

6.Whether the suit is not maintainable in the present form?

.....OPD

7. *Whether the plaintiff has a cause of action?*

.....OPD

8. *Whether the plaintiff is estopped from filing the suit by her act and conduct?*

.....OPD

9. *Whether the suit bad for non-joinder and mis-joinder of the necessary*

.....OPD

10.Whether the suit had not been properly valued for the purpose of court fee and jurisdiction?

.....OPD

11.Whether this court has no jurisdiction to hear and decide the present suit?

.....OPD

12.Relief.

7. Issue Nos. 1 and 6 were decided in affirmative and all other issues were decided in negative. The suit of the plaintiff was accordingly dismissed. Learned Trial Court held that there was non-compliance of provisions of Order 7 Rule 3 of the Code of Civil Procedure. Plaintiff had failed to identify the passage alleged to be existing in Khasra No. 219.

8. Plaintiff assailed the judgment and decree passed by learned Trial Court in first appeal under Section 96 of the Code of Civil Procedure. In first appeal, learned Lower Appellate Court reversed the findings returned by learned Trial Court and decreed the suit of the plaintiff to the following effect:-

> *" In view of my findings on point No. 1 above, the present appeal succeeds, which is accordingly accepted, with costs through-out. The impugned judgment and decree are set aside. Consequently, the suit of the plaintiff,Smt. Rama Devi, is decreed for declaration to the effect that she has a right of passage by way of easement of custom and prescription to pass through Khasra No. 219 to her houses and other property. A further decree or permanent prohibitory inunction is passed in her favour and against the defendants restraining them from causing any nuisance or creating any obstruction in such passage and yet another decree for mandatory injunction is also passed in favour of the plaintiff and against the defendants directing them to remove the obstruction created by them in the said passage, forthwith."*

9. Learned Lower Appellate Court had held that the property in question was duly identified by way of site plan Ext. PW5/A. It was also held that on the basis of oral and documentary evidence on record, the existence of passage on Khasra No. 219 was proved and it was also proved that the plaintiff had customary and prescriptive right of easement to use the said passage. The existence of availability of alternative passage to the house of the plaintiff was held to beof no consequence for deciding the controversy between the parties.

10. The instant appeal stands admitted on the following substantial questions of law: -

1. *Whether the learned 1st Appellate Court below has wrongly reversed the well-reasoned judgment passed by the learned trial court whereby the suit of the respondent has been dismissed on account of the failure of the plaintiff to identify the suit property and substantiate/corroborate Ext. PW5/A and for having failed to establish the existence of the alleged path over the suit land?*

3. *Whether the suit has wrongly been decreed for declaration of right of passage by way of easement of custom and prescription to pass through the suit land without establishment of the said claim while to the contrary, the existence of the alternate general public path adjacent to the house of the plaintiff has been duly proved even by the plaintiff's witnesses PW-3 and PW-6 themselves*?

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

12. In the first instance, it is necessary to ascertain as to what kind of right of passage has been claimed by the plaintiff over Khasra No. 219. Indisputably,Khasra No. 219 did not belong to plaintiff. Exhibit P-3 is the jamabandi of said Khasra Number on record. Roshal Lal and Shyam Lal, defendants are recorded owners of said land. The area of said land is 1-4 Bighas. As per averments made in the plaint, plaintiff has asserted her right of passage over Khasra No. 219 in following terms: -

> "*That the defendants are threatening to block the passage as shown in the rough site plan Annexure-A and are causing nuisance to the passage to the house of the plaintiff unnecessarily. The defendants are very headstrong and quarrelsome persons and they are threatening the plaintiffs with dire consequences who is a poor widow and are threatening to block the passage by constructing boundary and to create hindrance in the user of the house of the plaintiff.* ***The plaintiff has been exercising the right of passage as a matter of right since the time of her ancestor and the said right is being exercised on the basis of custom which is ancient and reasonable and duly recognized, thus the plaintiff has got customary right of passage through the land of the defendants as shown in the site plan*** *and that cannot be obstructed to and in case the defendants raise the construction, then the plaintiff is entitled to demolition of structure."*

13. Thus, plaintiff claimed customary right of passage from Khasra No. 219. Customary right has been defined in Section 2(b) of Indian Easements Act, 1882 as under: -

> "*2(b)*Any *customary or other right (not being a license) in or overimmovable property which the [Government], or the public or any person may possess irrespective of other immovable property;"*

14. The customary easement is defined in Section 18 of the Act as under:-

> *"18.**Customary easement**. -An easement may be acquired in virtue of a local custom. Such easements are called customary easements.*
>
> *Illustrations".*
>
> *(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.*
>
> *(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B 's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A 's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A 's house."*

15. The customary right referred to in Section 2(b) of the Act is distinguishable from the customary easement as defined in Section 18 of the Act. The customary rights arise from customs but need not be **appurtenant to the dominant tenement.** No fix period of enjoyment is necessary to establish customary rights, but the custom must be proved to be reasonable and certain. On the other hand, for proving customary easement the **appurtenant to the dominant tenement** is *sine quo non*. It has to be pleaded and proved like any other easement.

16. Plaintiff, as noticed above, had pleaded existence of customary right. The record of the case nowhere reveals that the plaintiff had pleaded or proved the purpose or extent of alleged passage through Khasra No. 219. It was not her case that the claimed passage through Khasra No. 219 was the

only passage available to the property of plaintiff. There is nothing also to suggest as to from where the passage started so as to continue through Khasra No. 219. Thecertainty of custom has to be pleaded and proved. The vague and absurd oral statement(s)about the custom to use other's lands for passage cannot be held to be sufficient compliance.

17. Totalarea of land comprised in Khasra No. 219 measures 1-4 Bighas i.e. about 1000 square meters. The entire stretch of KhasraNo. 219 cannot be said to be used as passage. It was for plaintiff to have pleaded and proved the exact extent of passage so claimed by her through Khasra No. 219 by sufficiently identifying the samein order to prove the reasonableness of alleged customary right. This gains more significance when the evidence suggests existence of public path as an approach to the house of plaintiff.

