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EDITOR

Rajeev Bali
Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

ASSISTANT EDITOR

Ramnik Sharma
Deputy Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

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Constitution of India, 1950 - Article 226 - Resolution of Gram Panchayat- Official record tempered - Inquiry and F.I.R. ordered- Petition dismissed. Title: Residents of Village Bhalech vs. State of H.P. and Others **(D.B.)** Page-149

Constitution of India, 1950 – Article 226 – Service matter - Petitioners joined

as constable and agreed to serve in the pay scale of 5910 – 20200 +1900(GP) up to 8 years of service as a condition of recruitment and this process was not challenged by the petitioners - Held - It is settled law of the land that if a person participate in a process without protest he cannot challenge it - In this case, the government in it's wisdom issued a notification vide which, revised the period of grade of revised pay band and grade pay to constables from 2 years service to 8 years regular service -The notification vide which the confirmation of higher pay band plus grade pay was revised from 2 years to 8 years applicable to constables was issued by Finance Department on 14.01.2015 - This Notification dated 01.01.2015 was modified as being applicable to constables appointed on or before 01.01.2015 - In advertisement dated 05.03.2015 also it was clearly mentioned that the posts of constables were in the pay scale of 5910-20200 + grade pay of rupees 1900 up to 8 years of service in terms of Notification dated 14.01.2015 so the cut off date as has been fixed subsequently vide Notification dated 17.06.2016 is not arbitrary - This Court has serious doubts as to whether it can issue a writ of mandamus directing the State Government to alter this policy decision of changing the period of regular service to be rendered in grade pay of Rs.10300 – 34800 + 3400 (Grade pay) - The petition found without merits and accordingly dismissed. (Paras 38,39,41 and 42) Title: CT Vikash Jamwal & others vs. State of H.P. & others Page- 1231

Constitution of India, 1950 - Article 226 - Transfer of investigation to the Central Bureau of Investigation- Petitioner apprehends a serious foul play in the investigation for the reasons that the police intended to protect and save its officials- Held, it is well settled that investigation can be transferred from local police to Central Bureau of Investigation only in exceptional cases and not as a matter of routine- Investigation is credible and not biased in any manner- Petition dismissed. Title: Amit Kumar vs. State of H.P and others **(D.B.)** Page-223

Constitution of India, 1950 - Article 226- Writ of quo warranto - University Grant Commission Regulations, 2019- H.P. University Act, 1970- Appointment of Vice Chancellor- University Grants Commission Regulations, 2010, are directory under the purview of State Legislation, as the matter has been left to the State Government to adopt and implement the scheme- Petition dismissed. Title: Dr. Dharam Pal Singh vs. State of H.P. and others. Page-208

Constitution of India, 1950 - Article 227 - Recruitment and Promotion Rules - Petitioner being eligible and qualified applied for the post of Junior Office Assistant (IT) against one post reserved for visually impaired category in Himachal Pradesh University- Representation for exemption from typewriting test on account of his being visually impaired disallowed- Since Government of Himachal Pradesh vide Communication dated 10.05.2013 instructed all the Departments that instead of granting exemption in typewriting test visually impaired may be imparted necessary basic training including computer training through Composite Regional Centre, Sundernagar, as such the request/representation of petitioner ought to have been accepted - Petition allowed - University directed to complete selection process of petitioner without insisting upon him to pass typewriting test. Title: Jagdish Kumar vs. State of H.P. & another Page-846

Constitution of India, 1950 - Article 227 - Section 13 (B) of Hindu Marriage Act- Waiving off statutory period of six months- Very object of the provision is to enable the parties to dissolve a marriage by consent, specially if marriage has broken irreparable and there is no possibility of rapproachment- No fruitful purpose would be served by keeping the matter pending for six months- Order of Family Court quashed and set aside- Petition allowed. Title: Rhythm Chauhan vs. Smt. Neelam Nengnong Page-1096

Constitution of India, 1950 - Article 227 - Section 8 of the Arbitration and Conciliation Act 1996- Mandatory provisions of Section 8 of the Arbitration and Conciliation Act are required to be complied with while filing application under Section 8 of the Act in as much as necessary documents for reaching the conclusion as drawn by the learned Trial Court in the impugned order had to be part of the application- Order of Trial Court set aside- Petition allowed. Title: M/S Super Vending Technologies & another vs. Mukesh Sahni & another Page-832

Constitution of India, 1950 - Article 227 - Supervisory jurisdiction - Opportunity for leading evidence - The Trial Court closed the evidence of petitioner on failure to produce evidence despite reasonable opportunities- Held- If the Court does not assemble on a particular day, certain cases are listed for recording evidence, then if there is general notice that those cases should be taken on the next date, it cannot be assumed that on the said next date the parties have to necessarily produce their witnesses- Petition allowed.

(Paras 5 & 6) Title: Sarwan Kumar alias Majnu vs. Punjab National Bank & another Page-758

Constitution of India, 1950 - Articles 226 and 227 - **Industrial Disputes Act, 1947-** Award of Industrial Tribunal-cum-Labour Court- Challenged- Held- Writ Court has jurisdiction to examine the correctness and genuineness of the award passed by the Tribunal, especially when there is an error of law apparent on the face of record - Modification if any, in standing order with regard to age of retirement, can always be said to have come in force with effect from 29.08.2005 and as such, all the employees retired prior to that date, cannot be permitted to claim the benefit of the same after their retirement- Award passed by Learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla set aside - Petition allowed.Title: Gabriel India Limited vs. Presiding Officer, Industrial Tribunal-cum-Labour Court & others Page-1048

Constitution of India, 1950 - CCS (Classification, Control and Appeal) Rules, 1965 - Rule 14- Disciplinary Authority imposed punishment of removal of the petitioner from the service on the basis of charges framed against him as well the inquiry report- Held- Disciplinary Authority was bound to act in quasi-judicial manner as well as to assign reasons while imposing the penalty of dismissal- Order of Disciplinary Authority neither reasoned nor speaking- Petition allowed- Orders of Disciplinary Authority and Appellate Authority set aside. Title: Khub Chand vs. Himachal Road Transport Corporation & others Page-455

Constitution of India, 1950 - CCS (Pension) Rules, 1972 - Writ of Mandamus- Contribution towards GPF- Petitioner was allotted GPF number but later on was asked to switch over to Contributory Pension Scheme as per rules of 2006, on the ground that his regular appointment took place after May, 2003- Held- As per notification dated 17.02.2006 all appointments made by the Government of Himachal Pradesh on or after 15.05.2003 bar the appointees concerned from drawing the benefits of CCS (Pension) Rules, 1972- Regular appointment of the petitioner took place after May, 2003 as such, not entitled for the benefit of CCS (Pension) Rules- Petition dismissed.

Title: Duni Chand vs. State of H.P. & others Page-437

Constitution of India, 1950 - Condition of mandatory period of service as

provided under Clause 6.1 and 11.1.2 of "The Post Graduation/ Super specialty policy for regulating admission to various Post Graduate and Super Specialty Courses in Medical Education Applicable in the State of Himachal Pradesh, 2019"- Held- Conditions cannot be arbitrary and unreasonable - Very purpose and loud object of the policy is to provide super specialist to the public at large- Period of mandatory service of 4/5 years provided under clause 6.1 unreasonable and as such, same deserves to be reduced to two years - Petition disposed of. Title: Dr. Manoj Sharma vs. State of H.P. & others Page-986

Constitution of India, 1950 - Extraordinary jurisdiction- Petitioners who were appointed as Chowkidars on part time basis in their respective Gram Panchayats have approached the Court for issuance of directions to the respondents to grant them daily wage status from due dates, with all consequential benefits as has been granted to other part time employees of Gram Panchayats – Held - Policy decision, to convert part time workers into daily wagers and regularization thereafter, on completion of requisite period, is to be applied uniformaly qua all such appointees of various Gram Panchayats, Panchayat Samitis and Zila Parishads in the State - No discrimination can be made while converting their services from part time basis to daily wage on the ground of availability of funds with the concerned Gram Panchayats, Panchayat Samitis and Zila Parishads- Writ petition allowed. Title: Hari Chand and others vs. State of Himachal Pradesh and others Page-1065

Constitution of India, 1950 - Reservation for distinguished sportsperson – Held - Once it is not in dispute that game of Kabaddi stands included in list of games as provided under existing notification of year 1999, and the petitioner after having participated/ won medal in National Sports Festival for Women cannot be debarred from availing the benefit of reservation of 3% quota meant for distinguished sports persons- Petition allowed. (Paras 8, 9 & 13) Title: Kumari Poonam Thakur vs. State of Himachal Pradesh and others Page-893

Constitution of India, 1950- Article 16- Reservations- There are two types of reservations, vertical and horizontal- In common parlance posts which are reserved for SC, ST and OBC etc., where the posts which are reserved under category of sports persons, ex-serviceman, persons with physical disabled etc., are said to be horizontally reserved- Any person belonging to SC or ST or OBC etc. can compete for the post of general category- Respondent not considering

the petitioner for the post of sports person on the ground that petitioner belongs to SC category- Held- That in service jurisprudence there is no 'reservation of post for General Category'- A post which is not reserved is an open post- The candidate belonging to reserve category has a right to compete for an open category post and if selected on merit, has a right to exhaust an open category post and cannot be said to have exhausted the reserved post- Rejection is arbitrary- Direction issued to respondent to offer appointment to the petitioner- Petition allowed. Title: Neelam vs. State of H.P. & others Page-325

Constitution of India, 1950- Article 226 - H.P. Civil Services Contributory Pension Rules, 2006- Petitioner has not complied with mandatory provisions of Rule 4(1) of H.P. Civil Services Contributory Pension Rules, 2006, thereof the department cannot be faulted with the temporarily stopping release of salary in favour of the petitioner- Petition dismissed. Title: Sumit Kumar vs. State of H.P. & others Page-375

Constitution of India, 1950- Article 226 - H.P. Para-Medical Council Act, 2003 - Registration as para-medical practitioner having recognized qualification- Institute which conducted the relevant examination had no valid affiliation with the premier regulatory mechanism- Petition disposed of accordingly. Title: Mohinder Pal and others vs. State of H.P. and others Page-287

Constitution of India, 1950- Article 226 – Reference - Central Civil Services (Pension) Rules, 1972- Employee shall be entitled for benefit of daily waged service for the purpose of calculating qualifying service for pension- Reference answered accordingly. Title: Smt. Balo Devi vs. State of H.P. and others **(D.B.)** Page-132

Constitution of India, 1950- Article 226 - Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013- Rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965- Competence of the complaints committee to issue memorandum - Internal Complaints Committee does not have the power to proceed with formal/regular inquiry on its own- The Internal Complaint Committee has no authority to issue the impugned memorandum- Petition allowed. Title: Praveer Kumar Thakur vs. State of H.P. and others Page-293

Constitution of India, 1950- Article 226 – Tender - Misrepresentation of material facts at time of submission of bid as well as at the time of entering into agreement with HPCL- HPCL was under legal obligation to verify the claim at the evaluation of bid and to act in fair and unbiased manner- Held, the stand taken by HPCL in the matter reflect arbitrariness on its part- Petition allowed- Directions issued thereof. Title: M/s Vikrant Oil Carrier vs. Hindustan Petroleum Corporation Ltd. and others **(D.B.)** Page-114

Constitution of India, 1950- Article 226 - Transfer Policy - Judicial review of the order of transfer is permissible when the order is made on irrelevant considerations- The Court is competent to ascertain whether the order of transfer passed is bonafide or as a measure of punishment- It is for the bureaucrats and not for the politicians to effect transfer and postings- Petition allowed and impugned transfer order is quashed and set aside. Title: Pradeep Kumar vs. The State Electricity Board Ltd. and other **(D.B.)** Page-180

Constitution of India, 1950- Article 226- Allotment of Retail Outlet Dealership- Petitioner being fully eligible for being allotted Retail Outlet Dealership has been wrongly held to be ineligible for the allotment of the same- Held-site offered by the petitioner was not in terms of the advertisement issued by the respondent, as such, there is no infirmity in the rejection of his candidature- Petition dismissed. Title: Manish Kumar vs. Indian Oil Corporation Ltd & other Page-334

Constitution of India, 1950- Article 226- Appointment for the post of Information Scientist (Library) Ordinance 3.3(a)(1) of Himachal Pradesh University- Objection qua qualification- Held- There is no illegality in the degrees of M.A. (English) and MCA obtained by respondent No. 4 from the respondent University especially as these degree were not obtained by simultaneously joining the courses as alleged by the petitioner being devoid of any merit- Petition dismissed. Title: Lalit Kumar vs. H.P. University & others Page-681

Constitution of India, 1950- Article 226- Appointment of Personal Assistant challenged on the ground that due weightage was not given to the experience which the petitioner had and respondent No. 4 who had no experience was recommended for appointment by ignoring the legitimate candidature of the petitioner- Selection was to be made on the basis of sum total of evaluation criteria and not just on the basis of experience- marks of respondent No. 4

were much more as compared to the petitioner- Held- appointment of respondent No. 4 is neither in violation of the provisions of the advertisement nor the R & P rules- Petition dismissed. Title: Sidharth vs. State of H.P. & others Page-339

Constitution of India, 1950- Article 226- Jurisdiction- Tender Cancellation- Held- Constitutional Courts can always exercise jurisdiction on all the matters including the matters arising from the Government contracts in case the transactions suffer from arbitrariness, irrationality, malafides or bias- Actions of respondent suffer from vice of arbitrariness and discrimination whereas fairness should be the hallmark of every public action- Petition dismissed. Title: Nakul Chauhan vs. State of H.P. and Others **(D.B.)** Page-157

Constitution of India, 1950- Article 226- Petitioner challenged the order of Debts Recovery Appellate Tribunal, Delhi, being without jurisdiction- Held- DRAT erroneously without there being any jurisdiction proceeded to decide the application under Section 17(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002- Order of DRAT quashed and set aside. Title: State Bank of India vs. Debt Recovery Appellate Tribunal & others Page-344

Constitution of India, 1950- Article 226- Post of J.E. (Civil), HPSEB Ltd.- Objections to Answer Key- Re-assess the objections of petitioners on the ground that these have not been rightly considered- Held- The objections of the petitioners have already been considered by a panel of experts as such reliefs claimed by the petitioners are not permissible- Petition dismissed. Title: Upanshu Sharma vs. State of H.P & other **(D.B.)** Page-427

Constitution of India, 1950- Article 226- Promotion- Seniority- Petitioner not promoted as Laboratory Attendant from the date when persons junior to him were promoted- Held- Seniority list bad in law- Respondents are directed to promote the petitioner to the post of Laboratory Attendant from the date when persons junior to him were promoted- Writ allowed. Title: Rajinder Kumar vs. State of H.P. & others Page-462

Constitution of India, 1950- Article 226- R&P Rules- Appointment for the post of Pump Operators- Selection Committee adopted the criteria as prescribed in the R and P Rules for determining the merit of the candidates, including that of the petitioner and the private respondents- Held- A candidate

elder in age and who has obtained educational qualification earlier, has to be given preference over others who are younger in age and have obtained educational qualifications later on- Selection Committee selected the candidates who were found more meritorious than the petitioners- petition dismissed being without any merit. Title: Vijay Kumar & others vs. State of H.P. & others Page-675

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Regularization of service - Held - Service is to be regularized as per Recruitment and Promotion rules as notified on 31.12.1998 from the date he completed 10 years service as part time class IV employee with 240 days in each calendar year with all the consequential benefits- Petition allowed. Title: Saroj Kumari vs. State of H.P. Page-171

Constitution of India, 1950- Article 226- SARFAESI Act, 2002 - Indian Registration Act, 1908 - Registration of Sale Certificate qua the property in issues which the petitioner purchased through an auction held under the provisions of SARFAESI Act- Held- Petitioner is clearly protected by the provisions of Section 17(2) (XII) of the Registration Act and the sale certificate does not require any registration- Petition allowed. Title: Sunil Kumar Grover vs. State of H.P. & others Page-363

Constitution of India, 1950- Article 226- **SARFAESI Act, 2002**- Section 14- Order of District Magistrate vide which application under Section 14 of SARFAESI Act was dismissed has been assailed- Loan amount of proforma respondent was declared NPA when he failed to liquidate the liability- Held- There was no reason for the District Magistrate to have construed the secured asset to be an agricultural land- District Magistrate exceeded his jurisdiction vested in him under Section 14 of the SARFAESI Act- Petition allowed- Order of District Magistrate is quashed and set aside.Title: State Bank of India vs. District Magistrate & others **(D.B.)** Page-1359

Constitution of India, 1950 - Article 226 - Selection criteria for the post of Junior Engineer (Electrical) - Screening test- held- The rules of procedure/ Business adopted by the Respondent-Board are not under challenge in this petition- There is no *per se* allegation of malafide contained in the petition to infer that the selection of selected candidates was for reason other than merit- Petition dismissed. (Para 7, 8 & 9) Title: Lokesh Gupta vs. State of H.P. &

others Page-1260

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 7 Rule 11- **H.P. Land Revenue Act, 1953**- Sections 37, 171- Plaintiff has sought declaration in the suit with respect to the order passed by the Assistant Collector, IInd Grade, under Section 37 of the H.P. Land Revenue Act- Application of defendant for rejection of plaint under Order 7 Rule 11 of Code of Civil Procedure was dismissed by the Ld. Trial Court- Held- Section 171 of H.P. Land Revenue Act expressly bars the jurisdiction of Civil Court, as such civil suit filed by the plaintiff cannot proceed- Petition allowed- Application under Order 7 Rule 11 allowed. (Para 5(vii) Title: Rajinder Kumar Sood vs. Om Prakash Sood Page-1268

Constitution of India, 1950- Article 227- Ld. Trial Court dismissed the suit filed by the petitioner having been abated- Held- Application moved by the plaintiff under Order 22 Rule 4(4) of Code of Civil Procedure after two years from the date of death of defendant seeking exemption to bring on record legal representatives already misconceived- No error committed by the Ld. Courts below- Petition dismissed. (Para 4(i) & 4(iii)(b) Title:Gurmeeto & others vs. Pritam Chand & others Page-1292

Constitution of India, 1950- Article 227- Ld. Trial Court dismissed plaintiff's objections to the report of the Local Commissioner and confirmed the demarcation report- Held- Demarcation report was confirmed without summoning the Local Commissioner to face cross-examination by the parties, thus, the order passed by the Ld. Trial Court cannot be sustained- Petition allowed with the direction to Trial Court to decide objections afresh. (Para 4(v)

Title: Parveen & another vs. Yasin Page-1309

Constitution of India, 1950- Article 309- Services of petitioner were taken over as Shashtri w.e.f. 27.08.1990, he is entitled to pay scale of the post in question as prescribed in the R&P Rules- It is well settled law that statutory rules framed under Article 309 of Constitution of India cannot be superseded by issuance of administrative instructions- Petition allowed. Title: Madan Lal Sharma vs. State of H.P. Page-355

Constitution of India, 1950- D.C., Una, while regularizing the services of petitioner as Revenue Chowkidar reflected the date of retirement as

30.06.2016- As per copies of Pariwar Register and affidavit executed by the petitioner there is no force in the claim of the petitioner that his date of birth was 1964- Petition dismissed. Title: Gurdas Ram vs. State of H.P & others Page-433

Constitution of India, 1950 – Article 226 - Family Pension- Petitioners being parents of the deceased claimed family pension- Held - Parents are also entitled for post retiral benefits inclusive of pension- Petition disposed of. Title: Suman Devi and another vs. Union of India and others Page-108

Constitution of India, 1950 - Article 226 - Judicial Review- Petitioner fell short of only one mark in the selection- Petitioner registered objections with the Subordinate Service Selection Board qua some questions- The Board in turn, got these questions vetted by the experts panel- Held- The objections of the petitioner have already been considered by a panel of experts as such, relief claimed by the petitioner is not permissible. Petition dismissed. Title: Parshotam Singh vs. Himachal Pradesh Subordinate Service Selection Board and others **(D.B.)** Page-446

Constitution of India, 1950 - Article 226 - Promotion- Incharge Chilling Centres to the post of Technical Superintendent- Since petitioners, in terms of Rule 13 of Service Rules framed by the Milk Federation had become eligible for promotion to the post of Technical Superintendent after their having acquired three years experience against the post of Incharge Chilling Centres- Respondent Milk Federation ought to have promoted them from the due date- Callous and negligent attitude of the department cannot be a ground to deny the legitimate claim of the petitioners- petition allowed with the direction to promote the petitioners from the date when they completed three years service against the post of Incharge Chilling Centres along with consequential benefits. Title: Surinder Kumar & others vs. H.P. State Cooperative Milk Producers Federation Page-540

Constitution of India, 1950 - Article 226 - Seniority list- Petitioner were neither issued any notice nor they were put to caveat by the department as to on account of what reasons their seniorities were unsettled- Held- Seniority list issued at the back of petitioners without issuing any notice is not sustainable being violative of principles of natural justice- Directions issued. Title: Naresh Sharma & others vs. State of H.P. & others Page-551

Constitution of India, 1950 - Article 226 - Service Matter - Petitioner a police constable named in FIR No. 78/ 2013 under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, represented the Director General of Police, Himachal Pradesh, to reinstate him in service on account of his acquittal by Hon'ble High Court of Himachal Pradesh- Representation rejected - Held - Representation rejected in slip shod manner without assigning any reason - Order passed by Director General of Police, Himachal Pradesh, is quashed and set aside with the direction to reinstate petitioner in service forthwith. (Para 5) Title: Narender Singh vs. State of H.P. & others Page-823

Constitution of India, 1950 - Article 226 - Writ petitions out of the judgment passed by the Ld. Central Administrative Tribunal, Chandigarh Bench- CCS (Pension) Rules, 1972- Resignation- Forfeiture of past service- The applicant remained absent from duty for eight years before tendering resignation- Whether resignation amounted to forfeiture of his past service- Held- Neither any pension nor pro-rata pension can be granted to the applicant. Title: Prasar Bharti Broadcasting Corporation & others vs. Jiwan Kumar **(D.B.)** Page-414

'E'

Employees Compensation Act, 1923 - Section 30 - Deceased aged 36 years, driver by profession died during course of employment, earning wages of Rs.10000/- per month- Compensation was worked out at Rs.9,47,800/- along with interest at the rate of 12% per annum- Held- Ld. Commissioner has erred in holding that monthly wages of deceased @ Rs.10000/- per month and the same is held to be Rs.8000/- per month- Appeal allowed- Order modified to pay compensation of Rs.7,58,240/- alongwith interest @12% per annum. Title: Shriram General Insurance Company Ltd. vs. Reena Devi & others Page-691

Employees Compensation Act, 1923 - Section 4A – Specific case of the petitioner is that he has suffered disability at 40% but due to the nature of disability was unable to drive the commercial vehicle, therefore his loss of earning was to the extent of 100% - Employees Compensation Commissioner assessed the disability suffered by the petitioner at 40% -Held – Appellant used to earn his livelihood by driving commercial heavy vehicle for which one needs to have lots of endurance and physical capacity and one has work for long and even at odd hours whereas one can drive a private vehicle at leisure and according to his convenience -Petitioner cannot drive commercial vehicle

,hence award is modified to the extent that respondent number 2 is held liable to indemnify the Respondent Number -1 and pay Rs. 4,35,288/- as compensation with interest at the rate of 12% per annum from 2.5.2007 plus 50% penalty to the appellant -Appeal disposed of.(Paras 21 and 22) Title: Meena Ram vs. Vinay Hand & another Page-1203

Employees Compensation Act, 1923- Section 30- Appeal- Deceased aged 63 years was working as driver on monthly salary of Rs.8000/- Total compensation was worked out at Rs. 4,19,688.80- Held- The Commissioner is last authority on facts- The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial question of law involved in the instant appeal therefore, no interference with the findings of fact recorded by the Ld. Commissioner called for- Appeal dismissed- Insurance Company saddled with liability to pay the compensation. Title: Sumitra @ Savitri vs. Veena Devi & others Page-625

Employees Compensation Act, 1923- Section 30- Appeal- Deceased was working as bus conductor on monthly salary of Rs.2500/- along with daily diet money of Rs.100/- etc.- Ld. Commissioner dismissed the claim petition on the ground that accident occurred due to deceased's own negligence- Held- The restrictions placed in Section 3 of the Act will not be applicable in case of death of employee- Appeal allowed- Matter remanded back for fresh decision. Title: Parkash Chand & another vs. Sanjeev Kumar & others Page-599

'H'

H.P. Land Revenue Act, 1954- Section 163- Question of Title- Adverse possession- Appellant encroached upon the suit land and claimed adverse possession during proceedings under Section 163 of H.P. Land Revenue Act, before the Assistant Collector 1st Grade- The Ld. First Appellate Court dismissed the appeal preferred by the appellants and accepted cross-objections reared by the State- Held- In so far as the respective verdicts, as, made by both the Courts below to respectively save from vestment and order for vestment of the house, as, borne on the suit land, is concerned, the same is quashed and set aside. Therefore, the instant RSA is partly allowed. (Para 14) Title: Gita Ram & others vs. State of H.P. Page-486

H.P. Land Revenue Act, 1954 - Section 37 and 46- Declaratory suit for correction of entries in record of right-H.P. Tenancy and Land Reforms Act-

Section 104- Conferment of proprietary rights- Jurisdiction of Civil Courts- Held- The mandate of Section 46 of H.P. Land Revenue Act, preserves a right in any aggrieved, from an erroneous entry occurring in the revenue records, to institute a suit for declaration, for seeking its correction. (Paras 13 to 16) Title: Surindera Devi & others vs. Kishori Lal & another Page-494

H.P. Land Revenue Act, 1954 - Section 163- Appellant encroached upon the suit land and claimed adverse possession during proceedings under Section 163 of H.P. Land Revenue Act, before the Assistant Collector 1st Grade- The Ld. First Appellate Court allowed the appeal preferred by the State and dismissed cross-objections reared by plaintiff Ram Rattan- Held- Possession of plaintiff is permissive- Regular Second Appeal allowed with condition that only after the conclusion of proceedings, to be forthwith drawn, by the plaintiff, before the statutory authority contemplated under H.P. Village Common Lands Vesting and Utilization Act, 1974, plaintiff be entitled in due course of law. Title: Ram Rattan vs. State of H.P. Page-467

H.P. Medical Education (Dental) Service Rules, 2006 - Petitioner challenged the proposal to fill up one post of Assistant Professor (Dentistry) by way of direct recruitment - Petitioner has not been able to make out a case that by initiating process for filling up present vacancy by direct recruitment, respondents, in any manner violated the mandate of 50:50 between direct recruits and the promotees in the cadre consisting of two posts, ratio of 50:50 can be maintained between direct recruits and promotees by giving one share to each category but in the cadre of 3 posts ratio of 50:50 cannot be maintained, posts are offered by rotation so as to obey the mandate of Rules, 2006 - Petition dismissed.Title: Dr. Arun Singh Thakur vs State of H.p. & others Page-856

H.P. Municipal Act, 1994- Sections 3 & 57- Property vested in municipality- Petitioner challenged the dispossession of office building- Held- Petitioner has a right to claim compensation or share in income from income generating assets, that too if found permissible and payable under law- Transfer of movable assets of Gram Panchayat to Nagar Panchayat held to be bad in law. Title: Gram Panchayat Sirinagar vs. State of H.P. & others **(D.B.)** Page-367

H.P. Tenancy and Land Reforms Act, 1972- Sections 58, 104, 34- Resumption of land to army personnel- Held- Vestment of propriety rights in non-occupancy tenants is automatic except in case of landowners falling in

re-instatement in service along with seniority and continuity - Held - On proven misconduct, the penalty of termination of service is valid- Writ petition allowed. Title: D.A.V Public School & other vs. Smt. Kamal Page-388

Industrial Disputes Act, 1947 - Section 25-G - Award- Award assailed- Retrenchment- No fault found with the findings recorded by the Learned Labour Court- Petition dismissed. Title: State of H.P. vs Rakesh Kumar Page-216

Industrial Disputes Act, 1947 – Section 33 - Dispute between the Union and the Company qua transfer of employees from one unit to the other- Jurisdiction of Labour Court to pass interim orders while dealing with a complaint under Section 33A of the Act- Held, Labour Court has jurisdiction to pass interim order and the same cannot be interfered with in exercise of jurisdiction under Article 226 of the Constitution of India- Petition dismissed. Title: M/s Wipro Enterprises Private Ltd vs. The Prisiding Officer,Industrial Tribunal-cum- Labour court & other **(D.B.)** Page-396

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Land Acquisition Act, 1894 - Suit for damages and subsequent appeal thereto dismissed – Held - Suit is amenable for being dismissed as the apt statutory remedies, as contemplated in the Land Acquisition Act, available to the plaintiff- Omission on the part of the plaintiff to recourse to specific statutory remedies bring the causality of dismissal of suit, as, aptly done by both the court below- Suit for possession was highly belated, as, it fell outside the period of 12 years prescribed for the afore purpose and fatally hit by the bar of limitation- Appeal dismissed. Title: Badru alias Badri Dass vs. State of H.P and others Page-244

'M'

Mental Healthcare Act, 2017- Sections 68, 69 and 83 - Appeal- office order to close petitioner Society by Senior Medical Superintendent HHMH & Rehab-cum-CEO, H.P. State Mental Health Authority has been challenged- Held- Provision of Sub-sections (3) & (4) of Section 68 of Act stand flagrantly violated while passing the impugned order by the Authority, as no opportunity of being represented or being heard or rectifying the purported shortcomings was given to the petitioner-Institution- Appeal allowed and impugned order quashed and

set aside. (Para 10, 11, 12 & 13) Title: Freedom Home Welfare Society vs. Chief Executive Officer, Mental Health Authority Page-1254

Motor Accident Claims Tribunal – Payment - Tax deducted at source for income tax on interest payable to claimant deducted by Insurance Company - Held - Deduction of income tax by Insurance Company on the interest accrued on the compensation deposited by the Insurance Company is illegal and contrary to the law of the land- Direction issued to Income Tax Officer to refund the tax deducted at source within eight weeks. Title: National Insurance Company Limited vs. Prabha Vati & others Page-749

Motor Vehicle Act, 1988 - Section 173 - Appeal by claimants for enhancement of award- Held, Learned Tribunal below has wrongly assessed the income of the deceased to be Rs.3000/- per month, whereas Learned Tribunal below ought to have assessed his income on the basis of minimum wages to the daily wagers and part timers in the State of Himachal Pradesh at the relevant time, income assessed to be Rs.6000/- per month.

A. Award under Conventional heads not as per judgment rendered by Hon'ble Apex Court in Pranay Sethi's case- Award modified. (Para 19)

B. **Code of Civil Procedure, 1908** - Order 41 Rule 33 - Power of Appellate Court - Additional award- The amount of compensation can be enhanced by an Appellate Court, while exercising power under Order 41 Rule 33 of CPC even if there are no cross objection/ appeal. (Para 21) Title: Pano Devi & another vs. Gautam Nath & others Page-954

Motor Vehicle Act, 1988 - Section 173 - Appeal by Insurer on the ground to set aside the award as the deceased was gratuitous passenger at the time of accident – Held - Insurer failed to prove the factum of gratuitous passenger.

A. Award under Conventional heads not as per judgment rendered by Hon'ble Apex Court in Pranay Sethi's case- Award modified. (Para 19)

B. **Code of Civil Procedure, 1908** - Order 41 Rule 33- Power of Appellate Court- Additional award- The amount of compensation can be enhanced by an Appellate Court, while exercising power under Order 41 Rule 33 of CPC even if there are no cross objection/ appeal. (Para 21) Title: United India Insurance Company Limited vs. Jagdish Kumar and others Page-975

Motor Vehicles Act, 1988 - Section 173- Deceased was doing agricultural work, selling mil and was earning Rs.5000/- per month- Motor Accident Claims Tribunal saddled the insurer Company to pay compensation to the

tune of Rs.15,85,000/- along with interest @ 8% per annum from the date of filing of petition - Held - Ld. Tribunal has erred in awarding certain amounts under conventional heads- No amount on account of loss and love and affection can be awarded- Tribunal erred in making additional 50% on account of future prospects specially when deceased was not in Government Service- Award modified. Title: National Insurance Company Ltd vs. Dharmesh (Minor) & others Page-606

Motor Vehicles Act, 1988- Section 173- Appeal for enhancement of compensation- Deceased 25 years of age at the time of accident- Wrong multiplier was applied- Appeal allowed- Compensation enhanced to Rs.14,14,168/-.Title: Kaura Devi & another vs. Joginder Singh & others Page-621

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20, 25 and 29 read with Section 3 of the Indian Evidence Act, 1872 – Conviction – Held - Evidence of official witnesses are trustworthy- No link missing- Conviction upheld - First offender sentence reduced. Title: Gurvinder Singh & another vs. State of H.P. Page-586

Negotiable Instruments Act, 1881- Sections 138 & 139- Dishonour of cheque- Presumption rebuttable- Acquittal- Version of complainant as to why cheque in issue was given to him by the accused is completely different from the case put forth in the complaint – Held - Accused duly rebutted the presumption by proving his case that it was not in lieu of some amount borrowed by him from the complainant- Complainant has discredited his own case- Appeal dismissed. Title: Ram Lal vs. Mauji Ram Page-71

'P'

Prevention of Corruption Act, 1988- Sections 7, 13(2)- Criminal Revision- State has assailed in this revision the order of Ld. Special Judge, vide which order to release case property was passed, in this revision- Case property was seized during investigation claiming it to be disproportionate assets accumulated by the respondent beyond his known sources of income- Held- The trial has been closed as abated without adjudication of the allegation of the prosecution- There is no judicial verdict qua seized property being

disproportionate as such present petition also deserves to be closed as abated. (Para 4, 5, 6) Title: State of H.P. vs. Mahinder Singh Page- 1356

Punjab Village Common Lands (Regulation) Act, 1961- Vestment of Shamlat Deh - Suit for permanent prohibitory injunction - Decree pronounced against the defendants- Appeal partly allowed, however, the cross-objections were dismissed- Held- Suit land in shamlat consequently vest in the estate right holders whose name(s) occur in the list of Bartandaran, the right to use it, in the manner as enshrined in the apposite Wajib Ul Urz - No evidence that the name of the plaintiff is there in the list of Bartandarans - The plaintiff cannot claim exclusively of enjoying the suit land through the ouster of the other estate right holder in the Mohal concerned nor obviously any apposite injunction can be rendered - Appeal dismissed. (Para 9 & 10) Title: Bidhi Chand & others vs. State of H.P. Page-739

'S'

Specific Relief Act, 1963 - H.P. Land Revenue Act, 1973- Section 171- Suit for declaration and possession and subsequent appeal thereto dismissed- Correction of the entries in the Jamabandi- Held- Section 171 completely bars the making of corrections in the Musabi or the records of right- Trial Judge rightly held that suit is not maintainable- Matter remanded to First Appellate Court with the direction of demarcation of the suit land. Title: Mehboob vs. Man Singh & others Page-508

Specific Relief Act, 1963 - Section 5 and 38- Suit for possession by demolition of construction and permanent injunction- Matter compromised- First Appeal dismissed- Held- Demarcation Report Ex. CW1/A cannot be accepted to be validly made- Fresh demarcation ordered – Matter remanded to First Appellate Court. Title: Bhagwan Dass vs. Chaman Lal & others Page-481

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

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

Between:

TEJ SINGH,
AGED 35 YEARS,
S/O SH. MANI SINGH,
R/O VILL. KHADEEN,
P.O. NAYA GRAM,
TEHSIL KASAULI,
DISTRICT SOLAN,
HIMACHAL PRADESH.

....PETITIONER

(BY MS. SHEETAL VYAS,
ADVOCATE)

AND

STATE OF HIMACHAL PRADESH,
THROUGH, SECRETARY HOME,
GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA, HIMACHAL
PRADESH.

....RESPONDENT

(BY MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. KAMAL KISHORE SHARMA
AND MR. NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL)

CRIMINAL MISC. PETITION (MAIN) No.1684 of 2021
Date of Decision: 21.09.2021

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21, 26 and 29- Recovery of 28 grams of Resin/Chitta- Two cases already stand registered against the bail petitioner under the Narcotic Drugs and Psychotropic Substances Act- Rigors of section 37 of NDPS Act not attracted- Co-accused already stands released on bail- No material on record suggestive of the fact that bail petitioner indulged in illegal trade of narcotics- Fundamental postulate of criminal jurisprudence is the presumption of innocence- Bail petition allowed subject to conditions. (Para 13)

Cases referred:

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

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

O R D E R

By way of present bail petition filed under Section 439 Cr.PC, prayer has been made on behalf of the bail petitioner namely Tej Singh, for grant of regular bail in FIR No. 269/2020 dated 19.12.2020, under Sections 21, 26 and 29 of the ND&PS Act, registered at Police Station Sadar, District Hamirpur, Himachal Pradesh. Respondent-State has filed the Status report in terms of order dated 1.9.2021

2. Record/status report reveals that on 18.12.2020, police received secret information that present bail petitioner alongwith his wife is staying in Patiyal Guest House, Matansidh, District Hamirpur, and he indulges in the illegal trade of narcotics. On the basis of aforesaid information, police raided the room No. 105 of the aforesaid guest house and allegedly, recovered 28 grams of heroin/chitta. Apart from present bail petitioner, his wife Nisha and other two persons namely Amit and Parveen were also present in the room at the time of raid. Since no plausible explanation came to be rendered on record with regard to possession of aforesaid quantity of contraband by the

accused, police after completion of necessary codal formalities, lodged an FIR, as detailed hereinabove and since then, present bail petitioner is behind bars, whereas other remaining accused have been already enlarged on bail by the learned Special Judge-II, Hamirpur.

3. Before filing the petition at hand, petitioner had approached this Court for grant of bail, but same was dismissed as withdrawn. Now since challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner coupled with the fact that other co-accused stand already enlarged on bail, petitioner has approached this Court in the instant proceedings for grant of regular bail.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly acknowledging the factum with regard to filing of the challan in the competent Court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the antecedents of the petitioner, he does not deserve any leniency and as such, his application for grant of bail deserves outright rejection, who in the event of his being enlarged on bail may indulge in such like activities again. While referring to the status report, Mr. Bhatnagar, submits that in past also, two cases already stand registered against the bail petitioner under the NDPS Act and as such, it can be safely presumed that he is not a drug addict, rather has become a drug paddler and as such, prayer from grant of bail made on his behalf may not be accepted.

5. Having heard learned counsel for the parties and perused the material available on record, this Court finds that on the date of the alleged incident, intermediate quantity of contraband was recovered from the room occupied by the present bail petitioner and other three persons named herein above. It is also not in dispute that police after having received secrete information, recovered 28 grams of chitta/herion from room No. 105 occupied by the present bail petitioner in the presence of the independent witnesses

and as such, it is difficult to believe that petitioner has been falsely implicated. However having taken note of the fact that at the time of recovery, four persons were in the room and contraband came to be recovered from beneath the pillow, where allegedly present bail petitioner was sitting, it would be too premature at this stage to rule out/conclude complicity, if any, of the bail petitioner in the alleged commission of the offence. Whether contraband found in the room was kept/brought by the present bail petitioner is a question, which needs to be determined in the totality of evidence collected on record by the prosecution, especially, when three other persons were also present in the room. Since quantity of contraband recovered from room occupied by the petitioner is intermediate, rigours of Section 37 of the Act, are otherwise not attracted. No doubt, petitioner has indulged in the crime having adverse impact on the society, but this court cannot lose sight of the fact that guilt, if any, of the bail petitioner is yet to be determined in the totality of evidence led on record by the prosecution. Since other three co-accused already stand enlarged on bail and nothing remains to be recovered from the bail petitioner, there appears to be no reason for this court to let the bail petitioner incarcerate in jail for an indefinite period during trial. No doubt, as per status report two cases under the Act stand registered against the bail petitioner, but since no material worth credence has been led on record by the investigating agency suggestive of the fact that petitioner indulges in the illegal trade of the narcotics, this Court sees no reason to curtail his freedom indefinitely during trial. Otherwise also, no fruitful purpose would be served by keeping the bail petitioner behind the bars, rather, he needs to be provided immediate medical help so that he is brought back to the mainstream. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

6. Otherwise also, it is not understood that in case petitioner had been repeatedly indulging in the illegal trade of narcotics, why till date, respondent-State has not filed any application for cancellation of bail in two other cases, already stand registered against him. It is not only the solitary case ,where such omission on the part of the State, has come to the notice of this Court, but in number of cases, State has opposed the grant of bail to the accused on the ground that in past, cases are also pending against the accused. But it is not understood that why applications are not being filed before the courts for cancellation of bail. Learned Additional Advocate General is directed to take up the matter with the concerned quarters so that immediate steps are taken by the concerned investigating agency to file application for cancellation of bail in those cases, where accused despite having obtained bail from the competent court of law have indulged in the crime again.

7. It has been repeatedly held by Hon'ble Apex Court as well as this Court in catena of cases that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law. Since guilt, if any, of the bail petitioner is yet to be proved, in accordance with law, his prayer for grant of bail deserves consideration, especially when he is behind bars for more than nine months. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions. It has been repeatedly held by the Hon'ble Apex Court in various pronouncements that pendency of criminal cases, if any cannot be reason /basis to deny the bail to the petitioner in subsequent cases.

8. Needless to say, object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable

that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it***

would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and

circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

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

12. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

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

likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).

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

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been

lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

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

> ***incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
>
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

14. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

> ***(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
>
> ***(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
>
> ***(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and***

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

(e) He shall handover passport, if any, to the Investigating Agency.

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

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

Copy **dasti.**

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

Between:

DUMNU RAM,
S/O SH. CHET RAM,
AGED 26 YEARS,
R/O VILLAGE BADGIAHAR,
TEHSIL SUNDERNAGAR,
DISTRICT MANDI, H.P.
PRESENTLY LODGED IN
JUDICIAL CUSTODY

....PETITIONER

(BY MR. LOVNEESH THAKUR,
ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(MR. SUDHIR BHATNAGAR
WITH MR. NARENDER THAKUR,

DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) No.1767 of 2021
Date of Decision: 27.09.2021

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376 and 452- Section 4 of the Protection of Children from Sexual Offences Act, 2012—Victim prosecutrix as well as her mother have specifically denied the allegation of rape leveled against the petitioner- Fundamental postulate of criminal jurisprudence is the presumption of innocence- Bail petition allowed subject to conditions. (Para 11)

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

O R D E R

Bail petitioner namely Dumnu Ram, who is behind the bars since 4.9.2020, has approached this Court in the instant proceedings filed under Section 439 Cr.PC., for grant of regular bail in case FIR 0035, dated 13.2.2016, registered at PS Sundernagar, District Mandi, Himachal Pradesh, under Sections 376 and 452 of the IPC and Section 4 of the Protection of Children from Sexual Offences Act.

2. Pursuant to order dated 13.9.2021, passed by this Court, Respondent-State has filed the status report. ASI Rajinder Singh, I.O. P.S. Sundernagar, District Mandi, H.P., is also present with records. Record perused and returned. Close scrutiny of record/status report reveals that on 13.2.2016, victim-prosecutrix presented one complaint at Police Station Sundernagar, alleging therein that on 12.2.2016, she alongwith her father had gone to Slapar Hospital for getting her eye checked. At 2:00pm, her both sisters also met her and thereafter, their father after having purchased some articles asked them to return to their house. She alleged that after some time, she asked her two sisters to come slowly, whereas she went fast and when she reached Dhaarli Village, two boys were sitting there. She alleged that those

two boys after having seen her, started moving ahead of her and when she reached home, she directly went to the kitchen, where the bail petitioner, at 4:30 pm, forcibly entered in the kitchen and made an attempt to outrage her modesty. She alleged that the above named person sexually assaulted her against her wishes and while he was wearing his cloths, her mother reached there and slapped both of them. She disclosed that present bail petitioner fled away from the spot and thereafter, entire incident was disclosed to her father when he came back home. In the aforesaid background, FIR as detailed herein above, came to be lodged against the present bail petitioner. Though, after lodging of FIR, bail petitioner remained absconded for almost four years, but subsequently, surrendered on 4.9.2020 and since then, he is behind bars. Since challan stands filed in the competent court of law and statements of victim-prosecutrix and her mother stand recorded, petitioner has approached this Court in the instant proceedings for grant of regular bail

3. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting factum with regard to filing of challan in the competent court of law and recording of the statements of victim-prosecutrix and as well as her mother, submits that keeping in view the gravity of the offence alleged to have been committed by him, he does not deserve any leniency. Mr. Bhatnagar, submits that though victim-prosecutrix and her mother have resiled from their initial statements given to the police, but there is overwhelming evidence adduced on record by the investigating agency, suggestive of the fact that bail petitioner taking undue advantage of innocence and minority of the victim-prosecutrix sexually assaulted her against her wishes. He further states that otherwise also, consent, if any, of victim-prosecutrix is immaterial and as such, bail petitioner does not deserve to be enlarged on bail. Lastly, Mr. Bhatnagar, submits that since the petitioner has absconded for more than four years, it may not be in the interest of justice to enlarge him on bail at this stage, who in the event of his being enlarged on bail

may not only flee from justice, but may also temper with the prosecution evidence and as such, prayer for grant of bail on his behalf may be rejected.

4. Having heard learned counsel for the parties and perused material available on this record, this Court finds that on 12.2.2016, victim-prosecutrix, who, admittedly, at that time, was minor, had gone to hospital with her father. She after having checked up her eye though was coming back to her house alongwith her two sisters, but as per her own statement, she asked her sisters to come slowly, whereafter she of her own, reached the house ahead of her both sisters, where she was allegedly sexually assaulted by the bail petitioner against her wishes. Though aforesaid version putforth by the victim-prosecutrix , if read in its entirety, suggests that victim-prosecutrix had prior acquaintance with the present bail petitioner, who after having seen her near Village Dhaarli, started moving ahead of her, but since consent, if any, of minor is immaterial, prior acquaintance and consent, if any, given by the victim-prosecutrix is of no relevance. However, having taken note of the fact that statements of victim-prosecutrix as well as her mother stand recorded in the court, wherein they both have specifically denied the allegation of rape leveled against the petitioner, prayer made on behalf of the bail petitioner deserves to be considered. If the statement of victim-prosecutrix recorded before the court below is perused in its entirety, it suggests that though at the time of the alleged incident, bail petitioner was present in the room, where allegedly, incident took place, but he did not commit any forcible sexual assault on the victim-prosecutrix. Victim-prosecutrix in her cross-examination has categorically denied factum with regard to her having subjected to forcible sexual intercourse by the accused. Though aforesaid version putforth by the victim-prosecutrix is totally contrary to her initial statement given to the police under Section 154 Cr.PC as well as her subsequent statement recorded by the Magistrate under Section 164 Cr.PC, but aforesaid version putforth by her in cross-examination, is fully

corroborated by the version putforth by her mother, wherein she while specifically denying the factum with regard to forcible sexual intercourse by the petitioner deposed that she had gone to collect the firewood and when she came to know from a lady that accused was sitting in one of the rooms with child victim, she came back and saw them sitting together and gave beating to both of them. She deposed that accused ran away from the spot. Cross-examination conducted on this witness reveals that some lady namely Nirmala had told her that accused was sitting with the child victim inside her house. She deposed that accused had removed his trouser and was masturbating himself. She also admitted in her cross-examination that her daughter i.e. victim-prosecutrix had told her that accused had not committed any sexual assault upon her. Medical evidence adduced on record, nowhere reveals that there are injuries, if any, on the internal or external part of the victim-prosecutrix and as such, mere reliance if any, on the FSL report may not be sufficient to conclude guilt of the accused at this stage.

5. Leaving everything aside, this Court finds that statement of material prosecution witnesses i.e. victim-prosecutrix and her mother, stand recorded and as such, no fruitful purpose would be served by keeping the present bail petitioner, who is 26 years old young boy, behind bars for an indefinite period during trial, especially when, he has already suffered for more than a year in jail. Though case at hand is to decided by the court below on the basis of totality of evidence collected on record by the Investigating Agency, but having noticed aforesaid glaring aspects of the matter, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial, especially when guilt, if any of him is yet to be proved in accordance with law. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's

being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

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

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should***

be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal

against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

(ix) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(x) nature and gravity of the accusation;
(xi) severity of the punishment in the event of conviction;
(xii) danger of the accused absconding or fleeing, if released on bail;
(xiii) character, behaviour, means, position and standing of the accused;
(xiv) likelihood of the offence being repeated;
(xv) reasonable apprehension of the witnesses being influenced; and
(xvi) danger, of course, of justice being thwarted by grant of bail.

10. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

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

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

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are***

instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the

> ***investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
>
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.***

12. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

> ***(f) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if***

prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

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

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

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

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

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

Copy **dasti.**

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

Between:-

BHAYANSARU DEVI W/O SH. ROOP SINGH,
RESIDENT OF VILLAGE BAMSOI (TAKOLI)
POST OFFICE NAGWAI, TEHSIL AUT,
DISTRICT MANDI, H.P. AGED ABOUT 40 YEARS,
THROUGH HER FATHER NAMELY
SH. NANDU SON OF SH. SHOBHA RAM,
RESIDENT OF VILLAGE CHLOHATTI,
POST OFFICE, PNARSA, TEHSIL AUT,
DISTRICT MANDI, H.P. ...PETITIONER

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH ....RESPONDENT.

(SH. RAJINDER DOGRA,

SENIOR ADDITIONAL ADVOCATE GENERAL.)

CRIMINAL MISC.PETITION (MAIN) No. 1808 of 2021
RESERVED ON: 24.09.2021.
DECIDED ON :28.09.2021.

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 363 and 376- Protection of Children from Sexual Offences Act, 2012- Sections 4, 17 and 21- No apprehension of petitioner absconding from the course of justice or influencing the investigation of the case in any manner- Bail petition allowed subject to conditions.

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

O R D E R

Petitioner is accused in case registered vide FIR No. 96 of 2021 dated 30.7.2021 at Police Station, Padhar, District Mandi, H.P. under Sections 363, 376 of IPC and Sections 4, 17 and 21 of the POCSO Act, 2012. Petitioner is in custody since 07.08.2021 in the above noted case.

2. By way of instant petition, petitioner has prayed for grant of bail, in the above noted case, under Section 439 of the Code of Criminal Procedure (for short 'Code') on the grounds that petitioner has been falsely implicated in the case. She is mother of one Pawan Kumar, who is the main accused in the case. She has been arrayed as accused on the allegation that she despite knowledge that the prosecutrix was below 18 years of age, allowed her to stay with her son Pawan Kumar in the house. She also had the knowledge of the rape committed on prosecutrix by Pawan Kumar.