18. Plaintiff has placed reliance on document Ext. PW5/A for identifying the claimed passage. No village map has been placed on record to authenticate or corroborate the contents of Ext. PW5/A. Admittedly, the site plan Ext. PW5/A has been prepared by a person who claimed himself to have done diploma in preparation of plans. Plaintiff examined the author of Ext. PW5/A as her witness (PW-5). By way of his affidavit, this witness stated that he had prepared plan Ext. PW5/A on the spot on the asking of plaintiff. In cross-examination, he admitted that he had not associated any owner of the adjoining land. He had mentioned the Khasra Number as disclosed to him by the plaintiff. He had not associated local Patwari. Thus, from deposition of PW-5, it is clear that the site plan prepared by him had no reference to revenue record. The exact position of Khasra No. 219 *vis-a-vis* Khasra Nos. 215 and 218 could be evident only from field map or the village map. In such view of the matter, the reliance placed on document Ext. PW5/A by learned Lower Appellate Court is clearly misplaced. PW-5 had not even associated the defendants. In this view of the matter, the passage shown in site plan Ext PW-5/A does not satisfy the legal requirements. Even otherwise the path shown in

above said document does not reveal its exact extent and purpose. In case document Ext. PW5/A is ignored, there is nothing on record to suggest nature, extent or even existence of passage over Khasra No. 219 as claimed by the plaintiff.

19. While cross-examining one of the defendants as DW-1, it was suggested on behalf of the plaintiff that common passage touched Khasra No. 219 and from there onwards plaintiff had a passage to her house through Khasra No. 219. Such suggestion was denied by DW-1. However, it can be inferred from such suggestion that the plaintiff claimed a passage through Khasra No. 219 to approach her house from a common passage. Such stand of the plaintiff firstly is not her pleaded case and secondly the same even contradicts the contents of Ext. PW5/A as no such link between common passage and house of plaintiff is described therein by way of passage through Khasra No. 219.

20. Learned Lower Appellate Court decided the appeal on the premise that plaintiff had claimed right of passage through Khasra No. 219 as customary and prescriptive easement. Learned Lower Appellate Court has clearly erred in drawing such an inference which was not borne from the record.

21. Resultantly, the appeal deserves to be allowed. Judgment and decree dated 17.06.2008, passed by learned District Judge, Hamirpur in Civil Appeal No. 50 of 2005, is set aside and judgment and decree dated 01.04.2005, passed by learned Civil Judge (Jr. Division), Barsar, District Hamirpur, H.P. in Civil Suit No. 63 of 1999, is affirmed in light of the observations made herein.

22. The appeal is accordingly disposed of, so also the pending miscellaneous application(s), if any.

Decree sheet be prepared accordingly.

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

Between:

SH. CHET RAM S/O LATE SH. FATE RAM, S/O LATE SH. JAMBHARIA, RESIDENT OF VILLAGE PHANIPRA, TEHSIL CHACHIOT, DISTRICT MANDI, H.P.

….APPELLANT.

(BY MR. S.D. GILL, ADVOCATE)

AND

1. ROSHAN LAL,

2. MUARI LAL, BOTH SONS OF SH. KRISHAN CHAND SON OF LATE SH. JAMBHARIA,

3. SMT. SEETA DEVI WIDOW OF LATE SH. RAJU SON OF SH. KRISHAN CHAND,

4. UMESH KUMAR (MINOR) SON OF LATE SH. RAJU SON OF SH. KRISHAN CHAND, THROUGH HIS MOTHER SMT. SEETA DEVI.

5. KUMARI DEVINDRI DEVI, D/O LATE SHRI RAJU

6. SURENDRA KUMARI, D/O LATE SHRI RAJU
7. POOJA KUMARI (MINOR) DAUGHTERS OF LATE SH. RAJU THROUGH THEIR MOTHER AND NATURAL GUARDIAN SMT. SEETA DEVI WIDOW OF LATE SH. RAJU S/O LATE SH. KRISHAN CHAND, RESPONDENT NO.3,

ALL RESIDENTS OF VILLAGE PHANIPRIA, TEHSIL CHACHIOT DISTRICT MADNI, H.P.

…. RESPONDENTS.

8. SOHAN LAL SON OF SH. HIRA LAL SON OF LATE SH. JAMBHARIA, VILLAGE PHANIPRA, TEHSIL CHACHIOT DISTRICT MADNI, H.P.

9. (a) SMT. DHEBAR WIDOW OF LATE SH. FATE RAM, VILLAGE PHANIPRA, TEHSIL CHACHIOT DISTRICT MADNI, H.P.

9 (b) SMT. KHIMI D/O LATE SH. FATE RAM AND WIFE OF SH. KATKU, RESIDENT OF VILLAGE KALANG, TEHSIL AND DISTRICT KULLU, H.P.

9 (c) SMT. PADMA DEVI D/O LATE SH. FATE RAM AND WIFE OF SH. GURNAM SINGH, PRESENTLY RESIDING AT VILLAGE LORAN, TEHSIL AND DISTRICT KULLU, H.P.,

10. SH. KISHAN CHAND,

11. MAST RAM, SON OF LATE SH. JAMBHARIA,

12. KALA DEVI, D/O LATE SHRI JAMBHARIA,

13. CHINTA DEVI, D/O LATE JAMBHARIA

14. GANGI DAUGHTER OF LATE SH. JAMBARIA,

15. SMT. BALKI DEVI WIDOW OF LATE SH. JHANBRIA,

16. KARUNA DEVI, D/O LATE SHRI HIRA LAL

17. REENA DEVI, LATE SHRI HIRA LAL

18. NIRMALA DEVI MINOR DAUGHTERS OF LATE SH. HIRA LAL THROUGH THEIR MOTHER AND NATURAL GUARDIAN PERFORMA RESPONDENT NO.19.

19. SMT. PATU DEVI WIDOW OF SH. HIRA LAL S/O LATE SH. JHAMBRIA,

ALL RESIDENTS OF MOHAL PHANI PRIA, TEHSIL CHACHIOT, DISTRICT MANDI, H.P.

.....PERFORMA RESPONDENTS.

(BY MR. H.S. RANGRA, ADVOCATE, FOR RESPONDENTS NO.1 TO 3, 5, 6, 11, 13, 15 AND 19)
RESPONDENTS NO. 4, 7, 8, 9(a), 9 (b), 12, 14, 17 AND 18 ARE *EX PARTE*)
(NAMES OF RESPONDENTS NO.9 (c), 10 AND 16 ARE DELETED FROM THE ARRAY OF RESPONDENTS)

REGULAR SECOND APPEAL
No.35 of 2020
Decided on: 07.09.2022

Code of Civil Procedure, 1908- Section 100- Second appeal- **Specific Relief Act, 1963-** Section 34, 38- suit for declaration and permanent prohibitory injunction- sought declaration to the effect that will executed by grandfather of plaintiff is illegal, null and void as a result of fraud- suit land was being coparcenary property could not have been bequeathed by way of will- **Held**- plaintiff failed to prove that he was grandson of testator- Plaintiff could not present pedigree table of previous owners of suit land commencing from common ancestor- no presumption as testator was and not of sound disposing mind- plaintiff to lead cogent and reliable evidence that testator was not of sound mind at the time of execution of will- will in question duly proved by scribe and attesting witness- will was executed by testator knowing and fully understanding the act- appeal not sustainable in absence of substantial question of law- appeal dismissed. (Paras 7,8)

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

J U D G M E N T

As per report of the Registry, steps have not been taken for the service of respondents No.9(c) & 16 and further, legal representatives of deceased-respondent No.10 have also not been brought on record. Mr. S.D.

Gill, learned counsel for the appellant submits that taking into consideration the fact that respondents No.9(c) and 16 are proforma respondents and further, deceased respondent No.10 is also proforma respondent, on his prayer, their names be deleted from the array of the respondents. Ordered accordingly.

Names of respondents No.9 (c), 10 and 16 are deleted from the array of respondents. Registry to carry out necessary correction in the memo of parties.

Heard for the purpose of admission.

Brief facts necessary for the adjudication of the present appeal are that appellant/plaintiff filed a suit for declaration and permanent prohibitory injunction against the contesting defendants to the effect that Will dated 26.03.1999 was illegal, null and void and was procured by the predecessor of defendants No.3 to 7 and that the suit land was co-parcenery property, which otherwise could not have been alienated by way of Will. Decree was also sought for restraining the defendants by way of permanent prohibitory injunction also.

2. According to the plaintiff, the suit land was owned and possessed by late Shri Mithan son of Shri Dayalu, who was the common ancestor of the parties. After the death of Mithan, Shri Jhambria inherited the suit land being the son of Mithan. He was the 'karta' of family and custodian of the suit land. Mithan had two sons, namely Jhambria and Shibu. Plaintiff was the grandson of Jhambria, who expired on 20.09.2005. After the death of Jhambria, predecessor-in-interest of defendants No.3 to 7, namely, one Shri Raju got mutated the inheritance of the suit land in favour of the defendants. As per the plaintiff, he was informed that the inheritance stood attested in favour of all successors, but in the month of June, 2009, when plaintiff visited the Patwarkhana to obtain certain revenue records, it is then that he came to know that the suit land had been mutated on the basis of a Will of Jhambria,

which Will was a result of fraud. According to the plaintiff, Jhambria had never executed any Will nor he could have had bequeathed the ancestral property to the exclusion of the plaintiff. Further, as per the plaintiff, the Will was shrouded with suspicious circumstances as Jhambria was old, aged and ailing person. The same was further outcome of misrepresentation of facts and collusion between defendants No.1 and 2 and late Shri. Raju, predecessor-in-interest of the other defendants. It is in this background, the suit stood filed.

3. Defendants No.4 to 7 filed a composite written statement through their natural guardian, opposing the suit, *inter alia*, on the ground that Jhambria was not related to plaintiff. As per the defendants, Fate Ram, father of the plaintiff was the son of one Janglu. Smt. Balki was the wife of Janglu, who gave birth to Fate Ram. She later on got settled with Jhambria when Fate Ram was about two years old. Jhambria was having two wifes. One was Smt. Balki and the another was Smt. Bangalan. Smt. Bangalan got settled with the brother of Jhambria, namely Shibu and gave birth to Hira Lal, i.e. the father of proforma defendant No.8. Sohan Lal, proforma defendant No.8 inherited the property of Shibu. Jhambria executed Will dated 26.03.1999 in favour of the defendants. As per the contesting defendants, the suit land was not ancestral and co-parcenery property, but the same was self acquired property of late Shri Jhambria, whose brother was already separated in mess and possession of land. Further, as per the contesting defendants, the father of the plaintiff used to live at Karsog for the last twenty five years and plaintiff himself was residing at Kullu. There was no blood relation between plaintiff and Shri Jhambria. The defendants had served Shri Jhambria, who therefore, bequeathed his entire property in their favour by way of Will dated 26.03.199, which was duly executed in the presence of attesting witnesses and scribe. The Will was a genuine document and was not suffering from any suspicious circumstances.

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

> *"1. Whether the Will No.39 dated 26-3-1999 is liable to be declared null and void, as prayed for?OPP*
> *2. Whether the plaintiff is also entitled to be declared as the joint owner in possession of the suit land alongwith defendants, as prayed for? OPP.*
> *3. Whether the defendants are liable to be restrained from forcibly dispossessing the plaintiff from the suit land or alienating the same through a decree of permanent prohibitory injunction, as prayed for? OPP.*
> *4. whether the plaintiff is also entitled for the relief of mandatory injunction to the effect that in case he is forcibly dispossessed from the suit land the possession be restored, as prayed for? OPP.*
> *5. Whether the suit is not maintainable in the present form, as alleged? OPD.*
> *6. Whether the plaintiff has no locus standi to file the pressent suit, as alleged? OPD.*
> *7. Whether the plaintiff is estopped by his own act and conduct to file the present suit, as alleged? OPD.*
> *8. Whether the plaintiff has no enforceable cause of action and right to sue, as alleged? OPD.*
> *9. Whether the suit is time barred, as alleged? OPD.*
> *10. Whether the Will No.39 dated 26-03-1999 is a valid document, as alleged? OPD.*
> *11.Relief."*

5. On the basis of evidence led by the parties in support of their respective contentions, the issues so framed were answered by learned Trial Court as under:-

"*Issue No.1*	*:*	*No.*
Issue No.2	*:*	*No.*
Issue No.3	*:*	*No.*
Issue No.4	*:*	*No.*
Issue No.5	*:*	*Yes.*
Issue No.6	*:*	*Yes.*
Issue No.7	*:*	*No.*
Issue No.8	*:*	*No.*
Issue No.9	*:*	*No.*
Issue No.10	*:*	*Yes.*

RELIEF : The suit of the plaintiff is dismissed as per operative part of the judgment."

6. The suit was dismissed by the learned Trial Court by returning the findings that the Will executed by Jhambria was a valid document and not shrouded with suspicious circumstances. Learned Trial Court held that presumption cannot be drawn that as the testator was old, therefore, he was not of sound disposing mind. Learned Trial Court also held that it was for the plaintiff to lead cogent and reliable evidence that Jhambria was not of sound disposing mind at the time of execution of the Will, which he failed to do. Learned Trial Court held that the Will being a registered document, the same itself proved its genuineness. Learned Trial Court held that the execution of the Will was duly proved by the scribe of the Will as also the attesting witnesses. It also held that though there was no doubt that Jhambria had received the property from Mithan, but the plaintiff had failed to prove with cogent and reliable evidence that he was the grandson of Jhambria. In fact, plaintiff had categorically admitted that the first husband of Balki was Janglu and he also admitted that she got settled with Jhambria when his father was of tender age. Learned Trial Court held that Balki Devi, the wife of Jhambria had also testified that she was married to Janglu and gave birth to Fate Ram from his loins and this evidence of Balki Devi and admission of the plaintiff was sufficient to conclude that Fate Ram was not born from the loins of Jhambria. On these basis, learned Trial Court held that the plaintiff was not entitled to be declared as joint owner in possession of the suit land and as the plaintiff was not grandson of Jhambria, he was not having any locus to file and maintain the suit itself.