3. It has been contended on behalf of petitioner that the investigation of the case is already complete and the protracted incarceration of petitioner is not going to serve any fruitful purpose. Petitioner is permanent resident of village Bamsoi (Takoli), Post Office

Nagwai, Tehsil Aut, District Mandi, H.P. She has undertaken not to tamper with the prosecution evidence and is ready and willing to abide by all the conditions as may be imposed in case of her enlargement on bail.

4. On notice, the respondent has placed on record the status report. As per case of the respondent, on 30.7.2021, Pawan Kumar kidnapped the prosecutrix (minor) and committed rape on her. It is alleged that more than once the prosecutrix had accompanied accused Pawan Kumar to his house with the knowledge and consent of the petitioner herein. Petitioner was aware of the fact that the prosecutrix was below 18 years of age. She despite knowledge of the minority of the prosecutrix allowed her to stay with Pawan Kumar in her house and she also abetted the offence under Section 4 of the POCSO Act.

5. I have heard Mr. Devender K. Sharma, learned counsel for the petitioner and Mr. Rajinder Dogra, Senior Additional Advocate General for the respondent and have also perused the contents of the status report as well as the records of investigation produced by the Investigating Officer present in the Court.

6. It is revealed from the record that even prior to the date of alleged offence, the prosecutrix had accompanied Pawan Kumar to his village and had stayed with him. It appears from the material on record that Pawan Kumar and prosecutrix were known to each other from quite some time.

7. The allegation against the petitioner is that she abetted the offence under Section 4 of the POCSO Act, by allowing a minor to stay in her house in the company of her son Pawan Kumar, who had allegedly raped her. It is also alleged against the petitioner that she intentionally failed to report the matter to the authorities under the POCSO Act or to the parents of the prosecutrix.

8. The status report reveals that respondent is relying upon the alleged disclosures made by petitioner during the police custody. No independent and corroborative evidence is stated to have been in possession of respondent to substantiate the alleged offence is against petitioner. It is just an allegation that the petitioner was aware about the age of the prosecutrix and that her son Pawan Kumar had committed rape on the prosecutrix.

9. The status report does not suggest that there is any apprehension of petitioner absconding from the course of justice or influencing the investigation of the case in any manner. It has also not been alleged against petitioner that she is in a position to influence the prosecution witnesses or to otherwise tamper with the evidence collected by the Investigating Agency.

10. Petitioner is a local resident of Village Bamsoi (Takoli), Post Office Nagwai, Tehsil Aut, District Mandi, H.P. and there is no likelihood of her absconding from the course of justice. Even the respondent has not expressed any such apprehension about the petitioner. The ends of justice can be served by putting the petitioner to strict terms. There is nothing on record to suggest that petitioner can potentially influence the prosecution witnesses.

11. In the peculiar facts and circumstances of the case, the application is allowed and the petitioner is directed to be released on bail in case registered vide FIR No. 96 of 2021 dated 30.7.2021 at Police Station, Padhar, District Mandi, H.P. under Sections 363, 376 IPC and Sections 4, 17 and 21 of the POCSO Act, on her furnishing personal bond in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one surety in the like amount to the satisfaction of learned Special Judge, Mandi, District Mandi, H.P. subject to the following conditions:

(i) Petitioner shall regularly attend the trial of the case before the learned Trial Court and shall not intentionally cause any delay in its conclusion.
(ii) Petitioner shall not in any manner tamper with the prosecution evidence and shall not dissuade any person acquainted with the facts of the case from disclosing the same in the Court.
(iii) Petitioner shall be liable for immediate arrest in the instant case in the event of petitioner violating the conditions of this bail.
(iv) Petitioner shall not leave the Country without express leave of this Court.

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

13. The petition is disposed of accordingly.

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

Between:
SH. PADAM DEV SON OF SH. BALAK RAM,
R/O VILLAGE & P.O. BAGGI, TEHSIL SADAR,
DISTRICT MANDI, H.P.

....PETITIONER

(BY SH. R.S.CHANDEL, ADVOCATE)

AND

SH. ASHOK KUMAR S/O SH. CHET RAM,
R/O VILLAGE & P.O. NER CHOWK,
TEHSIL SADAR, DISTRICT MANDI, HP.

....RESPONDENT

(BY SH. VINOD CHAUHAN, ADVOCATE)

CRIMINAL REVISION No. 207 of 2021
Date of Decision: 09.09.2021

Code of Criminal Procedure, 1973- Section 397 (1) read with Section 401- Criminal Revision- Conviction under Section 138 of the Negotiable Instruments Act, 1881- High Court has a very limited jurisdiction under Section 397 of the Code of Criminal Procedure to re-appreciate the evidence, especially, in view of the concurrent findings of the fact and law recorded by the Courts below- Held, no error of law as well as fact- Revision petition dismissed.

Cases referred:

Krishnan and another Vs. Krishnaveni and another, (1997) 4 SCC 241;
M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999) 2 SCC 452;

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

O R D E R

Cr. MP(M) No.2163 of 2019

Having carefully perused the averments contained in the application, which is duly supported by an affidavit, this Court is convinced and satisfied that delay in maintaining the accompanying petiton is neither intentional nor deliberate, rather same has occurred on the account of the circumstances, which were completely beyond the control of the applicant/petitioner and as such, delay of 2 years, 9 months and 17 days in filing the petition, which in my considered view has been sufficiently explained, is condoned. The petition be registered. The application stands disposed of.

CRIMINAL REVISION No. 207 of 2021

2. Instant Criminal Revision petition filed under Section 397(1) read with Section 401 of the Code of Criminal Procedure, is directed against the judgment, dated 19.97.2017, passed by learned Sessions Judge, Mandi,

District Mandi, H.P., in Criminal Appeal 41 of 2016, affirming the judgment of conviction dated 12.08.2016 and order of sentence dated 19.08.2016, passed by learned Judicial Magistrate, 1st Class-IV, Mandi, District Mandi, H.P., in Complaint No.87-III/15/09, whereby learned trial Court while holding petitioner-accused guilty of having committed an offence punishable under Section 138 of the Negotiable Instruments Act, convicted and sentenced him to undergo simple imprisonment for 15 days and to pay fine of Rs.15,000/- to the complainant.

3. Precisely, the facts of the case as emerge from the record are that the respondent ***(for short 'complainant')*** filed a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the Court of learned Judicial Magistrate, 1st Class-IV, Mandi, District Mandi, H.P., alleging therein that accused with a view to discharge his legal liability towards complainant issued cheque (Ex. CW1/A), amounting to Rs.10,000/- on 4.8.2009 of account of No.0101070828 of Punjab National Bank, Branch Baggi, Tehsil Sadar, District Mandi, H.P. However, fact remains that aforesaid cheque on its presentation to the bank concerned was dishonoured on account of insufficient funds. Bank concerned returned the cheque vide memos Ex.CW1/B and Ex.CW1/C. After receipt of aforesaid memos, complainant issued legal notice dated 22.09.2009 Ex.CW1/D, whereby he called upon the accused to make the payment good within the period of 15 days after receipt of notice. Since accused failed to repay the amount within the time stipulated in the legal notice, complainant approached the competent court of law by way of complaint under Section 138 of the Act.

4. Learned trial Court on the basis of the evidence adduced on record by the respective parties, held accused guilty of having committed the offence punishable under Section 138 of the Act, and accordingly convicted and sentenced him as per the description given hereinabove.

5. Being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by learned trial court, present petitioner-accused preferred an appeal in the Court of learned Sessions Judge, Mandi, which also came to be dismissed vide judgment dated 19.07.2017, as a consequence of which, judgment of conviction and order of sentence recorded by learned trial Court came to be upheld. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for his acquittal after quashing and setting aside the impugned judgments and order passed by learned Courts below.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds no force in the submission made by learned counsel for the petitioner-accused that learned courts below have failed to appreciate the evidence in its right perspective, rather this Court finds from the record that complainant has successfully proved on record that accused had issued cheque Ex.CW1/A, amounting to Rs. 10,000/- with a view to discharge his legal liability, but same was dishonoured on account of insufficient funds in the bank account of the accused.

7. Record clearly reveals that at no point of time accused denied factum with regard to issuance of cheque as well as his signature upon the same, rather his simple defence is that though he had issued cheque amounting to Rs.10,000/- in favour of the complainant, but since he had paid cheque amount in cash, complainant had undertaken to return back the same, but he instead of doing so, lodged a complaint against him under Section 138 of the Act. It is quite apparent from the aforesaid stand taken by the accused that cheque in question was issued by him that too with a view to discharge his legal liability and as such, there is presumption in favour of the complainant that cheque in question Ex.CW1/A, amounting to Rs.10,000/-, was issued by the petitioner for discharge of his lawful liability.

8. No doubt, aforesaid presumption is rebuttable and for that purpose petitioner-accused either can lead some positive evidence or can raise probable defence by referring to the evidence led on record by the complainant. In the case at hand, petitioner nowhere denied case of the complainant in his statement recorded under Section 313 Cr.P.C, rather he reiterated that cheque in question was issued by him, but same was to be returned by the complainant on account of the fact that he had received cheque amount in cash. Accused also examined his sister Amar Lata, who while deposing as DW-1 stated that on 4.8.2008, she received telephonic call of her brother Padam Dev that complainant Ashok Kumar would come to her. She stated that her brother asked her to pay Rs.9000/- to the complainant, who in lieu was to return the cheque. She deposed that though she paid Rs.9000/- to the complainant, but he did not return the cheque. DW-1 stated in her statement that complainant snatched amount from her. Aforesaid stand taken by DW-1, Amar Lata, who happens to be sister of accused, is totally contrary to the stand taken by the accused, who in his statement recorded under Section 313 Cr.P.C., claimed that he had returned the amount of Rs.10,000/- to the complainant, whereas DW-1 has taken all together different stand by stating that she on the askance of her brother Padam Dev returned Rs.9000/- to the complainant. There are contradictions and inconsistencies in the statement made by DW-1 and statement of accused recorded under Section 313 Cr.P.C. DW-1 deposed that complainant had snatched the money from her, but in cross-examination she admitted that she did not lodge any complaint to any quarter regarding snatching of money from her by the complainant. Such conduct on her part creates serious doubt with regard to correctness of the version put forth by her more particularly, in view of the statement of accused recorded under Section 313 Cr.P.C, wherein he stated that he returned Rs.10,000/- to the complainant.

9. Though, there is no denial, if any, on the part of the accused that he had not issued any cheque but even otherwise careful perusal of evidence led on record by the complainant reveals that he successfully proved all the ingredients of Section 138 of the Act and as such, no illegality and infirmity can be said to have been committed by the learned Courts below while holding petitioner-accused guilty of having committing the offence punishable under Section 138 of the Act.

10. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability. Similarly, Section 118 of the Act provides that unless contrary is proved , that the holder of the cheque received the cheque in discharge, in whole or in part, of a debt or liability. True, it is that to rebut aforesaid presumption accused can always raise probable defence either by leading some positive evidence or by referring to the material, if any adduced on record by the complainant. But in the case at hand, accused has miserably failed to raise probable defence much less sufficient to rebut the presumption applicable in favour of the complainant under Section 118 and 139 of the Act.

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."***

5. 12. Having carefully examined the evidence available on record, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below, which otherwise appear to be based upon the correct appreciation of evidence and as such, same need to be upheld. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

6. ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to***

> ***the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***
> 7.

8. 13. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as fact, if any, committed by the courts below while passing impugned judgments, and as such, there is no occasion, whatsoever, to exercise the revisional power.

9. 14. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but Mr. Singh, learned counsel representing the accused has failed to point out any material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

10. 15. Consequently, in view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned finding recorded by the courts

below, which otherwise, appear to be based upon proper appreciation of evidence available on record and as such, same are upheld.

16. Accordingly, the present revision petition is dismissed being devoid of any merit. The petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already served. Pending applications, if any, also stand disposed of.

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

Between:

1. SH. SUNIL THAKUR, S/O SH. KISHAN CHAND, MANAGER,M/S NEW PREM DHABA AND SWEET SHOP, CHAILA, TEHSIL THEOG, DISTRICT SHIMLA, H.P.
2. SH. TULSI RAM, S/O SH. AMAR SINGH, PROPRIETOR OF M/S NEW PREM DHABA AND SWEET SHOP, CHAILA, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

…PETITIONERS

(BY MS. ARUNA CHAUHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH FOOD INSPECTOR, DISTRICT SHIMLA, H.P.

…RESPONDENT

(BY SH.HEMANT VAID ADDITIONAL ADVOCATE GENERAL WITH MR. VIKRANT CHANDEL AND MR GAURAV SHARMA, DEPUTY ADVOCATE GENERALS)

CRIMINAL REVISION NO. 118 of 2010
Decided on : 13.08.2021

Code of Criminal Procedure, 1973- Section 397- Conviction under Section 16 (1) (a) (i) of Prevention of Food Adulteration Act, 1954- No reasons to discredit the report of Public Analyst- Compliance of Section 13(2) of the Act- Accused upon their making first appearance before the Court after the institution of the prosecution did not recourse to seek order from the concerned Magistrate for re-analyses of the samples to the Central Food Laboratory- Breach thereof is of no relevance- Revision petition dismissed.

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

O R D E R

The learned Judicial Magistrate, 1st class, Theog, District Shimla, upon case No. 13-3 of 2006, as arose from a complaint made by the Food Inspector, under section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954, (hereinafter referred to as, "the Act"), made an order of conviction upon the accused. Through a separate order drawn on 6.9.2007, he sentenced the accused to suffer simple imprisonment, of six months each, and, also sentenced them to pay a fine of Rs. 1000/- each, for the charge drawn under Section 16(1)(a)(i) of the Act. The learned Judicial Magistrate, through the afore drawn order also made a direction, that upon default of the accused, depositing the afore imposed fine upon them, thereupon, they shall further undergo simple imprisonment, for one month. However, the period of confinement, already undergone by the convicts during investigation and trial, was ordered to be set off, against the afore imposed sentence of imprisonment, upon each of the accused.

2. The verdict made by the learned Judicial Magistrate, 1st Class, Theog, District Shimla, was appealed by the aggrieved, before the learned Additional Sessions Judge, Shimla, the latter, upon Criminal Appeal No. 28-s/10 of 2007, made a verdict of dismissal, and, proceeded to affirm both the afore verdicts, of conviction and, the consequent therewith sentence(s), (supra) as became imposed, upon the accused, by the learned Judicial Magistrate, 1st

Class, Theog, Shimla. Consequently, aggrieved from the concurrently recorded verdicts(supra), by both the learned Courts below, the accused/convicts instituted the instant Criminal Revision before this Court.

3. Ext. P-1 is the notice issued by the Food Inspector, hence evincing his intention to purchase the sample(s) of Milk, for the purpose of analysis. Ext. P-2 is the receipt, issued by the accused. Ext. P-3, is spot memo. Vide memo, Ext. P-4, the sample alongwith form No. 7 was sent to the Public Analyst, Kandaghat, and therealongwith sample of seal, Ext. P-5 was also sent. He deposited it, with the Local Health Authority, Shimla, and, Ext. P-6, is the receipt, as received by the Food Inspector, from the Public Analyst, Kandaghat, as, appertaining to his depositing thereat, the collected samples, vide memo Ext. PW3/A. The report of the Public Analyast, is borne in Ext. P-7, and, was received through Public Health Authority, Shimla, vide Ext. P-8. In the afore report, an opinion occurs that the milk fat content of the sample concerned is 2.56%, and, hence breaches the statutorily prescribed standard of 4.5%.

4. The Food Inspector applied to the CMO, Shimla, for the granting of sanction for prosecuting the accused/convicts. The CMO concerned, through Ext. P-10, granted the aforesaid sanction. Through, letter Ext. PW2/A, addressed to the Local Health Authority, Shimla, to the Food Inspector concerned, an intimation was received from the CMO concerned, for prosecuting the accused, and, it also carried a request to send a notice under section 13(2) of the Prevention of Food Adulteration Act, to the accused. Consequently, the Local Health Authrority, Shimla, issued notice, borne in Ext,. PW2/B to the accused, postal receipts whereof are Ext. PW2/C and Ext. PW2/D. The learned trial Magistrate, after assessing the probative vigor of the testimonies of the prosecution witnesses concerned, hence made a conclusion that the echoing(s), carried in the complaint, as made by the Food Inspector concerned, were credible and proceeded to draw an verdict of conviction, and

also, imposed the consequent therewith sentence(s) (supra), upon each of the accused.

5. As aforestated, the verdict made by the learned Judicial Magistrate concerned, became affirmed by the learned Additional Sessions Judge, Shimla, through the latter making a decision, on 6.5.2010, upon Criminal Appeal No. 28-s/10 of 2007.

6. From a perusal of the evidence on record, it is clear, that the prosecution witnesses concerned, deposed with consistency, with respect to the collection of samples, from the commercial establishment concerned, hence owned by the accused. The accused in their respectively recorded statements, under Section 313 of Cr. P.C., did not, dispute the factum of purchase by the Food Inspector concerned, of the samples of adulterated milk, from their premises. However, the only contention as addressed, before this Court, by the learned counsel for the revisionists, is that there is a patent violation of sub-section (2) of Section 13, of the Prevention of Food Adulteration Act, as well as of Rule 17 and of Rule 18 of the Prevention of Food Adulteration Rules. For appreciating the vigor of the afore submission, it is deemed necessary, to extract the mandate carried, in, the, relevant sub-Section (2) of Section 13 of the Act, mandate whereof is extracted hereinafter:

> "(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the persons from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.

(2A) When an application is made to the court under sub-section (2), the court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the court and only one part of the sample has been sent by the court to the Director of the Central Food Laboratory under sub-section (2B), the court shall, as soon as practicable, return the remaining part to the Local (Health) Authority and that Authority shall destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the court: Provided that where the part of the sample sent by the court to the Director of the Central Food Laboratory is lost or damaged, the court shall require the Local (Health) Authority to forward the part of the sample, if any, retained by it to the court and on receipt thereof, the court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the Local (Health) Authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said Authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of sub-sections (2) to (2D) shall, so far as may be, apply.]

The learned counsel for the revisionists, argued with much vigor, before this Court, that a palpable breach, is visited upon sub-Section (2) of Section 13 of

the Act, inasmuch as “after the institution of the prosecution, against the accused, the, mandated therein requirement of a copy of the report of Public Analyst, being supplied to them, became transgressed, as the apposite postal receipts, carried in Ext. PW2/C, and, in Ext. PW2/D, in respect of therethroughs, the, apposite statutory intimation, becoming made to the accused, by the Food Inspector concerned, do not, disclose the complete address of the accused. Consequently, she argued, that the statutory facility, as purveyed to the accused, through the mandate, carried in provision (supra) inasmuch as theirs availing the apposite statutory benefit, within 10 days, from the receipt of the report of the Public Analyst, and, comprised in their getting the samples of purportedly adulterated milk, rather analysed from the Central Food Laboratory, becoming purportedly denied to them, and, she therefore argues, that hence grave prejudice has been caused to the accused/defense. She also submits that no relevance can be placed upon the report of the Public Analyst.

7. However, the afore made submission, by the learned counsel, for the petitioner is of no legal worth, as a reading of Ext. PW2/C and of Ext. PW2/D, exhibits whereof, are the postal receipts, appertaining to the statutory intimation, (supra) becoming purveyed, to the accused, about report of the Public Analyst, rather reveal that both contain the address of the commercial establishment concerned, hence wherefrom the seizure was made by the Food Inspector concerned.

8. Furthermore, even if, assuming the afore postal receipts, are defective and also if any inference, can be gathered therefrom, that the statutory intimation (supra), as envisaged in sub-Section (2) of Section 13 of the Act, was not made, by the Food Inspector concerned to the accused. However, yet the accused could upon theirs making their first appearance, before the Court, hence “after the institution of the prosecution”, coinage whereof occurs in sub-Section 2 of Section 13, of, the Act seek an order that the

samples concerned, be sent for re-analyses, to the Central Food Laboratory. Nonetheless, the accused, upon theirs making their first appearance, "after the institution of prosecution," institution whereof becomes initiated or instituted only upon presentation of the complaint concerned before the learned Magistrate concerned, did not recourse the afore endeavor. Since, sub-section (2) of Section 13 of the Act, invests in the accused, a statutory leverage to within 10 days, from the date of theirs receiving the report, of the Public Analyst, make an application to the Court concerned, rather for sending the samples concerned, to the Central Food Analyst, for the latter making re-analyses thereon(s). Reiteratedly, when the afore statutory leverage remained un-availed, by the accused, even upon their first appearance, before the learned trial Court, stage whereof becomes hence within the ambit of the statutory coinage "after the institution of the prosecution" rather the relevant statutory stage, and, obviously comprises the statutorily pronounced stage, hence rendering any earlier thereto stage or also any prior thereto intimation to the accused also irrelevant. Moreover, only thereafter, rather the first appearance of the accused before the ld. Trial Court would become caused, and, the accused could file an application before the learned trial Court, for, the afore purpose. However, the vigor of the afore would become denuded if at the afore stage, the accused evidently remain unsupplied with all the documents, as appended with the complaint, inclusive of the report of the public analyst. However, when the afore evidence is grossly amiss, thereupon this Court is constrained to conclude that the accused hence waived, and, abandoned the benefit of the afore statutory leverage, whereupon the aforemade address, does completely, lose its vigor.

9. Furthermore, the learned counsel appearing for the petitioners, has contended, on anvil of clause (b) of Section 17 of the Act, mandate whereof is extracted hereinafter:

> "17(b): The sealed containers of the remaining two parts of the sample and two copies of the memorandum in Form VII shall be sent in a sealed packet to the Local (Health) Authority immediately but not later than the succeeding working day by any suitable means;"

That the sample concerned though was collected, on 11.11.2005, yet was sent to CTL, Kandaghat on 14.11.2005. Therefore she contends, that the mandatory requirement, carried in the clause (b) of Rule 17 of the Act, becomes breached, and, upon the afore breach, a conclusion is to be made, that the sample was tampered with or become spoiled, hence rendering un-amenable for acceptance the report of Public Analyst. The afore made submission is dis-countenanced, as she has not read, the words, hence succeeding, "immediately". Since the reading(s) of the words hence succeeding, the word "immediately", bring forth an inference, that in case the days succeeding the collection of samples, by the Food Inspector concerned, are holidays, thereupon there is a tenable deterrent, upon the Food Inspector, to comply with earlier thereto mandate, carried in mandate of clause (b) of Rule 17, inasmuch as, his thereupon becoming validly precluded, to immediately send the collections, to the Public Analyst concerned, hence for analysis. However, if within the ambit of the afore statutory coinage, the Food Inspector, concerned initially failed to, through suitable means, send immediately since its collection, the sample concerned to the Public Analyst concerned, thereupon his failure would entitle the accused to get an acquittal. However, since the days subsequent to 11.11.2005, were respectively a second Saturday, and, a Sunday, hence holidays, thereupon if within the ambit of, the, afore statutory coinage, the Food Inspector despatched the samples to Public Analyst concerned, on the working day, immediately succeeding the afore two consecutive holidays, thereupon, it cannot be concluded that he committed breach, vis-à-vis, the

mandate of clause (b) of Section 17 of the Act, nor the accused become entitled to an acquittal.

10. Lastly, the learned counsel appearing for the petitioners has argued with much vigor, before this Court, that since PW-3, in his cross-examination, made a testification, that the Food Inspector concerned, did not, stir the pan concerned with a ladle, rather he stirred it with a spoon, therefore, there was no homogenous stirring of the entire contents of milk, as carried in the pan/container concerned, and, sequally she argues that any report, of the Public Analyst, as made thereon, was not meritworthy. However, the afore submission cannot be accepted, as the relevant Rules, do not mandate, that the stirring is to be done with any prescribed ladle, hence of, a particular size and dimension, rather the rules only provide that homogeneous stirring(s), be made of the entire contents of the purportedly adulterated food item, as becomes carried in the container/pan concerned. Since, in the cross-examination, of PW-3, he admits that there was stirring of the entire contents of the milk, as carried in the pan concerned, therefore, after homogeneous stirrings hence homogeneous samples, were in fact evidently taken from the milk container, and, also the report of the Public Analyst, is both cogent and tenable.

11. Furthermore, the learned counsel for the petitioners, contended with much vigor, before this Court that since the Food Inspector concerned had, after extracting the sample(s) from the pan or container concerned, had poured it into a jug of water, thereupon she contends that the deficiency, in the fat content of milk, has occurred from the afore factum. However, the afore submission cannot be accepted, as PW-4 in his cross-examination, has stated that the jug, was in a dried condition, wherefrom it is to be concluded, that it carried no water. In aftermath, only homogeneous sample(s) of milk, as evidently became taken by the Food Inspector concerned, from the apposite container hence became poured into a dried jug, jug whereof did not contain

any water. Furthermore, the exercise of its being put it inside a sealed packet, can be concluded to be made hence without any water from the jug concerned, it being empty, entering into the bottle concerned, nor the report of the Public Analyst can be discredited.

12. Be that as it may, the report of the Public Analyst concerned, has not been cast any onslaught on any legally worthy ground. Moreover, even if, PW-4 has not completely supported the prosecution case, nonetheless, the statements, of the Food Inspector, i.e. PW-1, and, of PW-2 and PW-3, carry the completest interse echoing(s). Therefore, the testimonies, of the afore witnesses do underwhelm, and, also ousts the relevance, if any, of the testification of PW-4, who, though, has resiled from his previous statement, in writing, however, upon his being cross-examined, by learned APP he has, rather, in the afore manner, supported the prosecution case.

13. The learned counsel, for the petitioner has made a submission before this Court, that the requirement of Rule 18 of the Prevention of Food Adulteration Act, provisions whereof are extracted hereinafter:

> **"18. Memorandum and impression of seal to be sent separately**- A copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent, in a sealed packet separately to the Public Analyst by any suitable means immediately but not later than the succeeding working day."

has been breached, as the copy of memorandum, and, the specimen seal impression of the seal, as used by the Food Inspector concerned, to seal the parcel, are to be sent separately by him, to Public Analyst. However, even the afore breach would not prejudice the prosecution case, unless evidence existed on record, hence personificatory, that the specimen of seal impression became not used to seal, the packet concerned, given the seals, as made, on the parcel concerned, carrying description(s) completely different, from, the ones, as occur on the sample seal. Since the afore evidence is not existing

on record, and, even otherwise, though, the afore requirement is cast, in a mandatory phraseology, yet when unless the afore evidence exists on record, its breach is inconsequential, evidence whereof is amiss, whereupon, its non compliance constrains this Court, to ascribe a directory connotation thereto, and, not a mandatory one. Necessarily, any breach thereof is, of no relevance.

14. Consequently, there is no merit in the petition, and, the same is dismissed. The impugned verdict is affirmed and maintained. Also, the pending application(s),if any, are disposed of. No costs.

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

Som Dutt and others Petitioners.

Versus

State of H.P ….Respondent.

Cr. Revision No. 149 of 2012
Reserved on: 30.7.2021
Decided on: 6.8.2021

Code of Criminal Procedure, 1973- Section 397- Criminal Revision- Conviction under Section 379 read with Section 34 of the Indian Penal Code, 1860- Credible identification of the accused in the Court- Witness admitted signatures on the memos- No reason to interfere with the findings of conviction- Revision petition dismissed.

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

For the Respondents: Mr. Hemant Vaid, Additional Advocate General with Mr. Vikrant Chandel, and Mr. Gaurav Sharma Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioners herein (for short "accused") faced charge(s) for the offences constituted under Section 379 read with Section 34 of the Indian Penal Code, hence before the learned Judicial Magistrate, First Class, Karsog, District Mandi, Himachal Pradesh.

2. Upon the afore drawn charge(s) against the accused, the learned trial Judge recorded findings of conviction, vis-a-vis, all the accused, and, vide order of 28.1.2012 the learned trial Court imposed upon the accused sentence of simple imprisonment for three months and to pay fine of Rs.3000/-, and, upon default(s), if any, of payment(s) of fine, the learned trial Court ordered that the accused shall undergo simple imprisonment for one month each.

3. All the accused became aggrieved from the afore made verdict of conviction and consequent therewith sentence becoming imposed upon each of them, and, obviously instituted a Criminal Appeal bearing No. 11 of 2012 before the learned Additional Sessions Judge, Mandi, Camp at Karsog.

4. The appellate Court through its verdict recorded on 8.6.2012 proceeded to dismiss the appeal preferred before before it, by the accused, and, obviously declined to make any interference with the verdict of conviction, and, the afore consequent therewith sentence(s) as become imposed by the learned trial Court.

5. The accused became aggrieved from the afore concurrent verdict(s), as, become recorded by both the Courts below, and, have instituted the instant petition before this Court.

6. The brief facts of the case are that ASI Sunder Singh alongwith HC Gian Chand, HHC Devi Singh, C Vichater Singh No. 484, HHG Lala Ram No. 6/6-18 and HHG Nnd Lal No. 6/6/97 was on patrolling duty on the intervening night of 17.9.008 and 18.9.2008 at place Dhungru Nallah at Pangna Pehgal Road. A red coloured Indigo car reached on the spot at about 1.20 a.m was stopped by complainant ASI Sunder Singh. Accused Manoj Kumar alias Manoj Kaushal was its driver, and, he was accompanied by

accused Bula Ram in the car. The car was without Registration Certificate. Accused Bula Ram apprised the police that for remolding the tyres of tractor which is being brought behind the car, they are going to Sundernagar. A tractor carrying trolley also reached on the spot. Accused Dalip Kumar was driving this tractor. Accused Som Dutt and Ranjan Kumar were also sitting on the tractor. Accused Som Dutt told the police that tractor belongs to him. Documents of the tractor were with Bula Ram. An affidavit showing that original owner Sunil Kumar had sold this tractor to accused Som Dutt was found in these papers. Complainant checked the tractor and trolley. He found that tractor was bearing No. HP-35-B-9310 and trolley was bearing registration No. HP-27-0458. This registration number was written on the Dalla of the trolley which was kept inside the trolley. On inquiry as to why tractor and trolley have different registration numbers, the accused disclosed to the complainant that trolley was parked on the side of the road at Phegal, and, was worth Rs.65,000/-, so they took away (stole) the trolley. During investigation the Investigating Officer seized the vehicle. After completion of the investigation, formal challan under Section 379 read with Section 34 IPC was presented before the Court.

7. The learned counsel appearing for the accused has limited his address, before this Court, only with respect to both the Courts below rather committing a grave fallacy in recording concurrent findings of conviction, and, theirs imposing consequent therewith sentences (supra), upon the accused, in as much, as despite PW-7 (Rajesh Thakur), not being recorded as owner in the Registration certificate appertaining to the tractor bearing No. HP-27-0458, yet his being associated in the relevant investigations, by the Investigating Officer. He submits that hence his testification is discardable. He obviously submits that since the stolen property was hence *Res Nullius*, thereupon, the prosecution case becomes completely faltered and staggered.

8. However, the aforemade submission cannot be accepted by this Court, as PW-6 in his testification, as, comprised in his examination-in-chief, has made vivid echoings therein, that the initial owner of the afore stolen property, was one Rattan Singh, and, the afore Rattan Singh through an affidavit mark ST, hence alienated the stolen property to one Nikka Ram, whereafter the afore Nikka Ram alienated the stolen property, through an agreement of sale Borne in mark ST-1, to Rajesh Thakur. Imperatively hence PW-7 Rajesh Thakur though not becomes reflected in the Registration certificate to be owner thereof, he became yet lawful owner thereof through the afore made un-rebutted testimony, as occurs, in the examination-in-chief of PW-6.

9. Further more, the stolen property does not become *Res Nullius*, nor the counsel for the accused can make any submission, that hence this Court being constrained to record findings of acquittal, vis-a-vis them.

10. Be that as it may, since the Police patrol nabbed the stolen property and also arrested the accused, from the site of occurrence besides when an eye witness to the occurrence, upon his stepping into the witness box as PW-3 (Gurdass), did unflinchingly prove Ex.PW-3/A the apposite recovery memo, whereon his signatures also exist, (i) thereupon, the prosecution has been able to fortifyingly prove the commission of the charged offences hence by the accused.

11. However the other submission addressed by the learned counsel for the petitioner, is, that since the accused were unknown both to the Investigating Officer and also to the eye witness, thereupon, the identification of the accused only in Court, without prior thereto any valid Test Identification Parade being conducted by the Investigating Officer concerned, does not firmly establish their identity, and also does not firmly prove their involvement in the charged offences.

12. However, even the afore made submission cannot be accepted by this Court, as the memos Ex. PW-2/A and PW-2/B, as became respectively, drawn by the Investigating Officer, under Section 27 of the Indian Evidence Act, 1872 do evidently carry thereon(s) the un-denied valid signatures of the accused. Moreover on Memo Ex. PW-2/A there also exist the valid signatures of witnesses thereto namely Om Dutt and Gauri Shankar, and, on memo Ex.PW-2/B the signatures of witnesses thereto namely Om Dutt and Sohan Lal do also exist. Since one signatory to the afore memo(s) stepped into the witness box as PW-2, and, though he resiled from his previously recorded statement in writing. However, his reneging from the previous statement recorded in writing, does not scuttle the evidentiary vigour of the afore drawn memo(s), as upon his becoming declared hostile, and, thereafter his being cross-examined by the learned Public Prosecutor, he does not deny the validity of his signatures hence existing on the memos (supra). The aforemade admission of PW-2, does completely, as contemplated under Sections 91 and 92 of Indian Evidence Act, belittles the effect, if any, of PW-2 resiling from his previous statement recorded in writing, rather his admission qua his making valid signatures, on the memos (supra), does boost a conclusion, that he has therethrough admitted all the recitals carried therein. Therefore, the afore recitals prove the charge drawn against the accused.

13. Accentuated vigor to the afore inference become garnered from the fact that, upon, both the afore drawn memo(s) the unrebutted signatures of the accused also exist. The accused did not proceed to contest the factum of occurrence thereon(s) of their valid signatures. Consequently omission or failure, if any, of the Investigating Officer to, during his holding investigation into the alleged offences, conduct a valid Test Identification Parade for his there through hence ensuring a credible identification in Court of the accused, does not bestow any benefit to the accused nor also hence their purported

identification only in Court by the prosecution witnesses concerned also does not suffer from any legal frailty.

In view of the above, the present petition is dismissed and, the Impugned judgment is maintained and affirmed. Records be sent back.

BEFORE HON'BLEMR. JUSTICE VIVEK SINGH THAKUR, J.

Between:-

NARCOTICS CONTROL BUREAU,
CHANDIGARH ZONAL UNIT,
ELECTRICAL STORES BUILDING,
SEC.25 (W), CHANDIGARH.

(BY SH.ASHWANI PATHAK,
SENIOR ADVOCATE, ALONGWITH SH.SANDEEP SHARMA, ADVOCATE)

.....PETITIONER

AND

OM CHAND
S/O SH. AMAR SINGH,
VPO SAKROHA, TEHSIL BALH,
DISTRICT MANDI, H.P.

(BY SH. DESHMITER THAKUR, ADVOCATE)

...RESPONDENT

CRIMINAL REVISION NO.165 OF 2021
Decided on :29.09.2021

Code of Criminal Procedure, 1973- Section 397- Release of vehicle intercepted with charas- Narcotic Drugs and Psychotropic Substances Act, 1985- Section 60- Vehicle has been released by Learned Special Judge taking all safeguards for production thereof during investigation as well as trial – Revision petition dismissed.

Cases referred:

Ashok Kumar vs. State of Himachal Pradesh, 2008(2) Shim. LC 452;
Narcotics Control Bureau vs. Sangeeta Bhardwaj, 2021(3) Him L.R. (HC) 1663
Rajendra Prasad vs. State of Bihar and another, (2001) 10 SCC 88=2001 AIR SCW 2314;
Smt. Basavva Kom Dyamangouda Patil vs. State of Mysore and another, (1977) 4 SCC 358=1977 Cri LJ 1141;
Sunderbhai Ambalal Desai vs. State of Gujarat, AIR 2003 SC 638;

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

J U D G M E N T

Petitioner, Narcotics Control Bureau, Chandigarh Zonal Unit (in short 'NCB') has preferred this revision petition against the order dated 16.07.2021, passed by learned Special Judge, Bilaspur, in Criminal Miscellaneous Application No.188/4 of 2021, whereby learned Special Judge has released vehicle Bolero Pickup bearing registration No.HP-33D-6900 in favour of owner-respondent Om Chand subject to furnishing Sapurdari bond in the sum of `6,00,000/- with one solvent surety in the like amount to the satisfaction of learned Judicial Magistrate, First Class, Bilaspur, District Bilaspur, H.P., and also subject to certain other restrictions directing the owner not to change colour, not to alienate the vehicle, produce the same before the Court or police, as and when required, and not to indulge the vehicle in similar type of activities. Direction was also given to retain photocopies of the documents of the vehicle on record.

2. Vehicle in question, being driven by one Gopal Krishan, was intercepted by NCB on 23.06.2021, wherein one Sanjay was also found

travelling. During checking, 7 kilograms of charas was recovered from the said vehicle and Gopal Krishan had disclosed that he was working with the respondent-owner as a driver.

3. For recovery of contraband from the vehicle, a case Crime No.43 of 2021 dated 23.06.2021 was registered under Sections 8, 20, 29 and 60 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') and besides arresting accused persons, vehicle was also taken into possession and seized by the NCB.

4. On 24.06.2021, respondent-owner had approached learned Special Judge, Bilaspur, District Bilaspur, H.P., by filing an application under Section 457 of the Code of Criminal Procedure (in short 'Cr.P.C.') for release of vehicle alongwith its documents and keys in his favour by stating in the application that he was owner-cum-driver of the vehicle, but on 22.06.2021 he had to appear before Court No.3 at Mandi in a case and, therefore, he had engaged accused Gopal Krishan alias Panku for carriage of plums from Kullu to Panipat (Haryana) w.e.f. 22.06.2021 to 25.06.2021 and he was not having knowledge of commission of crime by the driver engaged by him with further averments that he was never involved in the commission of offence. It was contended in the application that in case vehicle was not released to the owner it would result into irreparable loss as the vehicle would be destroyed by the rust. An undertaking was also extended to produce the vehicle in question before the Court or before the NCB Chandigarh as and when required to do so and readiness to furnish Sapurdari bond to the satisfaction of the Court with further assurance not to dispose of the said vehicle till final disposal of the case was also given.

5. Application for releasing the vehicle was opposed by the NCB, on the ground that investigation of the case was in progress and vehicle was required for the purpose of investigation and accused Gopal Krishan had never disclosed that he was engaged by the owner to take delivery of plums

from Kullu to Panipat with further submissions that when vehicle was intercepted at Swarghat, it was not carrying any plums, rather empty crates were there in the vehicle and that vehicle was required during trial of the case so as to prove the concealment of seized contraband in the empty crates and, therefore, in case vehicle was released, then there would be possibility of escape.

6. After taking into consideration submissions made by the parties and law laid down by the Supreme Court in cases ***Smt., Basavva Kom Dyamangouda Patil vs. State of Mysore and another, (1977) 4 SCC 358=1977 Cri LJ 1141; Rajendra Prasad vs. State of Bihar and another, (2001) 10 SCC 88=2001 AIR SCW 2314;*** and ***Sunderbhai Ambalal Desai vs. State of Gujarat, AIR 2003 SC 638,*** learned Special Judge has released the vehicle on terms and conditions referred supra.

7. Present petition has been filed on the ground that for transportation of contraband, in view of provisions of Section 60 of the NDPS Act, vehicle is liable to be confiscated and in case of release of the vehicle to the owner there would be possibility of disposal thereof by the owner before passing of order of confiscation making it impossible to confiscate the vehicle which would cause great prejudice not only to the NCB but also to the society.

8. Contra, it is contended on behalf of the respondent-owner that in view of conditions imposed by learned Special Judge, the respondent-owner shall be duty bound to produce vehicle as and when directed to do so either by the Court or by the NCB for the purpose of investigation as well as during trial.

9. Section 60 of the NDPS Act reads as under:-

> "60. Liability of illicit drugs substances plants articles and conveyances to confiscation.—
>
> [(1) Whenever any offence punishable under this Act has been committed, the narcotic drug, psychotropic

> substance, controlled substance, opium poppy, coca plant, cannabis plant, materials, apparatus and utensils in respect of which or by means of which such offence has been committed, shall be liable to confiscation.]
>
> (2) Any narcotic drug or psychotropic substance [or controlled substances] lawfully produced, imported inter-State, exported inter-State, imported into India, transported, manufactured, possessed, used, purchased or sold along with, or in addition to, any narcotic drug or psychotropic substance [or controlled substances] which is liable to confiscation under sub-section (1) and there receptacles, packages and coverings in which any narcotic drug or psychotropic substance [or controlled substances], materials, apparatus or utensils liable to confiscation under sub-section (1) is found, and the other contents, if any, of such receptacles or packages shall likewise be liable to confiscation.
>
> (3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance [or controlled substance], or any article liable to confiscation under sub-section (1) or sub-section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

10. Section 60(3) of NDPS Act provides that conveyance under Section 60(1) or sub-Section (2) shall be liable to confiscation unless the owner of the conveyance proves that it was so used without knowledge and connivance of the owner himself, his agent, if any, and further that the person-in-charge of the conveyance and that each of them had taken all reasonable precautions against such use. The plea of the owner is to be considered during procedure provided for making confiscation under Section 63 of the NDPS Act which contemplates that it shall be the Court which, irrespective of conviction or acquittal or discharge of the accused, shall decide that the vehicle seized under this Act is liable to be confiscated under Section 60 of NDPS Act or not and if it decides that vehicle is liable to be confiscated,

then it may order confiscation accordingly. But no such order of confiscation of the vehicle shall be made before expiry of one month from the date of seizure, or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim. Therefore, issue of confiscation is to be determined by the Court during trial and vehicle, if to be confiscated, would be confiscated by following procedure prescribed under Section 63 of the NDPS Act.

11. In ***Sunderbhai Ambalal Desai's*** case, the Apex Court has opined that power under Section 451 of Cr.P.C. should be exercised expeditiously and judiciously to serve numerous purposes including purposes enumerated in para-7 of the said judgment. With respect to seizure and release of vehicle it has been observed as under:-

> "17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.
>
> 18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance Company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

12. It has been held in ***Sunderbhai Ambalal Desai's case*** by the Supreme Court that whatever would be the situation, it is of no use to keep the seized vehicle at Police Station for a long period and, therefore, Magistrate

should pass appropriate order immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle if required at any point of time.

13. In present case, vehicle has been ordered to be released by learned Special Judge by taking all safeguards for production thereof during the investigation as well as trial which includes the stage, if so arrives of confiscation of the vehicle, by invoking provisions of Sections 60 and 63 of the NDPS Act. The custody of the vehicle is with the owner, but on behalf of the Court and this arrangement is only up to the stage of passing of order by the Court regarding disposal of the property on the conclusion of trial.

14. Similar view has also been taken by Coordinate Benches of this Court in ***Ashok Kumar vs. State of Himachal Pradesh, 2008(2) Shim. LC 452;*** and ***Narcotics Control Bureau vs. Sangeeta Bhardwaj, 2021(3) Him L.R. (HC) 1663.***

15. In view of aforesaid discussion, I do not find any illegality, irregularity or infirmity in the impugned order dated 16.07.2021, passed by learned Special Judge, Bilaspur, and, thus, it does not warrant any interference.

16. Petition is dismissed in the aforesaid terms alongwith pending application(s), if any.

17. Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy but if required, may verify it from Website of the High Court.

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

Between:

MASTER DIVESH SHARMA, THROUGH HIS GUARDIAN & FATEHR SH. PAWNESH SHARMA, C/O MANAGING DIRECTOR, HP STATE FOREST CORPORATION, SDA COMPLEX, KASUMPTI, SHIMLA-9

...PETITIONER

(BY SH. DUSHYANT DADWAL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

...RESPONDENT

(BY SH.HEMANT VAID AND MR. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERALS WITH MR. VIKRANT CHANDEL, DEPUTY ADVOCATE GENERAL)

CRIMINAL REVISION NO. 52 OF 2020
Reserved on : 9.8.2021
Decided on: 13.08.2021

Code of Criminal Procedure, 1973- Section 397- **Juvenile Justice (Care and Protection of Children) Act, 2015**- Section 15- There was omission on the part of the juvenile in conflict with law to record his presence before the Board concerned on effective hearings- Delays attributable to juvenile in conflict with law- No merits in revision- Dismissed.

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

O R D E R

Through the instant petition, the juvenile in conflict with law, challenges an order, made under Section 14 of the Juvenile Justice Act, 2015, by the Juvenile Justice Board, Kangra at Dharamshala, District Kangra, H.P.

Through the impugned order, the Juvenile Justice Board, made the hereinafter extracted order:

> "18. Thus applying the principles laid down in *Neeraj and others vs State of Haryana 2005 (4) RCR Criminal 71 and in X Minor (through his elder brother vs. State Criminal Revisions petition No. 24/2017 decided on 15.11.2011, and taking into consideration the fact that the provisions of Section 14 of the Junvenile Justice Act are directory and not mandatory and further taking into consideration the fact that the inquiry in the present case especially during the examination of the complainant on 4.6.2019 was delayed due to the non-appearance of the juvenile and further taking into consideration the seriousness of the allegations leveled against the juvenile, this Board does not deem it appropriate to terminate the inquiry pending adjudication before this Board. As far as the interest of the juvenile is concerned, the same can be looked into by the Board by speeding the inquiry and in the light of above discussion, the present application is dismissed".*

For adjudicating the import of the challenges made to the afore impugned order, it becomes incumbent, upon, this Court, to extract the mandate, carried in Section 14 of the Juvenile Justice (Care and Protection of Children) Act, 2015,provisions whereof are extracted hereinafter:

> ***"14. Inquiry by Board regarding child in conflict with law:***
>
> *(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under Sections 17 and 18 of this Act.*
>
> *(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard the circumstances of the case and after recording the reasons in writing for such extension.*
>
> *(3) A preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.*

(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

PROVIDED that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate, or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry namely:

(a) At the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) In all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child friendly atmosphere during the proceedings;

(c) Every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) Cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974)

(e) Inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973 (2 of 1974)

(f) Inquiry of heinous offences;

(i) For child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e)

(ii) For child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under Section 15."

A circumspect reading of, the mandate carried in sub-section (2) of Section 14 of the Act, does, unfold that the inquiry under Section 14 of the Act, shall become mandatorily concluded, by the Board concerned, within four months,

from the date of production, of, the juvenile in conflict with law, before the Juvenile Justice Board. However, the afore period of four months, is, extendable for a maximum period of two months, by the Board concerned, it having regard to the circumstances of the case, and, after its recording the reasons for its according the said extension. Furthermore, the mandate carried in sub-section (4) of the Act, makes a trite underlining, that if the inquiry enshrined in sub-section (2) of Section 14 of the Act, appertains to petty offences, and, it remains not concluded, evenafter the extended period, as mentioned in sub-section (2) of Section 14 of the Act, thereupon, proceedings shall stand terminated. The learned counsel for the petitioner, contends that since the juvenile in conflict with law, allegedly committed a petty offence, punishable under Section 304-A of the IPC, and, when readings of the definition assigned to petty offences, as carried in sub- clause (45) of Section 2 of the Act, provisions whereof are extracted hereinafter:

> *"(45) petty offences" includes the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment upto three years."*

Does vividly unfold, that it appertains to those offences, in respect whereof, the maximum prescribed punishment under the Indian Penal Code, or any other law, is, upto three years of imprisonment, and, when the sentence(s) of imprisonment, as imposable upon the petitioner juvenile in conflict with law, is, hence upto three years. Therefore, he argues that since the Juvenile in conflict with law, committed a petty offences, thereupon, yet the Juvenile Justice Board, rather not within the extended period of time, as mandated in sub-Section (2) of Section 14 of the Act, concluding the proceedings. Consequently, the breach of the mandate, borne in sub-Section (4) of Section 14 of the Act, comes to the forefront, and, the benefit thereof was extendable to the Juvenile, rather than the Board concerned making the impugned order. However, for the reasons to be assigned hereinafter, this Court, does

not, deem it fit to agree with the afore made submissions. Even though, statutory responsibility(ies) (supra) are cast upon the Board concerned, and, also are, amenable for being completely complied with, and also, when there are prima-facie blatant departures or breaches thereof, yet the, impugned order, would become well-founded, (i) only if the material, as, existing on record, hence, suggests that there were no willful abandonment(s) of care and caution(s) by the Juvenile Justice Board, inasmuch as through its making un-necessary adjournments, of the case concerned. If so, it would become concluded that the Board concerned did not willfully stall the operation, of, the mandate (supra), as carried in Section 14 of the Act. A thorough reading of the material on record, reveals that there are/is no willful departure(s) or breaches, and, of of mandatory provisions (supra), and also, when concomitantly rather the Juvenile Justice Board concerned had not untenably shed its statutory responsibilities, rather when the relevant material on record, is, suggestive, that the juvenile in conflict with law, for ensuring his becoming purveyed the statutory benefits (supra), his taking to, through a stratagem deployed, by him, through his counsel, or through his representatives, hence causing un-necessary prolongation(s) of the proceedings. Therefore, this Court proceeds to rather validate the impugned order.