7. In appeal, these findings have been affirmed.

8. Learned Appellate Court while dismissing the appeal filed by the plaintiff held that as per the plaintiff, he was the son of Fate Ram and

grandson of Jhambria and Jhambria was claimed to have inherited the entire suit land from common ancestor, namely, Mithan. Learned Appellate Court also held that defendants Raju and others were admittedly the grand-sons of Jhambria. The plaintiff was obliged to produce the Pedigree Tables of previous owners of the suit land commencing from Mithan, the common ancestor, which he failed to do. Learned Appellate Court held that DW-5 Smt.Balki Devi, wife of Jhambria had stated that Fate Ram, father of the the plaintiff took birth from the loins of her previous husband Shri Janglu and Fate Ram was three years old when she married with Jhambria. On these basis, learned Appellate Court held that it had no hesitation in holding that the plaintiff had not been able to prove on record with the help of oral and documentary evidence that he was son of Fate Ram and grandson of Jhambria.

9. With regard to the suspicious circumstances shrouding the Will, learned Appellate Court upheld the findings returned by the learned Trial Court by observing that the Will in question was duly proved by the scribe as well as attesting witnesses who had deposed in the Court that the Will was executed by the testator knowing and fully understanding his act.

10. Feeling aggrieved, the appellant has filed this appeal.

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

12. There are concurrent findings returned by both the learned Courts below to the effect that the plaintiff has not been able to establish the fact that he was the grandson of Jhambria. These findings have been returned by both the learned Courts below on the basis of evidence which has been led by the parties or to put it in other words, these findings have been concurrently returned by both the Learned Courts below in the absence of the plaintiff placing on record any cogent evidence to demonstrate that he was indeed the grandson of Jhambria. Further, with regard to the Will in dispute, both the learned Courts below have held that the same was not shrouded with

suspicious circumstances as cogent and reliable evidence produced on record by the beneficiaries of the Will to prove that it was a valid Will.

13. As the entire suit of the plaintiff was based on the fact that he was the grandson of Jhambria and in view of the fact that there were concurrent findings returned by both the learned Courts below that plaintiff had failed to prove that he indeed was a grand-son of Jhambria, in the absence of the present appeal involving any substantial question of law, the same is not sustainable. This is more so for the reason that learned counsel for the appellant was not able to demonstrate from the record that the plaintiff was actually the grandson of Jhambria. This Court can also not loose site of the fact that Smt. Balki (DW-5), wife of Jhambria herself deposed that father of plaintiff was born from the loins of her previous husband Janglu. The appeal is, therefore, dismissed. Pending miscellaneous applications, if any, also dismissed. Interim order, if any, stands vacated.

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

BETWEEN:

1. SH. PARKASH CHAND, DECEASED, THROUGH HIS LRS.
a) SUSHEEL KUMAR, S/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
b) SHASHI KUMAR, S/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
c) SUMNA DEVI, D/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
d) SUSHMA DEVI, D/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
e) SONA DEVI, WD/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
2. RAMESH CHAND, S/O SH. NAKELU RAM,
3. SURESH KUMAR DECEASED THROUGH HIS LRS.
a) ASHA DEVI WIDOW OF LATE SH. SURESH KUMAR
b) ANKUSH KUMAR SON OF LATE SH. SURESH KUMAR.
c). RAJNI BALA DAUGHTER OF LATE SH. SURESH KUMAR.
d). SAPNA KUMARI DAUGHTER OF LATE SH. SURESH KUMAR.
4. HARBANS LAL, S/O SH. NAKELU RAM.

ALL RESIDENTS OF VPO SIDHPURGHAR, TEHSIL JAWALI, DISTRICT KANGRA, HP.

….APPELLANTS.

(M/S BHUVNESH SHARMA, RAMAKANT SHARMA, MEENA SHARMA AND PARV SHARMA, ADVOCATES)

AND

1. ANJANI, S/O SH. KRISHAN DASS
2. DEV RAJ, S/O SH. KRISHAN DASS
3. RATTAN CHAND THROUGH HIS LRS
a) DAVINDER NATH S/O LATE SH. RATTAN CHAND, S/O SH. NAURANG.
b) MACHIRNDER NATH S/O LATE SH. RATTAN CHAND S/O SH. NAURANG.
4. ANIL KUMAR S/O SH. KARTAR SINGH.

ALL RESIDENTS OF V.P.O. BHARMAR, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

….RESPONDENTS.

(BY MR. ASHOK CHAUDHARY, ADVOCATE, FOR RESPONDENTS NO.1 AND 2)
(BY MR. ATHARV SHARMA, ADVOCATE, FOR RESPONDENTS NO.3 (a) AND 3 (b)
(RESPONDENT NO.4 IS *EX PARTE*)
REGULAR SECOND APPEAL NO.93 OF 2020

BETWEEN:

1. PARKASH CHAND, DECEASED, THROUGH HIS LEGAL HEIRS:-
a) SUSHEEL KUMAR, S/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
b) SHASHI KUMAR, S/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
c) SUMNA DEVI, D/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
d) SUSHMA DEVI, D/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
e) SONA DEVI, WD/O LATE SH. PARKASH CHAND S/O SH. KIRLU,
2. RAMESH CHAND, S/O SH. NAKELU RAM,
3. SURESH KUMAR DECEASED THROUGH HIS LRS.
a) ASHA DEVI WIDOW OF LATE SH. SURESH KUMAR
b) ANKUSH KUMAR SON OF LATE SH. SURESH KUMAR.
c). RAJNI BALA DAUGHTER OF LATE SH. SURESH KUMAR.
d). SAPNA KUMARI DAUGHTER OF LATE SH. SURESH KUMAR.
4. HARBANS LAL, S/O SH. NAKELU RAM.

ALL RESIDENTS OF VPO SIDHPURGHAR, TEHSIL JAWALI, DISTRICT KANGRA, HP.

….APPELLANTS.

(M/S BHUVNESH SHARMA, RAMAKANT SHARMA, MEENA SHARMA AND PARV SHARMA, ADVOCATES)

AND

1. ANJANI, S/O SH. KRISHAN DASS
2. DEV RAJ, S/O SH. KRISHAN DASS
3. RATTAN CHAND THROUGH HIS LRS

a) DAVINDER NATH S/O LATE SH. RATTAN CHAND, S/O SH. NAURANG.
b) MACHIRNDER NATH S/O LATE SH. RATTAN CHAND S/O SH. NAURANG.