2. The reasons (supra) are founded upon the notice of accusation being put on 2.5.2019 to the juvenile in conflict with law. On the afore date, he did not plead guilty, and, claimed inquiry. The matter was listed on 1.6.2019, for the recording, of, the testimonies, of PWs, , however, no PWs were present, on the afore date, as service upon them was not complete. On 4.6.2019, the juvenile in conflict with law was not present, however, one PW was present, but his statement could not be recorded, given the juvenile in conflict with law, becoming given an exemption from personal appearance. On 1.7.2019, the coram of the Board was not complete. On 5.8.2019, an

application for exemption, from personal appearance, of the juvenile, in conflict with law, was made, which became allowed. On 2.9.2019, the coram of the Juvenile Justice Board was not complete, hence the matter was listed on 5.10.2019, for proper orders. On 5.10.2019, an application seeking exemption from personal appearance of the juvenile, on behalf of his counsel, was moved and became allowed. Again on 1.11.2019, an application was moved on behalf of the juvenile, in conflict with law, was allowed. On 5.10.2019, again an application for exemption form personal appearance was moved, which was allowed. On 5.8.2019, hence after elapse of more than 4 months, from the first personal appearance on 1.2.2019, of the juvenile in conflict with law, before the Juvenile Justice Board, an application became cast, borne under Section 14 of the Act, before the Juvenile Justice Board. However, upon the afore made application, the impugned order, became rendered on 4.1.2020. Though, as stated (supra) there are departures, by the Juvenile Justice Board concerned, from the mandate carried in Section 14 of the Act. However, the validity of the purported departures, are to be tested, from, the date of the first appearance of the juvenile in conflict with law, before the board concerned, and, upto his moving an application, whereons, the impugned order became passed. Therefore, and, therefroms, this Court concludes, that the apposite departures appertaining to the afore spell are neither willful nor are made to stall the operation of the statutory mandate, as the displays (supra), in the order sheet (supra), as appertaining to the afore spell, reveal that there were rather omissions on the part of the Juvenile in conflict with law, to, record his personal appearance(s), before the Board concerned, respectively, upon the date assigned for the notice of accusation, being put to him, and, for the statements, of the PWs, being recorded. Consequently, it appears, that the counsel for the Juvenile in conflict with law, has despite occurrences of the delays (supra) rather attributable to him or the juvenile in conflict with law, hence through a

stratagem deployed by him, rather strived to capitalize, upon the mandate (supra), carried in Section 14 of the Act. Therefore, if the contention of the learned counsel for the petitioner, is, accepted, this Court, is, of the considered view, that the salutary purpose, behind the mandate carried in statutory provisions (supra) would become ill-validated. Even otherwise, if this Court, validates the endeavor of the petitioner, it would be counter-productive, inasmuch as the victim is concerned, conspicuously, when as aforestated, the, drawing of capitalization, upon the mandate (supra) by the juvenile, is, aptly pureyable to him, only upon his not delaying proceedings, whereas, is un-available to him, upon mis-advises to him, by his counsel, to prolong the proceedings, through his seeking repeated exemptions, from his personal appearance(s) before the Board concerned, hence causing frustration of the mandate (supra). Consequently, making balance(s) interse the rights of the victim, and, of, the juvenile in conflict with law, this Court deems it unfit to invalidate the impugned order.

3. Consequently, this Court finds no merit in the petition and the same is dismissed. The impugned order is affirmed and maintained. Also, the pending application(s),if any, are disposed of. No costs.

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

Between:

1. SH. PRATAP SINGH SON OF
SH. PIYARE LAL

2. SMT. PADMA DEVI WIFE OF
SH. PIYARE LAL

3. SMT. SUMITRA WIFE OF SH. BALBIR

4. SMT. NISHA WIFE OF SH. SANSAR
DASS

ALL R/O VILLAGE TANSERI, P.O. NOGLI,TEHSIL RAMPUR, DISTRICT SHIMLA, H.P.

5. SMT. MEENA DEVI WIFE OF SH. BHAGAT RAM,R/O VILLAGE BHALSI, TEHSIL NIRMAND,DISTRICT KULLU, H.P.

....PETITIONERS

(BY SH. AJAY KUMAR SENIOR ADVOCATE WITH MR. ROHIT, ADVOCATE).

AND

SMT. SHEELA DEVI WIFE OF SH. PRATAP SINGH R/O VILLAGE AND POST OFFICE NOGLI, TEHSIL RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P.

....RESPONDENT

(BY MS. MEENAKSHI SHARMA, ADVOCATE)

CRIMINAL REVISION No.21 of 2019
Decided on: 02.09.2021

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Protection of Women from Domestic Violence Act, 2006- Section 12- Maintenance- Orders of maintenance and rent of Rs. 4000/- per month awarded/ passed by the Courts below cannot be said to be on higher side- Revision dismissed.

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

O R D E R

Instant Criminal Revision Petition filed under Section 397 read with Section 401 of Cr.P.C, lays challenge to judgment dated 23.10.2018, passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, District Shimla, H.P., in Criminal Appeal No.0000038 of 2014, titled as Sh. ***Pratap Singh and others versus Smt. Sheela Devi,*** modifying the

judgment dated 10.9.2014, passed by learned Additional Chief Judicial Magistrate, Rampur Bushahr, District Shimla, H.P. in case No.26-3 of 2013, titled as ***Sheela Devi versus Pratap Singh and others,*** whereby learned court below while allowing the petition under Section 12 of Protection of Woman from Domestic Violence Act ***(for short 'Act,)*** having been filed by respondent herein, directed petitioner No.1 herein to pay Rs. 3000/- per month to the respondent, as maintenance allowance from the date of filing of the application. Besides above, learned Court below while directing petitioner No.1 to provide one room and kitchen alongwith toilet in the matrimonial house, also restrained the petitioner, his mother and sisters from committing any act of physical violence against the respondent herein.

2. Precisely, the facts as emerge from the record are that marriage interse petitioner No.1 and respondent was solemnized in the year, 2005 and out of their wedlock, a male child namely, Rajat was born. Allegedly, after 2-3 months of marriage petitioner No.1 started subjecting respondent to maltreatment and he also gave beatings to respondent. Though, respondent tolerated aforesaid uncalled for behaviour of petitioner No.1 for 3-4 years, but once he failed to mend his ways, she was constrained to leave her matrimonial home. To maintain herself and her son, respondent started tailoring work at village Nogli and also started living there in a rented accommodation. Since, during her stay in rented accommodation petitioner failed to provide financial support to respondent as well as minor child, she filed maintenance petition against him in the court. However, in those proceedings, petitioner No.1 undertook not to subject her to any type of maltreatment and as such, matter was compromised and respondent agreed to join the company of her husband in the matrimonial home. Since, after some time petitioner No.1 as well as other petitioners started harassing the respondent on one pretext or other, she was compelled to leave her matrimonial house. As per the respondent, petitioner No.1 and other family members wanted to throw her out from the

matrimonial house, so that they could solemnize another marriage of her husband. On 27.6.2013, petitioners No.2 to 5 gave severe beatings to the respondent, as a consequence of which, she suffered multiple injuries. Matter was reported to the police at police Station, Rampur Bushahr, who subsequently got the respondent medically examined from the Medical Officer and thereafter matter came to be referred to Protection Officer for initiating proceedings against the petitioners under the provisions of Protection of Women from Domestic Violence Act. The Protection Officer conducted the necessary inquiry and thereafter forwarded the matter to the lower court of initiating proceedings against the petitioners.

3. While refuting aforesaid claim put forth by the respondent, petitioners filed detailed reply and specifically denied allegations of beatings as well as mental harassment. Petitioners claimed that at no point of time respondent was compelled to leave her matrimonial house, rather she of her own volition and without there being any plausible reason left her matrimonial house and as such, is not entitled to any kind of maintenance. While specifically denying factum with regard to monthly income to the tune of Rs. 20,000/- ,as claimed by the respondent, petitioner claimed that he earns sum of Rs.4000/- per month on account of his being driver. Petitioners also refuted the claim of the respondent that petitioner No.1 earns sum of Rs.20,000/- per month by working as a Driver and sum of Rs. 2 lac from the apple orchard of his father.

4. Learned trial court on the basis of evidence led on record by the respective parties, held respondent entitled for maintenance to the tune of Rs.3000/- per month. Besides above, court also directed petitioner to provide one room and kitchen alongwith toilet in the matrimonial house to the respondent.

5. Being aggrieved and dissatisfied with the aforesaid order passed by learned Additional Chief Judicial Magistrate, Rampur Bushahr, District

Shimla, H.P., petitioners herein preferred an appeal in the court of learned Sessions Judge, Rampur Bushahr, who vide order dated 23.10.2018, modified the order granting maintenance passed by learned Additional Chief Judicial Magistrate. Learned Sessions Judge, Kinnaur set aside the relief of residence order passed by trial Court and directed the petitioner to pay rent in the sum of Rs.1000/- per month to the respondent with effect from 01.11.2018 in lieu of residential accommodation. In the aforesaid background, petitioners have approached this Court in the instant proceedings, praying therein to quash and set-aside the impugned order and judgment passed by learned Courts below.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that there is no dispute interse parties that marriage interse petitioner No.1 and respondent was solemnized in the year, 2005 and out of their wedlock one child was born. It is also not in dispute that prior to lodging of complaint respondent had filed petition under Section 125 Cr.P.C, seeking therein maintenance. However, before such proceedings could be taken to its logical end parties entered into the compromise, whereby petitioner No.1 undertook before the court that he as well as other family members would not subject respondent to mental harassment as well as maltreatment. It is also not in dispute that on 27.6.2013, matter came to be reported to the police at the behest of respondent that petitioners No.2 to 5 gave her beatings, as a consequence of which, she suffered multiple injuries. Factum with regard to injuries suffered by respondent stands duly established with the opinion rendered on record by Medical Officer, who had an occasion to medically examine the respondent after alleged beatings given to her by petitioners No.4 and 5. Similarly, record reveals that respondent though claimed before the learned Court below that petitioner earns Rs.20,000/- per month by working as a driver and sum of Rs. 2 lac from the apple orchard of his father, but such plea of her never came to

be proved in accordance with law and as such, learned Court below taking note of admission made by petitioner himself that he is earning Rs.4000/- per month, proceeded to award sum of Rs.3000/- as maintenance in favour of respondent as well as her minor son. However, record reveals that during the pendency of appeal before learned Sessions Judge, Kinnaur respondent filed an application under Section 311 Cr.P.,C with a view to demonstrate that after passing of impugned judgment and order by trial Court petitioner No.1 had got the job of a Diver in M/s Goyal Motors Company at Nogli and he is earning Rs.25000/- per month as salary. Though, petitioners denied the aforesaid contention of the respondent, but by not leading any cogent and convincing evidence. In the cases of present nature onus is always shifted upon a person from whom compensation is claimed to prove that he is not earning the income as is being claimed by the claimant. In the present case, respondent by stating that petitioner earns Rs.20,000/- as salary while rendering his services as driver in M/s Goyal Motors Company shifted the onus upon the petitioner to disprove the aforesaid fact which, he miserably failed to do. Moreover, it is none of the case of petitioner that he is not working as a driver, only dispute is with regard to quantum of salary received by him on account of his being driver in a private company. Record reveals that petitioner during mediation proceedings categorically admitted that factum with regard to his being driver in private company.

7. Though, in the case at hand, trial court ignoring admission made on behalf of the respondent that she does tailoring work, proceeded to grant maintenance to the tune of Rs. 3000/,- but learned Sessions Judge, though accepted aforesaid plea made on behalf petitioner, but yet having taken note of the fact that respondent besides sustaining herself requires money to maintain her minor son, proceeded to uphold the order granting maintenance to the tune of Rs.3000/- passed by court below. This court finds no illegality and infirmity in the aforesaid order passed by learned Sessions Judge because

it is difficult to accept that in sum of Rs.3000/- requirement of minor child can be fulfilled by mother. Now a day's prices of essential commodities are so high and it is hard to believe that one can sustain himself/herself in the meager amount of Rs. 3000/-. Since respondent failed to prove that her husband i.e. petitioner possesses immovable property and house in his name, learned Sessions Judge rightly modified the order passed by trial court directing the petitioner to provide one room accommodation in his house. Since petitioner failed to prove that respondent is not compelled to live in rented accommodation, learned Sessions Judge rightly directed him to pay Rs.1000/- as a rent. Since, there is no dispute that respondent is legally wedded wife of petitioner, who has one minor child to maintain it is otherwise obligation cast upon the petitioner being husband and father to provide adequate maintenance to her wife as well as child. Since petitioner is able bodied person, it cannot be accepted that he is unable to provide sum of Rs.4000/- to his wife and minor son on account of maintenance and rent. Sum of Rs.4000/-(Rs.3000+1000) awarded by court below by no stretch of imagination can be said to be on higher side and as such, no interference, if any, qua the same is called for.

8. Consequently, in view of the above, this Court finds no illegality and infirmity in the impugned judgments passed by Courts below and as such, same are upheld. Accordingly, the present petition is dismissed being devoid of any merit alongwith pending applications, if any.

9. Arrears on account of maintenance awarded by the court below, if not already paid, be paid forthwith by the petitioner failing which, he would render himself liable for penal consequence as well as contempt of the Court. Pending application(s), if any, also stands disposed of. Interim directions, if any, stands vacated.

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

BETWEEN:

RAM LAL, AGED 49 YEARS, SON OF SHRI PREM SINGH, RESIDENT OF VILLAGTE SHALINI, POST OFFICE SERI BUNGLOW, TEHSIL KARSOG, DISTRICT MANDI, H.P.

….PETITIONER.

(BY SHRI L.S.MEHTA, ADVOCATE)

And

MAUJI RAM SON OF SHRI SURAT RAM, RESIDENT OF VILLAGE BHURTHI, POST OFFICE SERI BUNGLOW, TEHSIL KARSOG, DISTRICT MANDI, H.P.

….RESPONDENT.

(BY MR. RAJESH KUMAR VERMA, ADVOCATE)

CRIMINAL APPEAL No.263 of 2020
Decided on: 31.08.2021

Negotiable Instruments Act, 1881- Sections 138 & 139- Dishonour of cheque- Presumption rebuttable- Acquittal- Version of complainant as to why cheque in issue was given to him by the accused is completely different from the case put forth in the complaint- Held- Accused duly rebutted the presumption by proving his case that it was not in lieu of some amount borrowed by him from the complainant- Complainant has discredited his own case- Appeal dismissed.

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

J U D G M E N T

By way of this appeal, filed under Section 378 of the Code of Criminal Procedure, the appellant has assailed the judgment passed by the Court of learned Judicial Magistrate, 1st Class, Karsog, District Mandi, H.P., in Criminal Complaint No.555 of 2017, titled as Shri Ram Lal Versus Shri Mauji Ram, decided on 02.03.2020, filed under Section 138 of the Negotiable Instruments Act, vide which the complaint so filed by the present appellant stood dismissed by the leaned Court below.

2. Brief facts necessary for the adjudication of the present appeal are that the appellant herein filed a complaint under Section 138 of the Negotiable Instruments Act against the accused, on the ground that the accused was known to him and had borrowed an amount of Rs.85,000/- from him in the month of October, 2016, in order to run his business of apples and other activities. In lieu thereof, he issued a cheque to him for an amount of Rs. 85,000/-,drawn upon State Bank of India, Karsog Branch, dated 21.03.2017. The cheque when presented before the bank, was dishonoured, vide memorandum dated 21.04.2017, on the ground of 'Insufficient Funds'. Thereafter, the complainant got issued a legal notice through counsel, dated 09.05.2017, to the accused, calling upon him to make good the amount of the cheque. As the same was not done, the complainant approached the Court and preferred the complaint under Section 138 of the Negotiable Instruments Act.

3. The complaint was resisted by the accused, who took the stand that he had given a blank cheque bearing his signatures, to the complainant as surety for one Shri Narayan Dass and the surety also was only for an amount of Rs.40,000/-. He further took the defence that though the cheque was bearing his signatures, yet neither the date nor the amount was in his handwriting. By way of the impugned judgment, the complaint stands dismissed and the accused stands acquitted.

4. Feeling aggrieved, the appellant has filed this appeal.

5. Learned counsel for the appellant has argued that the judgment passed by the learned Court below is not sustainable in the eyes of law as the learned Court erred in not appreciating that as it stood proved that the cheque in issue was bearing the signatures of the accused, nothing more remained to be proved by the complainant and this extremely important aspect of the matter has been ignored by the learned Court below while acquitting the accused. He has further submitted that the complainant had proved by leading cogent and satisfactory evidence to demonstrate that it was in lieu of an amount which the accused owed to him that the cheque in issue stood issued and this aspect of the matter has also been ignored by the learned Court below. On this count, he submitted that the appeal be allowed.

6. Supporting the judgment passed by the learned Court below, learned counsel for the respondent has submitted that there was neither any infirmity nor any perversity with the judgment passed by the learned Court below as the learned Court after correct appreciation of the pleadings of the parties as well as the evidence on record dismissed the complaint and acquitted the accused. He has argued that the complainant failed to demonstrate that the cheque indeed was issued in lieu of an amount which the accused owed to the complainant and in fact filing of the complaint was nothing but an abuse of the process of law. He further states that otherwise also it is settled law that the judgment of acquittal should not be interfere with in appeal until and unless the same suffers from *ex facie* perversity. According to him, as the findings returned by the learned Court below are duly borne out from the record of the case, therefore, the appeal deserves to be dismissed.

7. Having heard learned counsel for the parties and having gone through the judgment passed by the learned Trial Court as well as the record, this Court finds no perversity with the judgment of acquittal passed by the learned Court below in favour of the present respondent.

8. In order to prove his case, the petitioner entered the witness box himself and also examined an officer of the bank to prove that the cheque in issue was presented before the bank and dishonoured. On the other hand, to discredit the complainant, the accused examined Shri Narayan Dass as DW-1 and Shri Sewa Nand as DW-2 to prove that the cheque indeed was issued as surety for Narayan Dass.

9. Now, when one goes through the findings returned by the learned Trial Court, one finds that what weighed with the learned Trial Court while dismissing the complaint was that the stand taken in the complaint by the complainant was not in sync with what he deposed before the Court. Learned Court below held that in his cross-examination the complainant submitted that it was in lieu of a compromise that the cheque was issued as a negotiable instrument for an amount of Rs.85,000/- and this discredited the case put forth in the complaint by the complainant that the accused had borrowed an amount of Rs.85,000/- from him.

10. To find out, as to whether these findings were borne out from the record or were perverse findings, this Court has gone through the cross-examination of the complainant and other record too. It is mentioned in the complaint filed by the complainant under Section 138 of the Negotiable Instruments Act that the accused was known to him and he had borrowed an amount of Rs.85,000/- from the complainant in the month of October, 2016 'in order to run his business of apples and other activities'. Now, when one peruses the cross-examination of the complainant, one finds that he stated therein that he had lent an amount of Rs.5,00,000/- to three persons including the accused and in lieu of said debt, he had obtained affidavits of said three persons and thereafter, a compromise was entered into between him and the others and in lieu of this, a cheque of Rs.85,000/- was issued to him. Now, this statement which the complainant has made in his cross-examination, as to why the cheque in issue was given to him by the accused

is completely different from the case put forth by him in the complaint. This demonstrates that the complaint has not approached the Court with clean hands.

11. This Court is alive to the fact that as the signatures upon the cheque have been admitted by the accused, therefore, the presumption attached to Section 139 of the Negotiable Instruments Act does comes into play, but yet, this presumption is rebuttable. In this case, the accused has duly rebutted said presumption by proving his case that it was not in lieu of some amount borrowed by him from the complainant that the cheque was issued by him to the complainant. On the other hand, the complainant has discredited his own case in his cross-examination which creates a doubt over the story of the complainant and the genuineness of his claim.

12. In this view of the matter, as this Court does not finds any infirmity or perversity with the findings returned by the learned Court below, vide which the accused has been acquitted and the complaint has been dismissed, this appeal being devoid of any merit, is dismissed. Pending miscellaneous applications, if any, stand disposed of.

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

Between:-

1. RAVINDER KUMAR ALIAS JINDU,
SON OF KISHORI LAL,
R/O VILLAGE KUTHER,
P.O DHANOTU, POLICE STATION SHAHPUR, DISTRICT KANGRA, H.P.

2. KISHORI LAL
SON OF SHRI BHAGAT RAM,
R/O VILLAGE KUTHER, P.O DHANOTU, POLICE STATION SHAHPUR, DISTRICT KANGRA, H.P.

…….. PETITIONERS.

(BY SH. RAJESH MANDHOTRA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

…..RESPONDENT

(BY. SH. HEMANT VAID, ADDITIONAL
ADVOCATE GENERAL)

CRIMINAL REVISION NO. 133 of 2009
RESERVED ON: 5TH AUGUST, 2021
DECIDED ON: 13.08.2021

Indian Penal Code, 1850- Sections 452, 324 read with Section 34- Conviction- Medical evidence duly testified by the witness- Recovery of weapon of offence proved- Petition dismissed.

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

O R D E R

The petitioners (for short "the accused") became charged for the commission of offences constituted under Sections 452, 324 read with Section 34 of the Indian Penal Code, and, with respect to the afore drawn charge against the accused, the learned trial Court convicted and sentenced the accused to undergo simple imprisonment for a period of six months alongwith fine of Rs. 500/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month , for, charge drawn under Section 452 of I.P.C readwith Section 34 of IPC. The learned trial Court further sentenced the accused to undergo simple imprisonment for a period of three months alongwith fine of Rs. 500/-, and, in default of payment of fine, it sentenced the

accused to further undergo simple imprisonment for a period of 15 days , for, charge drawn under Section 324 of IPC readwith Section 34 of IPC.

2. Being aggrieved from the verdict of conviction, and, consequent therewith imposed sentences (supra), hence recorded by the learned trial Court, the accused preferred Criminal Appeal No. 6-D/2006, before the learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P. Upon the afore appeal, the learned Additional Sessions Judge made a verdict hence dismissing the appeal filed before it by the accused, and obviously hence maintained and affirmed the verdict drawn by the learned trial Court.

3. The brief facts of the case are that on 15.12.2004 at about 7.15 p.m. at village Kuther, the complainant Saroop Kumar was present in his shop when accused Ravinder Kumar came. The complainant asked him to give his money for the goods being supplied to the accused in the morning. Upon this, the accused Ravinder Kumar went to his house and returned back with his father. Accused Ravinder Kumar gave a darat blow to the complainant on his left hand. The complainant then raised alarm, on which Kishori Lal s/o Chunni Lal and Vinod Kumar son of Dev Raj came into the spot and rescued the complainant. Accused Ravinder Kumar gave a drat blow on the left side of Kishori Lal. It was also stated that the accused were also having a cycle chain with which they gave blow to Kishori Lal. Thereafter the complainant lodged an FIR with the police Station concerned. Both the complainant and Kishori Lal were medically examined. After completion of investigation, the relevant challan was prepared and presented before the Court.

3 (A). The FIR, as, lodged qua the ill-fated occurrence, is, embodied in Ex. PW-5/A. For proving the narrations carried therein, the prosecution ensured, the, stepping into the witness box, of, PW-1 (Kishori Lal), PW-2 (Vinod Kumar) and PW-4 (Saroop Singh). The afore PWs in their respective testifications carried in their respective examination(s)-in-chief, rendered a

vivid and graphic ocular account, vis-à-vis, the ill-fated occurrence, as, carried in the FIR (supra). The afore PWs, during their respective cross-examination(s), did not make any exculpatory echoings, vis-a,vis, the accused. Moreover, in their respective cross-examination(s) they did not make any gross improvements or embellishments upon their respectively recorded previous statements in writing. Consequently, when the depositions of the PWs (supra) are free from any taint or blemishes of any inter-se or intra-se contradictions, therefore, this Court becomes enjoined to mete the absolutest credence thereto.

4. Moreover, all the afore PWs, completely denied, the suggestion as became put to them, by the learned defence counsel, that the ill-fated occurrence did not take place at the relevant time. They also denied the suggestion, as became meted to them, that Darat borne in Ex. P-1, and, cycle Chain borne in Ex. P-2, recovered through memo Ex. PW-1/A, becoming never used by the accused in theirs inflicting injuries upon Saroop Kumar, and, upon Kishori Lal.

5. Be that as it may, the afore ocular account with respect to the genesis of the prosecution case, gathers support from the medical evidence, as, testified by PW-3 (Dr. Arun Gupta), who, upon, his stepping into the witness box, proved the apposite MLC(s) drawn with respect to Saroop Kumar and Kishori lal, MLC(s) whereof are respectively borne in Ex. PW-3/A, and, in Ex. PW-3/D. He also proved X-Ray form borne in Ex. PW-3/B, and, X-Ray Films borne in Ex. PW-3/C. He also testified that the injuries existing on the persons concerned, being causable through user, on the relevant injured portions of the examinees concerned, of, the incriminatory weapon(s) of offence.

6. Since, from a reading of the testification of PW-3, an obvious inference, ensues that the injuries borne on the person(s) of both Saroop Singh and Kishori Lal, are causable through user of weapon(s) of offence upon

their respective person(s). Therefore, the medical evidence testified by PW-3, does reiteratedly, and completely underscores the guilt of the accused, in, the charged offences.

7. The investigating Officer while stepping, into the witness box as PW-5 (SI/SHO Mohinder Singh), has proven his recovering the weapon(s) of offence, through memo Ex. PW-1/A. Though PW-5 was subjected to the ordeal of a rigorous cross-examination by the learned defence counsel, however, the learned defence counsel was unable to elicit from PW-5, any echoing that the handing over of the afore incriminatory weapon(s) of offence to him by the complainant, being concocted or invented. Therefore, the learned defence counsel has not been able to prove that the afore recoveries of the incriminatory weapon(s) of offence were either invented or concocted.

8. Significantly, since the medical evidence, and, the credible ocular account (supra), becomes rendered with completest firmness hence respectively by the medical specialist concerned, as well as, by the ocular witnesses to the occurrence. Therefore, even if the incriminatory weapon(s) of offence were handed over by the complainant, to the Investigating Officer, and, the latter thereafter through memo Ex. PW-1/A hence recovered them, would not bring any conclusion, that hence per-se, rather their proven user becoming completely eclipsed.

9. Though, the learned counsel for the petitioner has contended with much vigour, before this Court, that since the complainant has testified that the afore weapon(s) of offence belong to him, whereupon the factum of their user by the accused becomes eroded, and, also brings forth a further inference that the genesis of the prosecution case, that the accused had entered in the shop of the complainant, with theirs carrying, the, incriminatory items also becomes completely waned. However, the afore made submission, cannot be accepted by this Court, as the afore factum becomes generated, from the factum of after his, evidently snatching the incriminatory

weapon(s) of offence, from the hands of the accused, his keeping them in his custody, and, hence making an admission that they belong to him. The afore drawn inference by this Court is valid, as thereupon, the inter-se consonance(s) would occur, vis-à-vis, the afore drawn inference hence anchored, upon the afore alluded credible ocular account, as well, as, credible medical account, as, become with respect to the genesis of the prosecution case. Therefore, the afore made submission is rejected.

10. In sequel the present petition is dismissed, and, the impugned judgment is maintained and affirmed. Moreover, it is workable only, vis-à-vis, the accused/petitioner No.1 Ravinder Kumar, as, the petition instituted at the instance of accused/petitioner No.2 Kishori Lal is ordered to be abated through an order recorded by this Court on 19.9.2016. All pending applications stand disposed of accordingly.

BEFORE HON'BLEMR. JUSTICE VIVEK SINGH THAKUR,J.

Between

MANOHAR LAL
S/O LATE SHRI GOBIND RAM,
R/O VILLAGE DIGTHALI,
P.O. SUIN-SURHAR, P.S. BARMANA,
TEHSIL SADAR,
DISTRICT BILASPUR,
HIMACHAL PRADESH

.....PETITIONER

(BY SHRI RAJIV RAI & SHRI GURDEV NEGI, ADVOCATES)

AND

1. HET RAM
   S/O SHRI NATHU RAM
2. ROSHNI DEVI
   W/O SHRI HET RAM

3. RAVINDER
   S/O HET RAM
4. LATA DEVI
   W/O SHRI BABLI
5. NARESH @ BATHU
   S/O SHRI LEKH RAM
6. RAM LAL
   S/O SHRI GULABA RAM
7. KAMLESH KUMAR
   S/O SHRI HET RAM

   ALL RESIDENTS OF VILLAGE DIGTHALI, P.O. SUIN-SURHAR, P.S. BARMANA, TEHSIL SADAR, DISTRICT BILASPUR, H.P.

....RESPONDENTS

(BY SHRI INDERJEET SINGH NARWAL, ADVOCATE,
FOR R-1 & 3 TO 7; R-2 IS DEAD)

CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC NO.481 OF 2019
Decided on: 06.09.2021

Code of Criminal Procedure, 1973- Section 482- Inherent Jurisdiction- Complaint dismissed on the ground that testimony of the complainant is unreliable- Clear error regarding findings of disability which has resulted in grave injustice- No expert evidence with respect to possible vision- Complaint dismissed on wrong notion- Complaint restored.

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

O R D E R

Petitioner had filed a Private Criminal Complaint against the respondents, which has been dismissed by learned Judicial Magistrate First Class, Bilaspur vide impugned order dated 4.12.2017, on the ground that testimony of the complainant is unreliable for the reason that on one hand he has claimed that he is 100% visually impaired and has placed on record medical certificate to substantiate the said fact, and on the other hand in his

deposition he has given description of the accused persons as well as their activities during the alleged commission of offence alongwith weapons, i.e. Darat and Sticks, carried by them in their hands with further averment that after seeing the Darat and Sticks in the hands of the accused party, he had run towards his room. Learned Magistrate has observed that complainant, being 100% visually impaired incapable to see, has narrated a false story before the Court.

2. Respondents have filed reply, wherein relying upon document Ext. CW-1/A, which specifies blindness of the petitioner, impugned order passed by the Magistrate has been supported.

3. Learned counsel for the petitioner, being confronted with aforesaid reasoning, has placed on record another document i.e. Disability Certificate of the petitioner wherein extent of disability has been tabulated as per Guidelines and his disability has been shown in the table against the low vision and it has been declared to be permanent and 100%.

4. A booklet of Disability (Permanent Physical Impairment) regarding its Assessment and Certification, published and printed by National Institute for the Orthopaedically Handicapped, B.T. Road, Bon-Hooghly, Kolkata, providing Guidelines and explanation by its Director, based on Guidelines and Gazette notification issued by Ministry of Social Justice & Empowerment, Government of India, contains a Chapter 'Visual Disability' wherein it is observed that visually disabled persons can be categorized into two groups:-

> ***"Blindness: Persons who does not have light perception or persons who have light perception but cannot count fingers at a distance of 1 meter even with spectacles (best possible correction).***

Low vision: persons who have light perception and cannot count fingers up to a distance of 3 meters even with spectacles."

In it in points to be remembered in visual disability assessment, it has been observed that ***Vision has been taken as 100% and percentage of disability in such cases should be calculated from that and nothing thinking human body as 100% and considering vision as part of that.***

In the Guidelines for assessment of visual disability, definition of blindness and low vision has been given as under:-

1. **Blindness** refers to a condition where a person suffers from any of the condition, namely.

i) Total absence of sight; or

ii) Visual acuity not exceeding 6/60 or 20/200 (Snellen) in the better eye with best correcting lenses; or

iii) **Limitation of field of vision** subtending an angle of 20 degree or worse;

2. **Low Vision:** -Persons with low vision means a person a with impairment of vision of less than 6/18 to 6/60 with best correction in the better eye or impairment of field in any one of the following categories:-

a) Reduction of fields less than 50 degrees

B) Hemianopia with macular involvement

c) Altitudinal defeat involving lower fields.

In the aforesaid guidelines categories of visual disability have also been clarified as under:-

Category	Better eye	Worse eye	% age impairment
Category 0	6/9-6/18	6/24-6/36	20%
Category I	6/18-6/36	6/60-Nil	40%
Category II	6/60-4/60 or Field of vision 10-20	3/60-Nil	75%
Category III	3/60-1/60 or Field of vision 10o	F.C. at 1ft-Nil	100%
Category IV	F.C at 1ft-Nil Or field of vision 10o	F.C at 1ft-Nil	100%
One eyed persons 6/6	F.C. at 1 ft.-Nil or Field of vision 10		30%

(Note: F.C. means finger count.)"

5. From the aforesaid Guidelines it can be easily understood that 100% permanent visual disability does not mean that a person is not capable to see anything at all. In present case, the petitioner has been declared to be suffering from 100% visual disability on the basis of low vision.

6. In the aforesaid guidelines a person who does not have light perception or person who has light perception but cannot count fingers at a distance of 1 meter even with spectacles has been considered to be suffering from blindness whereas a person who has light perception and cannot count fingers up to a distance of 3 meters even with spectacles has been considered to be suffering from low vision. Therefore, a person of low vision is capable to see at least upto 3 meters.

7. In the present case disability certificate issued to the petitioner is on the basis of low vision, therefore, it cannot be said with certainty that he could not have seen the respondents as alleged in the complaint.

8. Effect and meaning of document Ext.CW1/A is to be assessed in view of Guidelines for assessment of disability, definition of 'blindness' and

'low vision', referred supra. In the light of above referred Guidelines, I am of the considered opinion that the rejection of complaint by learned Magistrate is based on wrong notion as 100% disability shown in certificate Ext.CW1/A does not mean that petitioner was not able to see anything at all. It is a clear error which has resulted in grave injustice. Learned Magistrate, in absence of expert evidence or any other evidence with respect to possible vision and quantum of capability of the complainant to see, should not have dismissed the complaint based on wrong notion. Therefore, impugned order is set aside and complaint filed by petitioner before the trial Court is revived to its original position and parties are directed to appear before learned trial Court i.e. JMFC, Bilaspur on ***27th September, 2021.***

9. It is made clear that petition has been allowed only on the issue involved in impugned order, but based on material before me, and no opinion with respect to merit of complaint or defence of respondents has been expressed by this Court which are to be considered and decided by trial Court at the appropriate stage by taking into consideration the material placed before him, in accordance with law.

Petition stands disposed of, including all pending miscellaneous application(s), if any.

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

Between:-

AMAN PREET KAUR, AGED 22 YEARS,
W/O SH. SIMRANJEET SINGH,
RESIDENT OF WARD NO. 12,
BEHLEEN PHATTI, BANWARI GARH,
DISTRICT SANGROOR, PUNJAB,
PRESENTLY IN JUDICIAL LOCK UP
SUB-JAIL MANDI, DISTRICT MANDI,
HIMACHAL PRADESH.

……PETITIONER

(BY SH. G.R. PALSRA, ADVOCATE)

AND

NARCOTIC CONTROL BUREAU,
SUB SONE MANDI, DISTICT MANDI,
HIMACHAL PRADESH. .....RESPONDENT

(BY SH. ASHWANI, PATHAK,
SENIOR ADVOCATE, WITH
SH. SANDEEP SAHRMA, ADVOCATE)

CRIMINAL MISC. PETITION (MAIN) No. 1614 OF 2021
RESERVED ON : 24.09.2021
DECIDED ON : 28.09.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substance Act, 1985**- Sections 8, 20 and 29- 1.306 Kg. charas was recovered –Commercial quantity- Rigors of Section 37 of NDPS Act attracted- Bail petition dismissed.

Cases referred:

Boota Singh vs. State of Haryana, (2021) SCC Online SC 324;
Karnail Singh vs. State of Haryana, (2009) 8 SCC 539;

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

ORDER

Petitioner is accused in case registered vide NCB Crime No. 41/2021 dated 13.06.2021 under Sections 8, 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') by the Narcotic Control Bureau (for short NCB), Sub Zone, Mandi District Mandi H.P.

2. Petitioner has approached this Court for grant of bail in the above noted case under Section 439 of Cr.P.C. on the grounds that the

petitioner is innocent and has been implicated falsely in the case. As per petitioner, nothing has been recovered from her or at her instance. No further recovery is required to be effected from her and further custodial interrogation is not required. It has been alleged that investigation of the case is complete. Petitioner is ready and willing to abide by all conditions as may be imposed. Petitioner has undertaken not to threaten, allure and induce prosecution witnesses. Petitioner alleges to be permanent resident of Ward No. 12, Behleen Phatti, Banwari Garh, District Sangroor, Punjab and is stated to be engaged in a private job.

3. On notice, respondent has placed on record status report. As per respondent, Intelligence Officer of NCB at Chandigarh, received a secret information that one person namely Simranjeet Singh, S/o Sh. Nirmal Singh has purchased Charas in District Kullu and will be transporting the same to Chandigarh on 13.06.2021. On such secret information, a team was constituted by the Zonal Director, NCB, Chandigarh. The team of NCB laid a Naka at Pulghrat on 13.06.2021. Municipal Councillor of the area Sh. Yog Raj along with LHHC No.235 Smt. Champa were associated as independent witnesses. At about 5.40 P.M., a Motorcycle bearing No. PB-13AD-2700 was intercepted. Simranjeet Singh was the rider and the petitioner was on the pillion.

4. After necessary formalities, a search was conducted. 526 grams of Charas was recovered from a bag being carried by petitioner on her back and 780 grams of Charas was found in another bag tied to the Motorcycle. Thus, total 1.306 Kgs. of Charas was recovered. Respondent has further submitted that the investigation is still continuing.

5. The bail of the petitioner has been opposed on the grounds that she is not entitled to bail having committed heinous offence. It has been submitted that petitioner is disentitled from getting the bail on account of the application of rigors of Section 37 of the NDPS Act.

6. I have heard Mr. G.R. Palsra, learned counsel for the petitioner and Mr. Ashwani Pathak, Senior Advocate assisted by Mr. Sandeep Sharma, Advocate, for the respondent.

7. It has been pointed out during the hearing of the case that petitioner is the wife of Simranjeet Singh, the rider of the Motorcycle. The secret information with NCB was with respect to purchase of Charas by Simranjeet Singh, a substantial part of which has been found from the bag being carried by the petitioner on her back and rest of the contraband has been found in a bag tied to the motorcycle. The available facts prima-facie suggest that petitioner had requisite intent and knowledge about contraband of commercial quantity being carried jointly by her and her husband Simranjeet Singh. The petitioner and her husband were in joint possession of commercial quantity of Charas, therefore, the rigors of Section 37 of the NDPS Act, will apply.

8. Thus, the implication of petitioner prima facie cannot be said to be without justification. That being so, this Court is unable to return findings that there are reasonable grounds to believe that petitioner is not guilty of charged offence. In addition, the possibility of petitioner indulging in similar offence during bail can also not be ruled out. Therefore, Section 37 of the NDPS Act comes into play and petitioner's right, if any, to be released on bail gets clogged.

9. The ingredients of Section 37 of the NDPS Act are to be read conjunctively and absence of any single condition thereof disentitles a person from relief of bail.

10. An argument has further been raised by learned counsel for the petitioner that there is no compliance of Section 42 of the NDPS Act, hence, the petitioner is entitled to bail. The argument so raised deserves to be rejected for the reasons that the compliance of Section 42 of the NDPS Act is a question of fact and is to be determined during trial of the case. The

respondent has denied the allegation of petitioner as to non-compliance of Section 42 of the NDPS Act. Reference can be made to a recent judgment dated 22.9.2021 passed by the Hon'ble Supreme Court in ***Union of India through Narcotics Control Bureau, Lucknow*** vs. ***Md. Nawaz Khan,*** Criminal Appeal No. 1043 of 2021 (Arising out of SLP (Crl) No. 1771 of 2021), wherein it has been held as under:

> *"**27**. Another submission that has been raised by the counsel for the respondent both before the High Court and this Court is that due to non-compliance of the procedural requirement under Section 42 of the NDPS Act, the respondent should be granted bail. Section 42 provides that on the receipt of information of the commission of an offence under the statute, the officer will have to write down the information and send it to a superior officer with 72 hours. It has been submitted by the respondent that though the information was received by the Zonal Director, the information was put down in writing by an officer who was a part of the team constituted on the receipt of the information. The written information was then sent to the Zonal Director. The Hon'ble Supreme Court in **Karnail Singh vs. State of Haryana, (2009) 8 SCC 539**, held that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay.*
>
> ***28.** Further, it was held that the issue of whether there was compliance of the procedure laid down under Section 42 of the NDPS Act is a question of fact. The decision in Karnail Singh (supra) was recently followed by the Hon'ble Supreme Court in **Boota Singh** vs. **State of Haryana, (2021) SCC Online SC 324**."*

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

12. Any opinion expressed hereinabove shall be construed only for the purposes of disposal of this application and shall have no effect on the merits of the case.

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

Between:

RAM KRISHAN SON OF LATE SHRI SHER SINGH, RESIDENT OF VILLAGE BIRTO, POST OFFICE GHUKARI, TEHSIL & DISTRICT KANGRA, H.P.

….PETITIONER.

(BY. SHRI N.S. CHANDEL, SENIOR ADVOCATE, WITH MR. VINOD GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL
PRADESH.

….RESPONDENT/STATE.

(BY. MR. ADARSH SHARMA, MR. SUMESH RAJ, MR.SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR.J.S. GULERIA, DEPUTY ADVOCATE GENERAL.)
MR. BINNY MINHAS, I/O DYSP/SDPO BANJAR, DISTRICT KULLU, H.P., PRESENT IN PERSON.

CRIMINAL MISC. PETITION (MAIN) NO.398 OF 2021
Decided on: 17.08.2021

Code of Criminal Procedure, 1973- Section 438- Anticipatory Bail- Indian Penal Code, 1860- Sections 420, 467, 468 and 120-B- Accused joined the investigation as and when directed by the Investigating Officer- No ground made out for custodial interrogation- Bail petition allowed subject to conditions.

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

J U D G M E N T

Petitioner in this case has approached the Court for the purpose of grant of anticipatory bail, in FIR No.102 of 2018, dated 28.09.2018, under Sections 420, 467, 468 and 120-B of the Indian Penal Code, registered at Police Station Banjar (Seraj), District Kullu, H.P. He was granted anticipatory bail, vide order dated 02.03.2021, passed by this Court.

2. Learned counsel for the petitioner submits that petitioner has post grant of anticipatory bail duly joined the investigation.

3. Learned Additional Advocate General submits that in the course of investigation, the petitioner is not cooperating. On a pointed query put to the learned Additional Advocate General by the Court, the Court was informed that the petitioner has been called twice or thrice since the date of grant of interim bail, for investigation.

4. It is not in dispute that after grant of the bail to the petitioner, he has participated in the course of investigation as and when directed by the Investigating Officer.

5. Having heard learned counsel for the parties at length, this Court is of the considered view that the word 'cooperation' is being wrongly interpreted by the police, as if an accused is supposed to confess his guilt during the course of investigation. That is not what is the intent of the word 'cooperation'. The word 'cooperation' means that on the asking of the Investigating Officer, the accused has to present himself before the Investigating Officer and participate in the investigation, but in the course of the same it is not as if he has to implicate himself so as to prove the case of the prosecution. Besides this, the State has not been able to point out specifically as to why the custodial investigation of the petitioner is necessary, especially as he has been participating in the investigation as an when directed by the Investigation Officer.

6. Taking into consideration these facts, this petition is allowed and order dated 22.03.2021, passed in FIR No.102 of 2018, dated 28.09.2018, under Sections 420, 467, 468 and 120-B of the Indian Penal Code, registered at Police Station Banjar (Seraj), District Kullu, H.P., is made absolute, subject to the following conditions:-

> *i) Petitioner shall furnish personal bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of learned Trial Court, within a period of two weeks from today.*
>
> *ii) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;*
>
> *iii) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.*
>
> *iv) 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*
>
> *v) He shall not leave the territory of India without prior permission of the Court.*

7. 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 this petition during the trial of the case. It is further clarified that in case the petitioner does not complies 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 the bail. The petition stands disposed of in the above terms.

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

Between:

RAKESH KUMAR,
S/O SH. PRAKASH CHAND,
R/O VILL. NAMBLAKH,
P.O. AMROH,
TEHSIL BHORANJ,
DISTRICT HAMIRPUR, H.P.

....PETITIONER

(BY MR. NEEL KAMAL SHARMA,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY
(TECHNICAL EDUCATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH.

2. DIRECTOR,
TECHNICAL EDUCAITON,
VOCATIONAL AND
INUDUSTRIAL TRAINING,
H.P. SUNDERNAGAR,
DISTRICT MANDI,
HIMACHAL PRADESH

....RESPONDENTS

(BY MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATE GENERAL
WITH MR. KAMAL KISHORE AND
MR. NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL.)

CIVIL WRIT PETITION No. 2726 of 2021
Decided on: 06.09.2021

Constitution of India, 1950 – Article 226 - Appointment for the post of Trainer, Information and Communication Technology System and Maintenance- Petitioner not offered appointment on account of model code of conduct and the panel exhausted after expiry of one year- Mere verification of documents would not confer right in favour of the petitioner to be selected- Once the appointments are made against the advertised posts, the select lists gets exhausted and those who are below the last in waiting list cannot claim appointment against the posts which subsequently became available, especially on account of resignation tendered by the selected candidate- Petition dismissed.

Cases referred:
Raj Rishi Mehra and Ors v. State of Punjab and Anr, 2013 (12) SC 243;

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

O R D E R

After having done diploma in Electronics and Communication Engineering from Himachal Pradesh Takniki Shiksha Board, petitioner herein made an application for the post of Trainer Information Communication Technology System and Maintenance, pursuant to advertisement issued by the respondent-department in August, 2019. On 16.10.2019, petitioner was declared successful in the screening test held at Kangra and thereafter, he was asked to appear for evaluation and document verification at Sundernagar. On 28.11.2019, petitioner presented himself at sunderngar for evaluation and

document verification and he was awarded 6.35 marks out of 15 marks. On 6.11.2020, respondent issued letter to the petitioner asking him to attend office for verification of educational qualification and other testimonial/certificates. Though, pursuant to aforesaid call given by respondent No.2, petitioner attended the office of respondent No.2 on 11.11.2020, but despite verification of her documents, he was not offered appointment against the post in question. On 12.3.2021, petitioner was informed under the RTI that petitioner could not be offered appointment on account of modal code of conduct imposed in light of elections of various Panchayati Raj of Institutions in HP and panel has exhausted on 3.1.2021 after expiry of one year. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for following main relief:

> *"(i) That the respondents may kindly be directed to offer appointment to the present petitioner for the post of trainer information and communication technology system maintenance under the post code 128 immediately."*

2. Reply to the petition stands filed, wherein factum with regard to the participation of the petitioner in the selection process initiated pursuant to the advertisement issued in August, 2019, has been duly admitted. Respondents No. 1 and 2 have stated in their reply that final result of the selection process under reference was declared vide office order dated 3.1.2020, whereby Trainers in different trades were engaged under students Welfare Fund. Persons namely Sh. Anil Jagota, Sh. Himanshu Sharma and Ms. Richa Guleria were shown at Sr. Nos. 1 to 3, respectively, in the merit list drawn in trade of Information, Communication, Technology System and Maintenance, qua which trade, petitioner had also applied. Since Sh. Anil

Jagota, who was at serial No.1 in the merit list did not join the service, person figuring at Sr. No.1 of the waiting list was offered appointment against the post in question, however, other selected candidates namely Himanshu Sharma and Richa Guleria, after having joined the post in question resigned on 27.7.2020 and 9.7.2020, respectively, as is evident from Annexure R-2 annexed with the reply filed by the respondents. On account of aforesaid development, the respondent department called three persons from the waiting list for joining against the aforesaid three posts. Person figuring at Sr. No.1 of the waiting list did not respond to the call given by the respondent-department and as such, person next to him in the waiting list came to be appointed against the post of Mr. Anil Jagota, who after having selected had not joined.

3. Precisely, case of the petitioner, who is at Sr. No.3 of the waiting list is that since other two posts had fallen vacant on account of resignations tendered by Sh. Himanshu Sharma and Ms. Richa Guleria, department ought to have offered him appoint against one of the post. However, aforesaid prayer made on behalf of the petitioner cannot be accepted for the reason that two posts fell vacant on account of resignation tendered by Sh. Himanshu Sharma and Ms. Richa Guleria and as such, person figuring in the waiting list could not have been offered appointment against such post, rather to fill up such posts, department is /was under obligation to start fresh selection process. Since person namely Anil Jagota, who was at Serial No. 1 in the merit list, did not join, department rightly offered his post to a person figuring at Sr. No.1 in the waiting list.

4. It is well settled by now that in case selected candidate after his/her selection joins the post in question and thereafter, resigns, respondent department concerned would not fill up such posts amongst the candidates figuring in the waiting list, rather in that eventuality, department is required to initiate fresh selection process. No doubt, in the case at hand, department,

after resignation of two selected candidates called the petitioner for verification of documents, but mere verification of documents, if any, by the department would not confer any right in favour of the petitioner to be selected against the post, which otherwise is required to be filled up by initiating fresh selection process.

5. The Hon'ble Apex Court in case titled ***Raj Rishi Mehra and Ors v. State of Punjab and Anr, 2013 (12) SC 243*****,** has held as under:

> *"15. The question whether the candidates whose names are included in the waiting list are entitled to be appointed against the unfilled posts as of right is no longer res integra and must be answered in negative in view of the judgments of this Court in Union of India v. Ishwar Singh Khatri 1992 Supp (3) SCC 84, Gujarat State Dy. Executive Engineers' Association v. State of Gujarat and others 1994 Supp (2) SCC 591, State of Bihar v. Secretariat Assistant Successful Examinees Union 1986 and others (1994) 1 SCC 126, Prem Singh and others v. Haryana SEB and others 1996) 4 SCC 319, Ashok Kumar and others v. Chairman, Banking Service Recruitment Board and others (1996) 1 SCC 283, Surinder Singh and others v. State of Punjab and another (1997) 8 SCC 488, Madan Lal and others v. State of J&K and others (1995) 3 SCC 486, Kamlesh Kumar Sharma v. Yogesh Kumar Gupta and others (1998) 3 SCC 45, State of J&K and others v. Sanjeev Kumar and others (2005) 4 SCC 148, State of U.P. and others v. Rajkumar Sharma and others (2006) 3 SCC 330, Ram Avtar Patwari and others v. State of Haryana and others 2007) 10 SCC 94 and Rakhi Ray and others v. High Court of Delhi and others (2010) 2 SCC 637.*
>
> *16. In Surinder Singh's case, this Court observed as under:*
>
> > *"A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the*

vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service

17. In Rakhi Ray's case, this Court referred to a number of judicial precedents and held:

"It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated from and such a deviation is permissible only after adopting policy decision based on some rationale",

> *otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law."*

6. In the aforesaid judgment, Hon'ble Apex Court has categorically laid down that a waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment, rather it is operative only for the contingency that if any of the selected candidates does not join then a person from the waiting list may be pushed up and be appointed in the vacancy so caused. Once the appointments are made against the advertised posts, the select list gets exhausted and those who are placed below the last appointee cannot claim appointment against the posts, which subsequently become available, especially on account of resignation tendered by the selected candidate.

7. While inviting attention of this Court to Annexure P-3 i.e. information received by the petitioner under RTI, Mr. Neel Kamal Sharma, learned counsel appearing for the petitioner, contends that since Ms. Richa Guleria, was absent on the date when documents were being verified, it is not understood that how, subsequently, she was shown to be a selected candidate. No doubt, perusal of aforesaid document (Annexure P-3-T) reveals that person namely Ms. Richa Guleria was absent on the date when documents furnished by the candidates were scrutinized/verified, but record made available to this Court by the respondents further reveals that there were many candidates, who could not come present for verification of their documents on the date fixed by the department, but subsequently, on their being submitted representations, they were afforded an opportunity to get their documents verified/scrutinized. Similarly, in the cases of Richa Guleria, who was one of the selected candidates, opportunity was afforded by the department to her for getting her documents verified and department having

found her more meritorious offered her appointment. Since Richa Guleria, has already resigned and is no more in the service coupled with the fact that waiting list drawn at the time of the selection has been exhausted after an expiry of one year, otherwise, there appears to be no reason for this court to go into this question at this stage.