4. ANIL KUMAR S/O SH. KARTAR SINGH.

ALL RESIDENTS OF V.P.O. BHARMAR, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

….RESPONDENTS.

(BY MR. ASHOK CHAUDHARY, ADVOCATE, FOR RESPONDENTS NO.1 AND 2)
(BY MR. ATHARV SHARMA, ADVOCATE, FOR RESPONDENTS NO.3 (a) AND 3 (b)
(RESPONDENT NO.4 IS *EX PARTE*)

REGULAR SECOND APPEAL
No.92 of 2020 A/W
REGULAR SECOND APPEAL
No.93 of 2020
Decided on: 20.09.2022

Code of Civil Procedure, 1908- Section 100- second appeal- **Specific Relief Act, 1963-** Section 34, 38- suit for declaration and permanent prohibitory injunction- plaintiffs claimed to be *gair marusi* tenants and sought certain partition orders to be illegal and void- defendants filed counter claim that plaintiff had stopped paying rent and had refused to vacate the premises- trial court decreed counter claim and dismissed the suit- **Held**- material irregularity at the stage of filing of first appeal cannot be cured at the stage of second appeal by filling two different appeals- trial court passed two distinct decrees and filing of one appeal only against two decrees was fatal- plaintiff did not file two independent appeals against dismissal of their suit and decreeing of the counterclaim- both suit and counter claim decided by a common judgment irrespective of separate decrees, filing of separate appeals is essential- in absence of appeal against the other, principles of res-judicata,

waiver and estoppel arise- single appeal is not maintainable- appeal dismissed. (Para 11)

These appeals coming on for admission this day, the Court passed the following:

J U D G M E N T

As both these appeals arise out of the judgment and decree dated 15.02.2016, passed by the Court of learned Civil Judge (Junior Division), Jawali, District Kangra, H.P., in Civil Suit No.97 of 2006, alongwith Counter Claim No.23/16/2006, as affirmed by the Court of learned District Judge-II, Kangra at Dharamshala, H.P., vide judgment and decree dated 04.12.2019, in Civil Appeal No.14-J/2016, the same are being disposed of with the consent of the parties by a single judgment.

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

The appellants/plaintiffs filed a suit for declaration and permanent prohibitory injunction against the respondents qua the suit land, stating in the plaint that earlier they were Gair Marusi tenants over the suit land and defendants were having no right, title or interest over the suit land and had no right to get the suit land partitioned and that plaintiffs had become owners of the suit land by virtue of the provisions of the Himachal Pradesh Tenancy and Land Reforms Act. Accordingly, a declaration was sought that order passed by A.C. 1st Grade, Jawali, dated 07.04.2005, partitioning the suit land and orders dated 07.11.2005 and 30.08.2005, passed by S.D.M. Jawali, upholding the orders of partition, be declared as illegal, null and void. Further, consequential relief of permanent prohibitory injunction for restraining the defendants from interfering in the peaceful possession of the plaintiffs and dispossessing them from the structure and

machinery on the basis of wrong orders was also prayed for. Alternatively, a relief of mandatory injunction and possession was also sought, on the ground that if during the pendency of the suit, defendants succeeded in dispossessing the plaintiffs, then their possession be restored.

3. The suit was resisted by the defendants. Defendants No.1, 2 and 4 resisted the suit, *inter alia*, on the ground that the plaintiffs were not in possession of the suit land as Gair Marusi tenants and there was no infirmity with the orders passed by the Revenue Authorities, which were sought to be declared as illegal and void. It was further the stand of said defendants that otherwise also the plaintiffs were having statutory remedy to challenge these orders which was not availed. It was further the case of said defendants that the suit land was lying vacant at the spot.

4. Defendant No.3 resisted the suit, *inter alia*, on the ground that neither the plaintiffs nor their predecessor-in-interest were ever inducted as Gair Marusi tenants over the suit land. As per defendant No.3, he had constructed a shed over the part of the suit land and father of the plaintiffs in the year 1972 took said structure on yearly rent of Rs.60/- with the understanding that the same shall be returned to defendant No.3, when requested. The rent was increased in the year 1995 and was settled at Rs.500/- per year. Further, as per defendant No.3, after the death of Nakelu Ram, plaintiffs came in possession of said shed and started paying annual rent on same terms. In the year 2002, intention of the plaintiffs changed and they stopped paying the rent and thereafter, defendants served a notice upon them under Section 106 of the Transfer of Property Act in terms whereof, the plaintiffs were requested to pay rent from March, 2002 onwards till March, 2005, but plaintiffs refused to admit the claim of the defendants. By way of said notice, plaintiffs were also called upon to hand over the vacant possession of the rented premises, as the same were required by defendant No.3 for personal necessity, but this was also not done. Defendant No.3 also

filed a Counter-Claim for ejectment and recovery of rent, on the grounds already narrated hereinabove.

5. Learned Trial Court, in terms of judgment and decree dated 15.02.2016 dismissed the suit filed by the plaintiffs and decreed the Counter-Claim filed by defendant No.3. Para-53 of the judgment passed by the learned Trial Court reads as under:-

> "*53. Keeping in view my findings on various issues, suit filed by plaintiffs seeking declaration of they being Gair Marusi tenants or that partition order is illegal, null & void, is hereby dismissed. Further, suit of plaintiffs for consequential relief of permanent prohibitory injunction and mandatory injunction is also hereby dismissed. Further, counter claim filed by defendant No.3 is decreed and he is held entitled to recover possession of land and shed from plaintiffs comprising in khata No.454, khatauni No.995, khasra No.3199, area measuring 0-03-00 Hms, situated in Mohal & Mauza Bharmar, Tehsil Jawali, District Kangra, HP, without demolition of structure raised over the suit land. Further, counter claimant/defendant No.3 is held entitled to recover arrears of rent amounting to Rs.180/- in total alongwith interest at the rate of 9% from the date of institution of counter claim till its recovery. In view of the peculiar facts & circumstances of the case, parties shall bear their own costs. Decree sheet be prepared accordingly. The case file complete in all respects be consigned to record room.*"

6. Record demonstrates that against the dismissal of the suit and the decree of the Counter-Claim, plaintiffs preferred only one single appeal, i.e. Civil Appeal No.14-J of 2016, which was dismissed by the Court of learned Additional District Judge-II, Kangra at Dharamshala, District Kangra, H.P., vide judgment and decree dated 04.12.2019, by holding as under:-

> " *19. In Parso versus Dumnu Ram and others 2017(3) Shim. Law Cases 1270, while deciding the substantial question of law, "whether one single appeal filed by plaintiff against the judgment and decree dated 30.09.2005 passed by the Court of learned Civil Judge (Sr. Divn.) Chamba, in Civil Suit No.38 of 2021 was maintainable in view of the fact that vide its judgment and decree dated 30.09.2005, learned trial Court while dismissing the suit filed by the plaintiff had decreed the counter claim filed by the*

defendant", the Hon'ble High Court on relying upon the judgments of the Hon'ble Supreme Court Court while answering this substantial question of law, has held that the single appeal is not maintainable.