8. Consequently, in view of the aforesaid discussion as well as law taken note herein above, this Court sees no merit in the present petition and accordingly same is dismissed. All pending applications stand disposed of.

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

Between

MADAN LAL
S/O SHRI BUGGA RAM,
R/O VILLAGE HARAMEHTA,
POST OFFICE DHAKROYAR,
TEHSIL KASAULI,
DISTRICT SOLAN,
HIMACHAL PRADESH.

.....PETITIONER

(BY SHRI DALIP K. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS SECRETARY FOREST
GOVERNMENT OF HIMACHAL PRADESH.

2. PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

3. AMAR CHAND,
PARENTAGE NOT KNOWN,
SENIORITY NO.616,

PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

4. PREM KUMAR
PARENTAGE NOT KNOWN,
SENIORITY NO.617,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

5. BASTI RAM
PARENTAGE NOT KNOWN,
SENIORITY NO.618,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

6. DESH RAJ
PARENTAGE NOT KNOWN,
SENIORITY NO.620,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

7. RANDHIR SINGH
PARENTAGE NOT KNOWN,
SENIORITY NO.624,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

8. TARBEZ SINGH

PARENTAGE NOT KNOWN,
SENIORITY NO.629,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

9. PAWAN KUMAR
PARENTAGE NOT KNOWN,
SENIORITY NO.630,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

10. BHUPINDER SINGH
PARENTAGE NOT KNOWN,
SENIORITY NO.634,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

11. MANI KARAN
PARENTAGE NOT KNOWN,
SENIORITY NO.643,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

12. RAGHUBIR SINGH
PARENTAGE NOT KNOWN,
SENIORITY NO.644,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

13. BALBIR SINGH
PARENTAGE NOT KNOWN,
SENIORITY NO.646,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

14. MANOHAR LAL
PARENTAGE NOT KNOWN,
SENIORITY NO.651,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

15. CHANDERSHEKHER
PARENTAGE NOT KNOWN,
SENIORITY NO.654,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

16. GIAN CHAND
PARENTAGE NOT KNOWN,
SENIORITY NO.658,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

17. SHANTI SWAROOP
PARENTAGE NOT KNOWN,
SENIORITY NO.660,
PRESENTLY POSTED AS RANGE FOREST OFFICER,

THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

18. DUNI CHAND
PARENTAGE NOT KNOWN,
SENIORITY NO.661,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

19. SHUBH KARAN
PARENTAGE NOT KNOWN,
SENIORITY NO.672,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

20. SANTOSH KUMAR
PARENTAGE NOT KNOWN,
SENIORITY NO.676,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

21. GIRDHARI LAL
PARENTAGE NOT KNOWN,
SENIORITY NO.677,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

22. DHARAM SINGH
PARENTAGE NOT KNOWN,
SENIORITY NO.719,
PRESENTLY POSTED AS RANGE FOREST OFFICER,
THROUGH PRINCIPAL CHIEF CONSERVATOR OF FOREST,
TALLAND, SHIMLA,
HIMACHAL PRADESH.

.....RESPONDENTS

(BY SHRI YUDHVIR SINGH, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION NO.182 OF 2021
Decided on: 03.09.2021

Constitution of India, 1950 – Article 226 - Promotion to the post of Forest Range Officer- Petitioner not promoted due to pendency of criminal case against him - Held - Adhoc promotion of the petitioner, if found entitled in consonance with instructions and procedure referred in the Hand Book on Personnel Matters Volume-I- Petition disposed of.

Cases referred:
Harsh Kumar Sharma, IFS v. State of Punjab & another, (2017) 4 SCC 366;
Union of India & others v. K.V. Jankiraman & others, (1991) 4 SCC 109;

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

O R D E R

Petitioner is serving as Deputy Ranger in the Himachal Pradesh Forest Department. In response to the process initiated for promotion to the post of Forest Range Officer, on 1.2.2020, petitioner made a request for considering his name for such promotion, but he was not promoted, despite making further request on 9.10.2020, due to pendency of criminal case against him, in pursuant to FIR No.11 of 2018, dated 11.2.2018, in Police Station Kasauli, District Solan, wherein he was arrested and remained in

police custody with effect from 12.2.2018 to 15.2.2018 and thereafter he was detained in judicial custody till 3.3.2018. After his release, he joined the duty on 5.3.2018, and he was actually reinstated by the competent authority vide order dated 29.3.2018. Chargesheet against the petitioner has been filed in the Court of Additional Chief Judicial Magistrate, Kasauli on 28.6.2018 and supplementary chargesheet was filed on 24.9.2018, which is pending adjudication and charges have not been framed against the petitioner till date.

2. Meeting of Departmental Promotion Committee (DPC) was held on 14.12.2020 and for pendency of the criminal proceedings, the DPC has adopted Sealed Cover Procedure with respect to the petitioner.

3. Present petition has been filed, seeking direction to the respondents-State to promote the petitioner with effect from 24.12.2020, the date on which respondents No.3 to 22, who are his juniors, have been promoted.

4. Learned counsel for the petitioner has submitted that in present case only chargesheet has been presented in Court and charges have not been framed and in view of this status of criminal case, there was no occasion for the DPC to adopt Sealed Cover Procedure, with respect to petitioner. He has placed reliance on pronouncement of Supreme Court of India in ***Union of India & others v. K.V. Jankiraman & others,*** **(1991) 4 SCC 109** and pronouncements of this High Court in **CWP(T) No.1850 of 2008,** titled as ***Surinder Singh v. State of H.P. and another,*** decided on 4.5.2010; and **CWP No.1529 of 2019,** titled as ***Manoj Thakur v. State of Himachal Pradesh & others,*** decided on 26.12.2019. Whereas, adoption of Sealed Cover Procedure by the DPC for considering the candidature of the petitioner has been justified by learned Deputy Advocate General by putting reliance on pronouncements of Supreme Court of India in ***K.V. Jankiraman's*** case; ***Delhi Development Authority,*** **(1993) 3 SCC 196;** and ***Harsh Kumar Sharma, IFS v. State of Punjab & another,*** **(2017) 4 SCC 366;** and that of

Delhi High Court in ***Union of Inida v. V. Appalla Raju***, **2017 SCC OnLine Del 6914 (WP (Civil) No.8758 of 2014,** decided on 30.1.2017**);** and ***Sidharth Rath v. Central Warehousing Corporation*, 2017 SCC OnLine Del 7829 (W.P.(C) No.3025/2017,** decided on 10.4.2017**),** with contention that ratio of ***K.V. Jankiraman's*** case stands clarified and explained in ***Harsh Kumar Sharma's*** case.

5. Procedure for consideration of cases where disciplinary/Court proceedings, etc., are pending, has been detailed in Hand Book on Personnel Matters, Vol-I (Second Edition), in Chapter 16 at Para 16.32, wherein it is mentioned that in supersession of all earlier instructions, the Government of India has issued revised instructions in this behalf on 14.2.1992, which have been adopted on 3.12.1992 for application to employees/Officers of Himachal Pradesh. These instructions have been reproduced in the Hand Book on Personnel Matters. These instructions also provide procedure for six monthly review of sealed cover cases and procedure for adhoc promotion.

6. Learned counsel for the petitioner submits that, in present case, Sealed Cover Procedure was adopted in the DPC on 14.12.2020 and six months have elapsed on 14.6.2020, but till date no six monthly review has been undertaken by the Department nor procedure for adhoc promotion has been undertaken, with respect to the petitioner, despite the fact that promotion of the petitioner would not be against public interest and the case registered against the petitioner is not related to his act, conduct or work related to his departmental duties, and that he is going to retire on 30.9.2021, without promotion for which he is otherwise entitled.

7. Learned counsel for the petitioner has submitted that the petitioner is going to retire on 30.9.2021 and, therefore, he is confining his claim only to the extent that review DPC with respect to petitioner be held at the earliest and candidature of the petitioner be considered for regular

promotion or at least for adhoc promotion as the petitioner, except for criminal proceedings pending in the Court, is eligible for promotion.

8. Without going into the merit, with respect to adoption of Sealed Cover Procedure, leaving the said issue open, but keeping in view the submissions of the learned counsel for the petitioner, limiting his prayer only for direction to hold six monthly review and to consider the case of the petitioner for regular/adhoc promotion, present petition is disposed of with direction to the respondents-State to hold six monthly review on or before 15.9.2021 and consider the case of petitioner for promotion/adhoc promotion in consonance with the instructions (OM), dated 14.9.1992, and procedure referred in Hand Book on Personnel Matters Vol-I, referred supra, and in case the petitioner is found entitled for promotion/adhoc promotion, the benefit thereof to the petitioner shall be extended before his retirement, preferably on or before 21.9.2021, and the decision taken for or against the petitioner shall be intimated to him immediately.

9. Petition stands disposed of, so also pending application, if any.

The parties are at liberty to use downloaded copy of this order from the web-page of the High Court of Himachal Pradesh and the authorities concerned shall not insist for certified copy, however, they may verify the same from the Web-site of the High Court.

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

Between:-

1. SMT. SUMAN DEVI,
W/O SHRI HIRDAY RAM,
R/O VILLAGE RANAGHAT,
P.O. SHARGAON, TEHSIL RAJGARH,
DISTRICT SIRMOUR, HP.

2. HIRDAY RAM, S/O SHRI LOTHA RAM,
R/O VILLAGE RANAGHAT,

P.O. SHARGAON, TEHSIL RAJGARH,
DISTRICT SIRMOUR, HP.

....PETITIONERS

(BY SH. M.L. SHARMA, ADVOCATE)

AND

1. UNION OF INDIA,
THROUGH THE SECRETARY (HOME),
TO THE GOVERNMENT OF INDIA,
JAISALMER HOUSE, MAN SINGH ROAD,
NEW DELHI.

2. DIRECTOR (ACCOUNTS),
CRPF, HOME AFFAIRS,
MAHAVIR NAGAR, TILAK NAGR,
NEW DELHI-110018.

3. THE DIGP, GROUP CENTRE,
CENTRAL RESERVE POLICE FORCE
(CRPF), PINJORE, HARYANA.

4. SMT. ARUNA WD/O LATE VINOD KUMAR,
NOW W/O SHRI MUKESH KUMAR,
S/O SHRI KESHAV RAM,
R/O NEHARTI, PO SANAURA,
TEHSIL RAJGARH, DISTRICT SIRMOUR,
H.P.

5. MANAGER, STATE BANK OF INDIA,
RAJGARH BRANCH, RAJGARH,
DISTRICT SIRMOUR, HP.

6. BABY BHUMIKA MINOR DAUGHTER,
OF LATE VINOD KUMAR AGED ABOUT 1-1/2,

YEARS THROUGH HER MOTHER AND NATURAL GUARDIAN, SMT. ARUNA WD/O LATE VINOD KUMAR,
NOW W/O SHRI MUKESH KUMAR,
S/O SHRI KESHAV RAM,
R/O NEHARTI, PO SANAURA,
TEHSIL RAJGARH, DISTRICT SIRMOUR,
H.P.

....RESPONDENTS

(BY SH. V. B. VERMA, CGC, FOR R-1 TO 3
MS. RANJANA PARMAR, SR. ADVOCATE WITH SH. KARAN SINGH PARMAR, ADVOCATE, FOR R-4 AND 6.
SH. ASHWANI SHARMA, SR. ADVOCATE WITH SH. MANYANK SHARMA, ADVOCATE, FOR R-5).

CIVIL WRIT PETITION No. 2978 of 2013
Reserved on: 27.8.2021
Date of decision: 10.9.2021

Constitution of India, 1950 - Article 226 - Family Pension- Petitioners being parents of the deceased claimed family pension- Held, parents are also entitled for post retiral benefits inclusive of pension- Petition disposed of.

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

J U D G M E N T

The predecessor-in-interest of the petitioners, and, of co-respondent No.6, the latter whereof, had become sued through her mother and natural guardian, one Smt. Aruna, and, who has become arrayed, as co-respondent No.4, in the instant writ petition, rather rear a claim for the meteings, of a mandamus, upon, respondents No. 1 to 3, to, sanction family pension to them. Moreover, apart from the afore, the other reliefs, espoused in the writ petition are extracted hereinafter:-

"To recover 2/3rd amount out of the amount of service benefits paid to respondent No.4 and pay 1/3rd amount to the 1st petitioner after adjustment of the ex-gratia amount of her share as mentioned in para-8 of the petition and deposit the remaining 1/3rd amount in fixed deposit in the name of proforma respondent to be paid to her on her attaining the age of majority.

3. To direct respondents 1 to 3 to pay amount of medical reimbursement of Rs. 5,41,292/- to the petitioners and recover the same from respondent No.4 which has been wrongly and erroneously paid to her.

4. Respondent No.4 may be directed to pay interest @ 9% per annum on the aforesaid share of the 1st petitioner and the proforma respondent from the due date till payment thereof."

2. The predecessor-in-interest of the petitioner(s), one Vinod Kumar, as disclosed in his death certificate, appended as Annexure P-1, with the instant writ petition, expired on 10.9.2012. Upon demise of the afore, co-respondent No. 4, his legally wedded spouse, became disbursed all the post retiral benefits, of her pre-deceased husband, inclusive of pension, rather both by the sanctioning, and, also by the disbursing authority(ies) concerned.

3. The writ petitioners, aver that since co-respondent No.4, after the occurrence of demise of her husband, one Vinod Kumar, has, remarried one Mukesh Kumar. Consequently, co-respondent No.4 forfeits her right, if any, to receive the pensionary benefits, as, arise from the occurrence of demise of her husband, one Vinod Kumar.

4. In the reply, meted to the writ petition, on behalf of co-respondents No. 4 to 6, the afore factum becomes completely belied. Moreover, in the reply, furnished to the writ petition, by co-respondent No.5, with whom, the apposite pension account is maintained, a contention is borne, that after

co-respondent No.5, ensuring the authenticity of the apposite assertions of co-respondent No.4, as, embodied in Annexure P-1, besides, upon, its assigning credibility to , an affidavit, sworn by co-respondent No.4, detailing therein qua hers not re-marrying, and nor, hers being employed, rather thereafters, the respondent concerned, making the apposite provisional pension payment order, for all the pensionary benefits being released into the account of co-respondent No.4, as, maintained by co-respondent No.5.

5. The afore made contention, as, reared in the reply, meted to the writ petition, by co-respondent No.5, also completely belies the afore made averments, in the writ petition, and, appertaining to co-respondent No.4, after the demise of her husband, hers contracting a marriage with one Mukesh Kumar. Therefore, she becomes a valid recipient, of the provisional payment order, as, made by the sanctioning authority concerned.

6. Moreover, in the reply, furnished to the writ petition by co-respondents No. 1 to 3, a contention is borne in paragraph-8 thereof, that a sum of Rs. 2, 50,000/- has been disbursed to the petitioners, out of the Central Welfare Fund. However, the trite conundrum besetting to this Court, and, whereons, an adjudication is to be meted, appertains to whether to the exclusions of the afores, hence only co-respondent No.4, became solitarily entitled to become a valid recipient of the post retiral benefits of her husband, one Vinod Kumar, inclusive of pensionary benefits.

7. However, it appears that only in the face of co-respondent No.4, becoming constituted as a nominee, of her pre-deceased husband, she became issued a provisional payment order, by the sanctioning authority concerned.

8. Be that as it may, a reading of sub-rule 6 of Rule 54 of the Central Civil Service Pension Rules, rules whereof are extracted hereinafter, bestows entitlements to pension, upon the widow, and, the afore bestowment lasting only uptil the date of her death or upon the marriage of the widow, whichever is earlier:-

"**(6) The period for which family pension is payable shall be as follows**:-

(i) subject to first proviso, in the case of a widow or widower, up to the date of death or re-marriage, whichever is earlier;

(ii) subject to second proviso, in the case of an unmarried son, until he attains the age of twenty-five years or until he gets married or until he starts earning his livelihood, whichever is the earliest;

(iii) subject to second and third provisos, in the case of an unmarried or widowed or divorced daughter, until she gets married or remarried or until she starts earning her liveli-hood, whichever is earlier;

(iv) subject to sub-rule (10-A), in the case of parents, who were wholly dependent on the Government servant immediately before the death of the Government servant, for life;

(v) subject to sub-rule 10 (B) and the fourth proviso, in the case of disabled siblings (i.e. brother and sister) who were dependent on the Government servant immediately before the death of Government servant, for life."

Since as afore stated, co-respondent No.4 had not re-married, after the demise of her husband, one Vinod Kumar, thereupon she became a valid recipient of the PPPO concerned. However, since co-respondent No.6 is a minor, and, hence wholly dependent, on the earnings of her pre-deceased father, one Vinod Kumar, thereupon uptil her marriage, she becomes entitled to along with her mother, to all the apposite retiral benefits, inclusive of pension, as arise from the demise of her father, one Vinod Kumar. In addition, the petitioners, who are not shown through any cogent evidence, to be not dependent upon the earnings as made by their pre-deceased son one Vinod Kumar, from the latters employment. Therefore, they too along with both (supra), are entitled to become valid recipients of all postal retiral benefits, inclusive of pension, hence uptil their respective demises.

9. In sequel, the exclusivity of bestowment of all post retiral benefits, inclusive of pension, by the disbursing/sanctioning authority concerned, vis-a-vis, co-respondent No.4, is not merit worthy. Therefore, this

Court directs the respondent concerned, to redraw the pension payment order, so as to include thereons, not only co-respondent No.4, but also both the petitioners, as well as proforma respondent No.6. However, any payment, as made earlier hereto, by co-respondent No.5, to, co-respondent No.4, may not be subjected to apposite adjustments, as, thereupon, there is every likelihood of co-respondent No.4, becoming subjected to penury or her source of livelihood becoming halted.

8. Lastly, since the claim for release of medical expenses, as, became purportedly incurred by the petitioners, for, treating their pre-deceased son, also cannot be granted by this Court, as in respect thereto, they may canvass their remedies, available to them, under law. Conspicuously, also when there is no evidence, that the afore requisite expenses, as became purportedly incurred by them, for the medical treatment of their son, rather did ever come to be incurred by them, especially when no valid proof qua thereof, is existing on record, and, rather when evidence of probative vigor, qua thereto can hence become adduced, only before the learned Civil Court concerned.

9. In view of the afore observations, the instant writ petition is disposed of. All pending applications, if any, also stand disposed of.

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

Between:-

M/S VIKRANT OIL CARRIER,
THROUGH ITS PROPRIETOR
CHANDERPOOL, SON OF
SH. BAJE SINGH, AGED 52 YEARS,
RESIDENT OF VILLAGE BHIKEWALA,
TEHSIL NARWANA, DISTRICT JIND,
HARYANA.

....PETITIONER

(BY SH. KSHITIJ SHARMA, ADVOCATE
AND MR. PRASHANT SHARMA, ADVOCATE)

AND

1. HINDUSTAN PETROLEUM CORPORATION
LTD. THROUGH ITS CHAIRMAN, 17
JAMSHEDJI TATA ROAD, MUMBAI,
MAHARASHTRA.

2. THE DEPUTY GENERAL MANAGER,
SHIMLA RETAIL REGION,
HINDUSTAN PETROLEUM LTD,
3rd FLOOR, HAMEER HOUSE,
LOWER CHAKKER, SHIMLA,
HIMACHAL PRADESH.

3. SH. GOPAL DAS
S/O NOT KNOWN
CHIEF DEPOT MANAGER,
NALAGARH DEPOT,
P.O.L. DEPOT, NALAGARH,
BADDI-NALAGARH ROAD,
VILLAGE DHADI KANIA,
P.O. NALAGARH, DISTRICT
SOLAN 174101.

4. M/s SAI ROADWAYS,
THROUGH ITS PARTNER/ATTORNEY
HOLDER-DALBIR SINGH, 1386/2,
OPPOSITE SHIV MANDIR, RAM NAGAR,
KALKA-133302.
DISTRICT PANCHKULA (HARYANA)

..RESPONDENTS

(MR. B.C. NEGI, SR. ADVOCATE WITH MR. NITIN THAKUR, ADVOCATE FOR R-1 TO R-3.
MR. ANKUSH DASS SOOD, SR. ADVOCATE WITH MR. RAJNISH K. LAL, ADVOCATE FOR R-4.)

CIVIL WRIT PETITION NO. 3542 OF 2021
RESERVED ON: 31.08.2021
DECIDED ON: 06.09.2021

Constitution of India, 1950- Article 226- Tender- Misrepresentation of material facts at time of submission of bid as well as at the time of entering into agreement with HPCL- HPCL was under legal obligation to verify the claim at the evaluation of bid and to act in fair and unbiased manner- Held, the stand taken by HPCL in the matter reflect arbitrariness on its part- Petition allowed- Directions issued thereof.

Case referred:
Noida Entrepreneurs Association vs. NOIDA, (2011) 6 SCC 508;
Tukaram Kana Joshi And Ors. Vs. Maharashtra Industrial Development Corporation & Ors. 2013 (1) SCC 353;

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

O R D E R

By way of instant petition, petitioner has assailed the award of work (transportation of bulk white petroleum products), by the Hindustan Petroleum Corporation Limited (for short, 'HPCL') in favour of respondent No.4, M/s Sai Roadways (for short 'Sai Roadways'), in pursuance to tender notice dated 23.07.2018.

2. On 23.07.2018, HPCL invited offers, under the two-bid system, for road transportation of bulk white petroleum products ex-Nalagarh for the period 1.10.2018 to 30.09.2023. Estimated tank trucks requirement was as under: -

Sr. No.	Description	**White oils** 1st to 3rd year 4th&

		5th year	
1.	Tank trucks with capacity of 12 KL & above and less than 18 KL	48	31
2.	Tank trucks with capacity of 18 KL and above.	135	40

3. Due date for submission of bids was 18.08.2018. Technical and financial bids were to be evaluated on 22.09.2018 and 15.10.2018 respectively.

4. As per tender document, the transporters could apply under three categories. First, those who had tank trucks in their physical possession. Second, those who were ready to offer tank trucks with temporary registration and third, those who belonged to SC/ST categories could make offers with booking slips only. The second category of transporters, as noticed above, could offer tank trucks with 18 KL and above capacity only.

5. On 09.08.2018, Sai Roadways submitted its bid and offered total 36 numbers of tank trucks, out of which, three chassis were claimed to be with it with temporary registrations. HPCL accepted the bid of Sai Roadways for 36 numbers offered tank trucks and letter of acceptance (LOA) was issued on 17.12.2018. A formal agreement was signed between HPCL and Sai Roadways on 01.01.2019.

6. As per allegations of petitioner, Sai Roadways violated tender conditions by submitting false information and thereby misrepresented to the HPCL its capacity for the purposes of evaluation. Two out of three tank trucks of more than 18 KL capacity bearing chassis numbers BJ2586 and BJ2579, offered by the Sai Roadways, with temporary registration numbers, were falsely represented to have been purchased from M/s Yashoda Motors, Patiala (Punjab) *vide* tax invoices dated 09.08.2018, whereas, these two chassis with No. BJ2586 and BJ2579 were sold by M/S Yashoda Motors to Shri Rajendra

Singh resident of Jamnagar, Gujarat and Shri Jagir Singh of Punjab in the first instance. The chassis purchased by Shri Rajinder Singh was temporarily registered with Registering and Licensing Authority, Jamnagar, Gujarat on 02.11.2018 vide No. GJ-10(T)X8413 and was further sold on 08.02.2019, by said Shri Rajinder Singh to Sh. Shekhar Chander one of the partners of Sai Roadways. Similarly, chassis No. BJ2586 was got registered by Shri Jagir Singh with Registering and Licensing Authority, Patiala (Punjab) under registration No. PB-11CQ0415. It was on 29.01.2019 that this chassis was further sold by Shri Jagir Singh in favour of above mentioned, Shekhar Chander.

7. On the above allegations, petitioner maintains that on 09.08.2018, when Sai Roadways uploaded its bid, it was not the owner of, above noticed, two chassis of tank trucks above 18 KL capacity. Even on the date of issuance of LOA i.e., 17.12.2018 and also on the date of signing of agreement dated 01.01.2019, Sai Roadways was neither having ownership of chassis bearing No. BJ2579 and BJ2586 nor their temporary registrations. The specific allegation of petitioner is that Sai Roadways submitted false and forged documents in respect of these two chassis for tank trucks above 18KL capacity with HPCL and by fraudulent means succeeded in securing the contract for 36 tank trucks. According to petitioner, Sai Roadways by unfair means has been able to influence the evaluation process in its favour, in which officers of HPCL, especially respondent No.3 was privy.

8. Basing its claim on the above noted allegations, petitioner has prayed for the following substantive reliefs: -

> *"A writ of certiorari to quash the award of tender/grant of letter of acceptance in favour of the private respondent-M/s Sai Roadways, because firstly, it has secured the tender through a well-planned, conscious and intentional fraudulent representations i.e. I furnished forged/false/fabricated/procured tax invoices dated 09.08.2018 (Annexure P-4 Colly.) and temporary certificate of*

registration dated 09.08.2018 (Annexure P-5 Colly.), secondly filed a false affidavit dated nil (Annexure P-3), as part of the technical bid which is clear from the registration certificate and form no. 29 (Annexure P-11 Colly and P-12 Colly) secured by the petitioner under the Right to Information Act; thirdly, the said private respondent has colluded with the official respondents, who purposely did not take any action against the said transporter and who are habitual with having underhand dealings with selected transporters; fourthly, the official respondents neither held any investigation/inquiry nor carried suspended the tank trucks of the said private respondent, in order to enrich the latter, purely at the cost of public interest; fifthly the official respondents have acted purely for private gain and completely forgotten about their duties, while dealing with State largesse.