20. In the present case also, the plaintiffs/ appellants have also field the single appeal against the dismissal of the suit of the plaintiffs and decreeing of the counter claim of the defendant No.3. In view of the law cited supra and in the present facts and circumstances of the case, single appeal is not maintainable. Accordingly, point no.1 is decided in the negative and against the appellants/ plaintiffs.

***Final Order**:*

21. In view of my above said discussion supra and findings, the present appeal is dismissed being not maintainable and the impugned judgment & decree dated 15.2.2016, passed by learned Civil Judge (Jr. Div.), Jawali, in Civil Suit No.97/2006, titled as "Parkash Chand & Ors. v. Anjali & Ors." and Counter Claim No.23/16/2006, titled as "Rattan Chand v. Parkash Chand & Ors." is affirmed and upheld. Pending application, if any, is disposed off accordingly. The parties are left to bear their own costs. Decree sheet be drawn accordingly. Record of learned court below be returned alongwith copy of judgment of this Court. The file of this Court after its due completion be consigned to Record Room."

7. It is in this backdrop that now two appeals stand filed by the plaintiffs against the judgment passed by the learned Appellate Court.

8. Having heard learned counsel for the parties and having carefully gone through the judgments and decrees passed by both the learned Courts below, as also the order in reference of the Hon'ble Division Bench of this Court in *RSA No.57 of 2017*, titled *Shri Ramesh Chand* Versus *Om Raj & others and other connected matters*, decided on *17.05.2022*, this Court is of the considered view that both these appeals merit dismissal. This is for the reason that as the dismissal of the suit of the plaintiffs by the learned Trial Court and decreeing of the Counter-Claim, filed by defendant No.3 by the learned Trial Court, amounted to passing of two distinct decrees, findings returned wherein, if not assailed independently, admittedly were to act as *res*

judicata, filing of one appeal only against said two decrees at the stage of preferring an appeal under Section 96 of the Civil Procedure Code was fatal as has been rightly held by the learned Appellate Court also.

9. Now, this material illegality which has taken place at the stage of filing of the first appeal cannot be cured at the stage of filing of second appeal by preferring two different appeal, because fact of the matter remains that the plaintiffs, for the reason best known to them, did not prefer two independent appeals (a) against the dismissal of their suit and (b) against the decreeing of the Counter-Claim.

10. In these peculiar circumstances, the findings which have been returned by the learned Appellate Court in Paras-19 to 21 of the judgment passed by it, which have been quoted by me hereinabove, do not suffer from any infirmity.

11. Incidently, this issue recently was the subject matter of a reference before this Court and the Hon'ble Division Bench of this Court in *RSA No.57 of 2017*, titled *Shri Ramesh Chand* Versus *Om Raj & others and other connected matters*, decided on *17.05.2022*, has held as under:-

> "*42. The principles deducible from the afore-discussed law can be summarized as follows:- (i) When two suits are consolidated and tried together with common issues framed and common evidence led by the parties, resulting in a common judgment and decree, the same can be subjected to challenge by way of a single appeal at the instance of the aggrieved party; (ii) Where a single appeal is filed questioning the judgment and decree passed in two suits, which were consolidated and decided by a common judgment, decision of such single appeal, by a common judgment, reversing or modifying the claim in one suit out of the two, can be challenged by the aggrieved party also, in a single appeal. (iii) When two suits though not consolidated but are decided by a common judgment, resulting into preparation of two separate decrees, the aggrieved party would be required to challenge both of them by filing separate appeals; (iv) When both the suit and the counter claim are decreed by a common judgment, regardless of whether separate decree has been prepared in the counter claim,*

both would be required to be challenged by separate appeals; (v) In a case where two separate appeals are required to be filed against judgment of the suit and the counter claim and if appeal is filed only against one and not against the other, non filing of appeal against such judgment and decree would attach finality thereto and would attract not only the principle of resjudicata but also waiver and estoppal and the judgment and decree not appealed against would be taken to have been acquiesced to by the party not filing appeal;

(vi) When however, two appeals are filed against a common judgment passed by the trial Court, both by the plaintiff and the defendant, and are disposed of by the first appellate Court by modifying/reversing/affirming judgment of the trial Court, the aggrieved party, would be required to challenge both by two separate appeals, in absence of which, non-filing of appeal against one shall attract bar of the principles of res-judicata against another. (vii) Where more than one appeals are required to be filed or are filed and one or more of them are dismissed for default, delay or any other similar reason, any such situation would attract res judicata and such dismissal would satisfy the requirement of appeal being heard and finally decided on merits "in a former suit" for the purpose of attracting principles of res judicata. 43. In view of the position of law delineated hereinabove, the judgment passed by this Court in RSA No.561 of 2005, titled Pohlo Ram vs. Jindu Ram and others decided on 28.10.2005 cannot be held to have laid down good law whereas judgments passed in (i) Smt. Satya Devi vs. Partap Singh and others, AIR 2006 HP 75 and (ii) H.P. State Forest Corporation through its Divisional Manager vs. Kahan Singh, 2017(1) Him. L.R. 36 and in (iii) Mohan Singh vs. Inder Singh & others 2017(1) Him. L.R. 368, are held to have been decided correctly."

12. Accordingly, in view of the findings returned hereinabove, as present appeals are not maintainable in the absence of the plaintiffs having preferred two distinct appeal before the learned Trial Court, they are dismissed. No order as to costs. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Between:

1. SH. RATTAN SINGH,
2. SH. PREM SINGH,
3. SH. ROSHAN LAL,
4. SH. AJMER SINGH,
5. SH. MEENA RAM

ALL SONS OF SH. SAWARIA RAM, RESIDENTS OF VILLAGE KOLAR, TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR, H.P.

….APPELLANTS.

(BY MR. R.K.GAUTAM, SENIOR ADVOCATE, WITH MR. SAHIL DAXIT, ADVOCATE)

AND

SH. RONKI LAL, S/O SH. SHEESH RAM, RESIDENT OF VILLAGE KOLAR, TEHSIL PAONTA SAHIB, DISTRICT SIRMOUR, H.P.

…. RESPONDENT.

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

REGULAR SECOND APPEAL
No.133 of 2008
Decided on: 15.09.2022

Code of Civil Procedure, 1908- Section 100- Second appeal- **Specific Relief Act, 1963-** Section 38, 5- Suit for permanent prohibitory and mandatory injunction and possession in alternative- alleged construction by defendants without any right- defendants claimed land exchange and adverse ownership in alternative- **Held**- Order 18, Rule 18 and Order 26, Rule 9 exist to facilitate the cause of justice and not to be invoked by a party to fill lacunae and create evidence in favour- defendants failed to prove that they had come in possession of suit land by way of exchange- plea of adverse possession not substantiated by defendants- construction carried out upon the suit land was during the pendency of the suit- spot inspection by court or appointment of local commissioner would not have facilitated adjudication- prayer made by appellants to for appointment of local commissioner or spot inspection rejected- defendants encroached upon the land pending suit and built structures- dismissed as meritless. (Paras 13, 14) Title: Rattan Singh & others vs. Ronki Lal Page-870

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

J U D G M E N T

By way of this appeal, the appellants have assailed judgment and decree dated 08.03.2006, passed by the Court of learned Civil Judge, (Jr. Division), Court No.1, Paonta Sahib, District Sirmaur, H.P., in Civil Suit No.29/1 of 2004, titled Sh. Ronki Lal Versus Sh. Rattan Singh & others, in terms whereof, the suit for permanent prohibitory and mandatory injunction and in the alternative, for possession was decreed by the learned Trial Court, as also the judgment and decree 26.12.2007, passed by the Court of learned District Judge, Sirmaur District at Nahan, H.P., in Civil Appeal No.37-CA/13 of 2006, tilted Shri Rattan Singh & others Versus Shri Ronki Lal, in terms whereof, the judgment and decree passed by the learned Trial Court was upheld by the learned Appellate Court while dismissing the appeal of the present appellants.

2. Brief facts necessary for the adjudication of the present appeal are that respondent-plaintiff (hereinafter to be referred as 'plaintiff') filed a suit for permanent and mandatory injunction and in the alternative for possession against the defendants, on the ground that the plaintiff was exclusive owner-in-possession of land comprised in Khata No.189, Khatauni No.305 min. Khasra No.456/430, measuring 3-18 bighas situated in Patti Masania of Mouza Kolar, Tehsil Paonta Sahib, District Sirmaur, H.P. and defendants being strangers to the suit land had startied digging foundation for construction of their house and chhappars in the suit land, without any right. Record demonstrates that though, initially the suit was filed only for permanent prohibitory and mandatory injunction, but subsequently, amendment was carried out in the plaint and alternative relief of decree for possession was also incorporated therein.

3. The suit was resisted by the defendants, *inter alia*, on the ground that Jiwan Singh had exchanged 0-5 bigha land out of the suit land towards Khasra No. 455/430, in the year 1970-71, in lieu of their abadi land and immediately after the exchange, the defendants had constructed their cattle shed and kachcha chhappars over the same in the year 1971 itself. This construction was carried out to the notice of Jiwan Singh and others openly and without any obstruction. According to the defendants, this fact was intentionally suppressed and concealed by the plaintiff and as the construction of cattle shed and Kachcha Chhappars was carried out on land measuring 0-5 bigha, towards khasra No.455/430, therefore, the plaintiff was having no right, title and interest over the same, because of the exchange that had taken place. It was further the stand of the defendants that as the plaintiff was out of possession of the suit land and in case exchange was not proved, then they had perfected their title over the suit land by way of adverse possession.

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

> "*1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP*
> *2. Whether the defendants have encroached 0-5 bighas of the suit land during the suit land during the pendency of this suit? OPP*
> *3. If issue No. 2 is held in affirmative, whether the plaintiff is entitled to the relief of mandatory injunction by way of demolition of super structure, as prayed for? OPP*
> *4. Whether the plaintiff is entitled to the relief of possession of 0-5 bighas of the suit land comprised in khasra No. 456/430/1 as prayed for? OPP*
> *5. Whether the suit is not maintainable? OPD*
> *6. Whether the plaintiff has no locus-standi to file the suit? OPD*
> *7. Whether the plaintiff has no cause of action ? OPD*
> *8. Whether the defendants are in possession of 0-5 bighas of suit land in lieu of an exchange as pleaded in para No.4 of w. as alleged ? OPD*
> *9. Whether the defendants have become owner of this 0-5 bighas of the suit land by way of adverse possession, if the plea of exchange fails ? OPD*
> *10 Relief."*

5. On the strength of evidence which was led by the parties in support of their respective contentions, the issues so framed were answered by learned Trial Court as under:-

> "*Issue No.1 : Yes*
> *Issue No.2 : Yes*
> *Issue No.3 : Yes*
> *Issue No.4 : Redundant*
> *Issue No.5 : No.*
> *Issue No.6 : No.*
> *Issue No.7 : No.*
> *Issue No.8 : No.*
> *Issue No.9 : No.*
> *Issue No.10 : No.*
> *RELIEF : Suit decreed per operative part of judgment."*

6. Learned Trial Court, thus decreed the suit by holding that the defendants had failed to prove the plea of oral exchange of land as taken by

them and evidence was contrary to the pleadings and not sufficient to prove the plea of exchange. Learned Trial Court also held that the defendants failed to demonstrate that they had perfected their title by way of adverse possession over 0-5 bigha of the suit land. Learned Trial Court further held that as defendants had failed to prove on record that they had come in possession of the suit land on the basis of some exchange and further as they had failed to prove that their title stood perfected by way of adverse possession, therefore, the defendants had admittedly encroached upon the suit land and that too, during the pendency of the suit, as was proved from the evidence on record, more so in light of the statement of DW-2 Lachhmi Chand, in the course of his cross-examination. On these basis, learned Trial Court held that the plaintiff was entitled to the relief of permanent prohibitory as well as mandatory injunction by removal of temporary sheds and foundations.

7. In appeal, these findings were upheld by the learned Appellate Court.

8. Learned Appellate Court held that the contention of the defendants was that they were in possession of the suit land since 1971 after the exchange was affected, as pleaded by them. This assertion of the defendants, however, stood falsified not only from the evidence led by the plaintiff, but also from the statement of DW-2 Lachhmi Chand, as was also held by the learned Trial Court. Learned Appellate Court held that DW-2 Lachhmi Chand had admitted in his cross-examination that whatsoever construction was there, the same was commenced by the defendants only a year back, i.e. somewhere in the month of June, 2004, because statement of this witness was recorded in the month of June, 2005 and therefore, this demonstrated that encroachment upon the suit land as well as construction carried thereupon was in the course of pendency of the suit. Learned Appellate Court further upheld the findings returned by the learned Trial

Court that the plea of adverse possession was not substantiated on record by the defendants.

9. The application, filed under Order 18, Rule 18 of the Civil Procedure Code, read with Order 26, Rule 9 thereof, in which prayer was made by the appellants/applicants for spot inspection either by the Court or by way of appointment of Local Commissioner to re-appreciate the evidence on the spot before learned Appellate Court was rejected by the same by holding that the question of visiting the spot or appointment of Local Commissioner would have arisen only, had there been material ambiguity in the evidence which could not have been explained, or in the alternative encroachment, if any proved of the land, could not be properly identified qua its placement on the spot or the dimensions thereof. Learned Appellate Court held this not being the case, a party could not be allowed to fish for evidence at the appellate stage or to create new evidence to the disadvantage of the other parties. On these findings, the application was dismissed and on the basis of the findings which have been narrated hereinabove, learned Appellate Court while upholding the findings returned by the learned Trial Court, dismissed the appeal.

10. Feeling aggrieved, the appellants have filed this Regular Second Appeal, which was admitted by the Court on 14.08.2008, on the following substantial questions of law:-

> 1. *Whether the impugned judgment passed by the lower appellate court is not sustainable in the eyes of law as the learned judge has failed to discuss in detail the evidence on record which was otherwise required to do so being the highest fact finding court?*
>
> *2. Whether the learned lower appellate court is wrong in dismissing the application under Order 18 Rule 18 read with Order 26 Rule 9 Code of Civil Procedure filed by the appellants before him*?

11. I have heard learned counsel for the parties and have also carefully gone through the judgments and decrees passed by both the learned Courts below as well record of the case.

12. I will answer both the substantial questions of law separately.

Substantial Question of Law No.1

13. A perusal of the judgments passed by both the learned Courts below demonstrate that there are concurrent findings returned by both the learned Courts below to the effect that '(a) defendants miserably failed to prove their plea of exchange of land in the year 1971 from one Jiwan Singh, (b) defendants failed to prove that their possession upon the suit land was from the year 1971, (c) defendants failed to demonstrate that they had perfected their title upon the suit land by way of adverse possession and that record demonstrated, including the statement of DW-2 Lachhmi Chand, that encroachment upon the suit land was made by the defendants during the pendency of the suit and whatever construction was carried thereupon was also during the pendency of the suit'. A perusal of the record as well as the judgments passed by the learned Courts below demonstrate that these findings were returned by the learned Courts below after taking into consideration the statements of plaintiff's witnesses as well as the documents which were exhibited on record by the plaintiff. The fact that stand of the defendants in the written statement was that they had come in possession of the suit property by way of an exchange which was entered into by them with one Jiwan Singh itself amounts to admission on the part of the defendants that in fact they were not owners of the suit land. Now, a perusal of the record demonstrates that Jiwan Singh entered into the witness box as PW-3 and he did not support the case of the defendants. A careful perusal of cross-examination of this witness demonstrates that the credibility of what he stated in in his examination-in-chief, was not impaired in his cross-examination. Therefore, this Court has no hesitation in holding that the

findings which have returned by the learned Courts below by holding that (a) defendants miserably failed to prove their plea of exchange of land in the year 1971 from one Jiwan Singh, (b) defendants failed to prove that their possession upon the suit land was from the year 1971, (c) defendants failed to demonstrate that they had perfected their title upon the suit land by way of adverse possession and that record including the statement of DW-2 Lachhmi Chand proved that encroachment upon the suit land was done by the defendants during the pendency of the suit and whatever construction was carried thereupon was also during the pendency of the suit, are clearly borne out from the record of the case. Further, as the judgment passed by the learned Lower Appellate Court is in the nature of affirming the judgment passed by the learned Trial Court, therefore, it cannot be said that the learned Appellate Court failed to discuss in detail the evidence on record. Substantial Question of Law is answered accordingly.

Substantial Question of Law No.2

14. Order 18, Rule 18 of the Civil Procedure Code, provides that the Court at any stage of a suit may inspect any property or thing concerning which any question may arise and where the Court inspects any property or thing, it shall as soon as may be practicable, makes a memorandum of any relevant facts observed at such inspection and such Memorandum shall form a part of the record of the suit. Similarly, the provisions of Order 26, Rule 9 of the Code of Civil Procedure, *inter alia*, provides that in any suit in which the Court deems local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, then the Court may issue a Commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court.

15. This Court is of the considered view that the provisions of Order 18, Rule 18, as also Order 26, Rule 9 of the Civil Procedure Code, exist to facilitate the cause of justice and the powers enshrined therein have to be

exercised by the Court, if the facts of the case so demand, but these provisions cannot be permitted to be invoked by a party to fill in the lacunae in his case. In other words, these provisions cannot be permitted to be resorted to by a party, calling upon a Court of Law to create evidence in his favour.

16. The prayer made in the application by the applicants/ appellants was for appointment of a Local Commissioner or for spot inspection by the Court to ascertain whether there was any encroachment as alleged by the plaintiffs and further to ascertain the issue of construction which stood carried out upon the suit land as also for plantation of fruit trees etc.

17. A quick reference to the stand of the appellants in the written is necessary at this stage also. The suit was resisted by the defendants on the ground that the suit land stood exchanged by them with Jiwan singh and that too as far back as in the year 1970-71, in lieu of their Abadi and immediately after the exchange, the defendants had constructed their cattle sheds and Kachcha Chhappars over the same in the year 1971 itself. This stand of theirs has been disbelieved by both the learned Courts below. Therefore, in the backdrop of the defendants having failed to prove that they had come in possession of the suit land by way of exchange, the spot inspection by the Court or appointment of a Local Commissioner would not having facilitated the adjudication of the case as the material was already available with the learned Courts below to adjudicate upon the lis.

18. Similarly, the plea of adverse possession taken by the defendants could not be substantiated by them and further it had come in the statement of DW-3 itself that whatever construction was carried out upon the suit land was carried out one year as from the date when he was making the statement in the Court. The statement so made by this witness in the Court in the month of June, 2005 and this obviously means that the construction activity was carried out by the defendants upon the suit land in the year

2004, i.e. during the pendency of the suit. To this effect also, there are concurrent findings returned by both the learned Courts below. In this background, when one peruses the findings which have been returned by the learned Appellate Court by dismissing the said application which already stand enumerated by me hereinabove, this Court does not finds any perversity therein. Substantial question of law is answered accordingly.

19 . In view of above discussion, as this Court does not finds any merit in the present appeal, the same is, accordingly, dismissed, also the pending miscellaneous applications, if any. No order as to cost. Interim order, if any, stands vacated.