And/or

With the further prayer, that consequential disciplinary action be also taken against the private respondent, as per the Discipline Guidelines, because the tender was secured by the said respondent based on forged documents/false information in accordance with Condition No. 5.3.,8.2.1.m and 8.2.2.13 of the DNIT/Discipline Guidelines (Annexure P-1)

And/or

With the further prayer that order of priority and allocation be re-assessed/re-done, in terms of the DNIT, as per the relevant condition is at Pg. No. 52, Condition No. 9 of the DNIT (Annexure P-1) and the work order/letter be re-issued to the deserving candidates, including the petitioner.

And/or

During the pendency of the present writ petition, that no further work be granted to the private respondent M/s. Sai Roadways in view of the apparent fraudulent representations made by the said transporter, to secure the tender.

And/or

Direct that Central Bureau of Investigation may kindly register a criminal case with regard to the selection and allocation of work, in relation to detailed notice inviting tender dated 28.07.2018 (Annexure P-1), especially in light of the fact that this is the third case (after M/s Vikrant Oil Carrier V. Union of India and others C.W.P. No. 628 of 2019 and Parvesh Kumar Aggarwal V. Hindustan Petroleum Corporation Ltd. and others C.W.P No. 2441 of 2021), wherein forged documents have been used by a private transporter in active collusion, and purely for

quid pro quo with the official respondents for awarding work related to transportation of fuels."

9. Respondents No. 1 to 3 i.e. HPCL and its impleaded officers have submitted their joint defence. It has been stated on their behalf that they had awarded the work vide agreement dated 01.01.2019 in favour of Sai Roadways after due verification of the documents. The specific stand of respondent No. 1 to 3 is that Sai Roadways had provided same details of offered tank trucks in its bid and also at the time of verification after issuance of LOA in its favour. Respondents No. 1 to 3 have acknowledged having received a complaint from the petitioner on 16.03.2021 and also proclaimed of having taken action thereon by seeking clarification from M/s Yashoda Motors, Patiala vide letter dated 20.03.2021. It is the case of respondents No. 1 to 3 that Yashoda Motors vide its response dated 02.04.2021 confirmed that chassis Nos. BJ2579 and BJ2586 were sold by it to Sai Roadways vide tax invoice dated 09.08.2018.

10. Respondents No. 1 to 3 have also taken exception to the filing of petition by the petitioner being barred on account of delay and laches as also the alleged inequitable conduct of the petitioner. In support of such objections, it has been contended that the agreement was executed between HPCL and Sai Roadways on 01.01.2019 and the petitioner waited for petition to be filed in June, 2021. In addition, the petitioner himself was one of the bidders and was also awarded some amount of tendered work. The petitioner since failed to fulfill its contractual obligations with HPCL, the contract of the petitioner was rescinded and therefore petition was result of sheer act of vengeance on the part of the petitioner.

11. Sai Roadways has also contested the allegations of the petitioner by filing a separate reply. The petitioner is accused of having approached this Court with unclean hands. Delay and laches have also been raised as one of the defences, besides the exceptions taken on the ground of maintainability

etc. On merits, Sai Roadways has denied the allegations of petitioner in general, however, it is pertinent to notice the contents of reply of said respondent in para (h) thereof, an extract of which reads as under: -

> *"….It is pertinent to mention here that the replying respondent had already purchased the registration numbers, chassis, and engine numbers from M/s Yashoda Motors and since the understanding between the replying respondent and the bank authorities was to the effect that if the tender is allotted in favour of the replying respondent by the Corporation immediately thereafter the bank authorities from where the replying respondent has to raise loan shall release the funds for purchase of these three trucks/tanker but in the meantime when the negotiation process was active between the finance company as well as the replying respondent M/s Yashoda Motors Pvt. Ltd from where the respondent had purchased the engine number, chassis number and registration number of three vehicles, one of the vehicle/truck was sold by Yashoda Motor Pvt. Ltd. Unauthorizedly and without any intimation to the replying respondent, on inquiry, it transpired that the second vehicle has been sold by Yashoda Motors to one Sh. Rajender Singh resident of Jamnagar illegally, hence, immediately the replying respondent took up the matter with Yashoda Motors Pvt. Ltd and purchased back the aforesaid Tank Truck from Sh. Rajendra Singh much before 60 days when the truck/tanker had to be physically placed for physical verification as per clause 5(f) of the tender document, hence, the contentions raised by the petitioner are absolutely frivolous and deserves to be rejected out rightly. Further, one of the vehicles was also purchased back from one Sh. Jagir Singh which was also unauthorizedly sold by M/s Yashoda Motors, but the fact of the matter remains that at the time of execution of the tender document and the information supplied by the replying respondent regarding these three tanks/trucks was absolutely true and not forged on any level, the replying respondent cannot be penalized for the wrong and illegal act of M/s Yashoda Motors Pvt. Ltd It is also pertinent to mention here that no clause/condition of the tender document has been violated and the present petition filed by the petitioner is just an attempt to mislead this Hon'ble Court which deserves to be dismissed, the replying respondent had already purchased the engine number, chassis number of the aforesaid vehicles and in lieu of that temporary numbers were also issued in favour of the replying respondent which is evident from the invoices an the Letter of*

Registration issued by M/s Yashoda Motors Pvt. Ltd issued in favour of the replying respondent as Annexure R-4/1. There was no violation, irregularities or illegalities in submitting the documents as wrongly projected by the petitioner. It is also pertinent to mention here that the petitioner had filed a complaint with the Corporation which is Annexure P-8 annexed by him, regarding the dispute, the contents of the complaint absolutely if perused will clearly demonstrate that the same is false as the replying respondent never released the bill and temporary RC of vehicle No. HP12L9815 the fact of the matter is that such vehicle as mentioned by the petitioner vehicle does not even exist and the same is a sheer imagination of the petitioner and he may be put to strict proof of the allegations regarding this particular vehicle number. The fact of the matter is that the vehicle which was purchased back from Mr. Rajendra Singh, resident of Jamnagar was not registered as HP12L 9715, but was numbered as PH12L 8815, hence, the entire complaint and allegations made by the petitioner are absolutely frivolous and misleading and secondly, one vehicle No. HP12L-9715 was also purchased back from one Sh. Jagir Singh which were wrongly and without information to the replying respondent were sold by M/s Yashoda Motors Pvt. Ltd.; the fact of the matter is that these three vehicles were already purchased by the replying respondent from M/s Yashoda Motors Pvt. Ltd alongwith its Engine Number, Chasis No. and Temporary Number as is evident from the tax invoices attached with the replying as Annexure R-4/1. Rest of the contents of this para where the petitioner has relied upon the judgments of the Hon'ble Apex Court are a matter of record, but the judgments so relied upon by the petitioner are not applicable in the present case."

12. Petitioner by way of rejoinder filed to the replies of the respondents has denied the averments made therein and has also reiterated its stand taken in the petition. It has been submitted that principle of delay and laches cannot bar the remedy of the petitioner as the allegations of fraud are involved against the respondents. It has further been mentioned that termination of contract of petitioner is subject matter of CWP No. 1080 of 2020, pending in this Court, by way of which, petitioner has assailed the termination. It has also been stated that petitioner had filed another CWP No. 628 of 2019, challenging the

illegal acts of HPCL in awarding a contract under the same notice inviting tenders, which was allowed by learned Single Judge of this Court and upheld by a Division Bench in LPA No. 4/2021. As per petitioner, HPCL had cancelled its contract as an Act of vengeance.

13. We have heard learned counsel for the parties and have also gone through the records.

14. Before delving into the rival contentions of parties, we deem it appropriate to notice certain relevant terms of the tender document as under:

Condition number 1 of Special Terms and Conditions: -

> *"**All Tank Trucks offered against invoice (temporary registration) have to be owned by the tenderers only.***
>
> *Tank Truck on Temporary registration means new chassis, with chassis number, engine number, fitted with ABS and with the provision for installing tank of capacity of 18 KL and above at a later date, no open body Truck will be accepted."*

Mode of online payment of earnest money deposit (EMD):-

Description	HPCL
For Transporters	Rs.5,000/- per Tank Truck in physical possession
For all Transporters offering Tank Truck with temporary registration & affidavit (For 18 KL & above only)	Rs. 1,00,000/- per Tank Truck.
For SC/ST Transporters offering Tank truck with booking slip.	Rs.5000/ per Tank Truck.

Clause No.5 (f) of instructions to tenderers prescribing rejection criteria: -

"5. **Rejection criteria**: Tenders/Tank Trucks will be rejected in the event of the bidders not complying with any of the following tender

conditions. HPCL may ask the bidder to submit/resubmit/upload any document(s) required to be submitted as a part of the Tender document or as a part of technical evaluation within the stipulated time. In case the required document is not submitted/uploaded within stipulated time, HPCL reserves the right to take decision as deemed fit basis the available documents submitted by the bidder.

……

……

f) Tenders without the required valid documents for the Tank Truck as given below: -

Description	Documents required*
Tank Trucks	RC Book, PESO License & Calibration certificate.
Tank Trucks with Temporary Registration	Temporary Chassis Registration Certificate & affidavit in the prescribed format.
TT offered under Booking slip (For SC/ST tenderers)	Chassis Booking Slip & affidavit in the prescribed format.

Clause 3 of special terms and conditions:-

"***3***. ***No. of Tank Trucks to be offered by Transporters:***

The transporters have to offer a Minimum of 5 (FIVE) tank trucks, of which at least 2 (two) should be owned tank trucks,. In the name of the Firm or any of the Partners or the Proprietor. In case offered tank trucks are more than 5 (five), at least 40% of the offered tank trucks should be owned.

Special Clause for SC/ST transporters: SC/ST Bidders may offer a minimum of 2 (Two) Tank Trucks, out of which at least 1 nos should be

owned. Above Two Tank Trucks, minimum 40% of the Total Trucks should be owned.

A bidder quoting for a particular capacity (12kl but less than 18KL or 18 KL and above) will have to offer at least one owned truck in that capacity, If a bidder offers only attached TT against a particular capacity, those trucks will be rejected in technical evaluation. The bid of the tenderer will be evaluated based on the remaining tank trucks offered."

Clause 8.2.1(m) of the Oil Industries Discipline Guidelines (for short 'guidelines')

Clause 8.2.1(m) of the Oil Industries Discipline Guidelines (for short 'guidelines') defines malpractices/irregularities and clause 'm' thereof include entering into contract based on forged documents/false information. The penalty prescribed as per Clause 8.2.2.13 for entering into contract based on forged documents/false information is blacklisting of tank trucks with further provision to the following effect: -

> *"However, in case, complicity of the transporter is established even in first instance of malpractice, the entire fleet will be blacklisted, contract terminated & carrier blacklisted along with forfeiture of SD".*

15. The tender documents also contained a standard form bulk petroleum products road transporters agreement which was required to be executed between HPCL and the successful bidder. Clause 17(d) thereof is relevant to be noticed here as under: -

> ***"This agreement is valid for a period upto xxxxxxx w.e.f. xxxxxxx. However, Company reserves the right to terminate***

this Agreement by giving two months advance notice without assigning any reasons and contractor is not entitled to claim any compensation from the Corporation.

……..

…..

(d). If any of the information submitted by the Carrier in the tender is found incorrect at any time."

HPCL and Sai Roadways executed an agreement dated 01.01.2019, in which also, the condition No. 17(d) as extracted above was incorporated.

16. Another requirement of the tender document was that an undertaking was to be submitted by a tenderer as under:-

UNDERTAKING

(On Non Judicial Stamp Paper- Rs.100.00)

…….

……..

6. We further confirm that the details as furnished by us have been verified and found correct. We undertake to place the Tank Trucks at the disposal of HPC in case the contract is awarded in our favour. If any information is found to be false and incorrect, the contract if awarded to us shall be liable to be cancelled and we shall be liable to pay to the Oil Company such damages/losses/claims as the Oil Company may put to due to termination of the contract. We also undertake that should there be any action against Oil Company resulting in damages of whatsoever nature to Oil Company on account of award of contract in our favour on the basis of the misrepresentations, we shall keep the Oil Company completely indemnified against all the claims/losses/damages/litigations/court action etc.

17. The above noted provisions of tender document, clearly spelled out that transporters submitting their bids on the basis of tank trucks with temporary registrations were mandatorily required to be owners thereof with chassis

number, engine number, fitted with ABS and having temporary registration. Since, this was eligibility criteria the same was required to be adhered strictly. As per prescribed rejection criteria and also the guidelines, want of eligibility requirements would entail rejection of tender in certain given situations. Undertakings were also solicited from tenderers to the effect that in case any information supplied by tenderer was found to be false and incorrect, even the awarded contract would be liable to be cancelled.

18. The examination of material on record divulgesthat petitioner obtained certain information, under Right to Information Act, from the Registration and Licensing Authority, Nalagarh, District Solan, H.P. with respect to the vehicles i.e. tank trucks No.HP-12L-8815 and HP-12L-9715 under which the chassis No. BJ2579 and BJ2586 were respectively registered with the said authority. The information provided by the PIO of the office of S.D.O (Civil), Nalagarh revealed that chassis No. BJ2579 was registered on 02.11.2018 in the name of one Shri Rajinder Singh son of Sh. Kanubha Vaghela with Registering and Licensing Authority, Jamnagar Gujarat under the registration No. GJ-10TX-8413 and said Shri Rajinder Singh further sold the said vehicle to Shri Shekhar Chander on 08.02.2019. As regards chassis No. BJ2586, it was revealed that the same was sold to one Jagir Singh who got it registered with Registering and Licensing Authority, Patiala under registration No. PB-11-CQ 0415. This vehicle was further sold by Shri Jagir Singh to Shri Shekhar Chander on 29.01.2019.

19. Respondents No. 1 to 3 along-with their reply have annexed certain documents that include the copies of registration certificates, issued by R&LA, Nalagarh, for vehicle Nos.HP-12L-8815 and HP-12L-9715 with chassis Nos. BJ2579 and BJ2586 respectively. As per these documents the date of registration of vehicle No. HP-12L-8815 is 2.11.2018 and for vehicle No. HP-12L-9715 is 27.11.2018.

20. It was argued on behalf of the petitioner that entries in these certificates of registration, especially with respect to the date of registration are incorrect and these documents as produced by the petitioner with HPCL were forged and fabricated. To support his contention, learned counsel for the petitioner has categorically stated that these registration certificates have QR Codes inscribedthereon and if such Codes are deciphered, the true and correct entries recorded in the records of Registering and Licensing Authority, Nalagarh would be evident. The contention of learned counsel for the petitioner in this behalf has been found to be correct. On application of QR Code Reader, the actual date of registration of vehicle No. HP-12L-8815 is 13.02.2019 and of vehicle No. HP-12L-9715 is 07.02.2019.

21. The extract of reply of Sai Roadways, reproduced hereinabove, is also evident of the fact that said respondent in fact had not purchased the above noted chassis from Yashoda Motors and it was by subsequent sales dated 07.02.2019 and 08.02.2019 that first purchasers S/sh. Rajinder Singh and Jagir Singh sold vehicles to Shri Shekhar Chander.

22. Though this Court in exercise of jurisdiction under Article 226 of the Constitution of India will not decide any dispute as to question of fact, but the factual position as has emerged from the records cannot also be ignored. There is no dispute between the parties, at least, to the fact that the documents referred to hereinabove were not the same which were supplied by Sai Roadways to HPCL for securing the contract. That being so, the conclusion becomes inevitable that Sai Roadways had not acquired the ownership of two numbers of tank trucks having chassis Nos. BJ 2579 and BJ 2586. Therefore, there was a clear misrepresentation on its part as to material facts not only at the time of submission of bid but also at the time of entering into agreement with HPCL. The transfer of said vehicles in the name of one of the partners of Sai Roadways was also at much subsequent stage i.e. on 07.02.2019 and 13.02.2019.

23. Thus, the stand maintained by Respondents about due verification of documents submitted by Sai Roadways does not appear to be correct. HPCL was under legal obligation to verify the claim of Sai Roadways at the time of evaluation of its bid. No efforts were made by the HPCL to inquire into the matter, even on complaint dated 16.03.2021 received from the petitioner. The inquiry allegedly conducted by the HPCL from Yashoda Motors appears to be a farce as Yashoda Motors itself was accused of having issued false tax invoice in favour of Sai Roadways. The burden that lied upon HPCL to check the veracity of the allegations made against Sai Roadways cannot be said to have been discharged, merely by seeking some information from Yashoda Motors. The entire details of information was readily available with the Registration and Licensing Authority, Nalagarh, District Solan, H.P., but no attempt appears to have been made by the HPCL to verify the records from the said office.

24. The HPCL being a public authority and an instrumentality of the State is bound to act in fair and unbiased manner. In ***Noida Entrepreneurs Association vs. NOIDA, (2011) 6 SCC 508*** their lordships have held as under:

> *"38. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse etc., acts as a trustee and, therefore, has 2to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.*
>
> *39. State actions required to be non-arbitrary and justified on the touchstone of* Article 14 *of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law.*

> *Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favoritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.*
>
> *40. The Public Trust Doctrine is a part of the law of the land. The doctrine has grown from* Article 21 *of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The Rule of Law is the foundation of a democratic society.*
>
> *41. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them". A decision taken in arbitrary manner contradicts the principle of legiti2mate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other.*

25. Thus, from the material on record especially from the conduct of HPCL and also the stand taken by the said authority in the present matter, sheer arbitrariness on its part is reflected. In view of the above, we are of the considered opinion that the allegations being of a very serious nature require investigation especially when forged registration certificates of vehicles are alleged to have been used in the deal.

26. Though petitioner has failed to convince and explain the reasons for not filing the petition within reasonable time from the award of work in favour of Sai Roadways, but in the given facts and circumstances, the delay in filing the petition will not be fatal, for the reason that there is sufficient material on record to suggest that on one hand Sai Roadways had not been fair in clinching the contract in question from the HPCL and on the other even the conduct of HPCL is not beyond shadow of doubt. The doctrine of delay and

laches is a rule of equity and an equitable doctrine. It is not an absolute rule that delay and laches will always defeat the remedy of a person. It depends upon the facts of each individual case. Reference in this behalf can be made to the judgment passed by Hon'ble Apex Court in ***Tukaram Kana Joshi And Ors. Vs. Maharashtra Industrial Development Corporation & Ors. 2013 (1) SCC 353,*** wherein it has been ruled that:-

> *"12.....Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if the whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third-party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience".*

And again:-

> *"14. No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners. (*Vide Durga Prashad v. Chief Controller of Imports *and Exports, 1970 AIR (SC) 769,* Collector (LA) v. Katiji *and*

others 1987 AIR (SC) 1353, Dehri Rohtas Light Railway Co. Ltd. v. District Board, *Bhojpur and others 1993 AIR (SC) 802,* Dayal Singh v. Union of India, 2013 AIR (SC) 1140 *and* Shankara Coop. Housing Society Ltd. v. M. Prabhakar and others 2011 AIR(SC) 2161.*)"*

On the basis of aforesaid exposition of law, we have no hesitation in holding that the rejection of the claim of petitioner in the instant case merely on technical ground of delay and laces will defeat the ends of justice.

27. At the same time, we are not unmindful of the fact that the contract in issue relates to bulk transportation of petroleum products of a PSU which has an element of public service and interest involved in it. More than half the contract period is already over. An abrupt disruption of contract at this stage may prove detrimental to the interests of public at large, therefore, in the peculiar circumstances of the case, we for the time being deem it expedient in the interest of justice to pass the following directions:

> The Board of Directors of HPCL is directed to constitute a special team of its officials, holding sufficiently high ranks and unconnected with the affairs of finalization of contract in issue between HPCL and Sai Roadways, to inquire into all the issues involved in the instant case and to take appropriate action against the wrong doers, if any, in accordance with law. This entire exercise shall be completed within a period of 6 weeks from the date of this judgment and compliance shall be reported to this Court.

28. The petition is allowed to above extent and is accordingly disposed of, so also the pending application(s), if any.

List for compliance on 25.10.2021.

BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J., HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Between

SMT. BALO DEVI
2/O LATE SHRI PRITAM CHAND,
R/O VILLAGE AND P.O. MOONDHI,
TEHSIL PALAMPUR,
DISTRICT KANGRA,
H.P.

.....PETITIONER

(BY M/S A.K. GUPTA, MANIK SETHI,
ABHYENDRA GUPTA, DEVENDER K. SHARMA,
BABITA CHAUHAN AND BONIT THAKUR, ADVOCATES)

AND

1. STATE OF H.P. THROUGH
   PRINCIPAL SECRETARY (I&PH) WITH
   HEADQUARTERS AT SHIMLA-2
   H.P.

2. THE ENGINEER-IN-CHIEF,
   I&PH WITH HEADQUARTERS AT
   US CLUB, SHIMLA-1

3. THE EXECUTIVE ENGINEER,
   I&PH DIVISION THURAL,
   DISTRICT KANGRA,
   H.P.

4. THE SENIOR DEPUTY ACCOUNTANT GENERAL,
   HEADQUARTERS AT SHIMLA-3

.....RESPONDENTS

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL
WITH M/S ANIL JASWAL, RAMEETA RAHI,
DINESH THAKUR, ADDITIONAL ADVOCATES GENERAL,
WITH MR. RAJU RAM RAHI, YUDHVIR SINGH THAKUR

AND DIVYA SOOD, DEPUTY ADVOCATES GENERAL
FOR RESPONDENTS NO.1 TO 3.
SHRI SHASHI SHIRSHOO, STANDING COUNSEL, FOR RESPONDENT NO.4)

CIVIL WRIT PETITION NO.3598 of 2019
Decided on: 28.09.2021

Constitution of India, 1950- Article 226 – Reference - Central Civil Services (Pension) Rules, 1972- Employee shall be entitled for benefit of daily waged service for the purpose of calculating qualifying service for pension- Reference answered accordingly.

This petition coming on for orders this day, Hon'ble Mr. Justice Vivek Singh Thakur, Judge, passed the following:

O R D E R

This Larger Bench has been constituted by Hon'ble the Acting Chief Justice to adjudicate and answer the following question:

> *"Whether the views expressed in CWP No.3396 of 2021 and Ex. Pet. No.117 of 2018 in CWP No.267 of 2015 OR the view expressed in the present judgment is the appropriate application of the judgment of the Hon'ble Supreme Court in Sunder Singh's case."*

10. Sunder Singh was appointed, on 1.1.1993, as a Baildar on daily-waged basis. His services were regularised with effect from 1.1.2002 after completion of 8 years service, and he retired on 31.1.20211, after serving, on regular basis, for 9 years 1 month. On account of denial of pension, for not having completed qualifying service of 10 years at his credit, as required under CCS (Pension) Rules, 1972, he approached this Court, by filing CWP No.3496 of 2011, by invoking Article 226 of the Constitution of India, seeking direction to count half of his daily-waged service towards qualifying service and thereafter pay pension to him from the due date alongwith incidental benefits.

11. Claim of Sunder Singh was based upon judgment dated 19.7.2007, passed by a Division Bench of this High Court in CWP No.180 of 2001, titled as *State of H.P. & others v. Sarab Dayal,* wherein it was held as follows:

> "We are, therefore, of the considered view that 50% of the continuous service rendered by the employees on daily rated basis followed by work charge/regular employment should be taken into account while calculating the qualifying service for purposes of entitlement to and the amount of pension to be paid to them."

12. The State had filed Special Leave Petition before the Supreme Court against aforesaid judgment dated 19.7.2007, but raising new questions before the Supreme Court and, thus, matter was remanded by the Supreme Court to this Court for fresh adjudication, with following observations:

> "We have perused the records and heard the learned counsel for the parties. We are of the considered view that an entirely new case has been weaved out before this Court. There are no pleadings to that effect. In this view of the matter, we are constrained to set aside the impugned judgment of the High Court and remit the matters to the High Court for fresh adjudication. To avoid any confusion, we direct the State to file a comprehensive amended writ petition in the High Court within eight weeks and reply of the same be filed within eight weeks thereafter and rejoinder, if any, within four weeks thereafter."

13. Consequent to directions of the Supreme Court, the Division Bench had formulated the question of law, arising before it to be adjudicated in CWP No.180 of 2001 and connected matters, as under:

> "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."

14. The aforesaid issue was answered by the Division Bench, vide judgment dated 31.5.2012, as under:

> ".....Consequently, we answer the question framed by us earlier by 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 Services (Pension) Rules, 1972. The writ petition is disposed of in the aforesaid terms."

15. Vide order dated 31.5.2012, CWP No.3496 of 2011, titled as *Sunder Singh v. State of H.P.,* was also disposed of by the same Division Bench of this High Court in terms of judgment dated 31.5.2012, passed in CWP No.180 of 2001 (*supra*).

16. Sunder Singh approached the Supreme Court of India by filing SLP No.34038 of 2012, which was allowed and the petitioner was granted special leave to file Civil Appeal No.6309 of 2017 against the order passed by the High Court in CWP No.3496 of 2011, wherein, in the aforesaid background, the Supreme Court has passed the following judgment:

> "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 for pension or which work charge service is counted. Earlier, in terms of O.M. dated 14.05.1998 (wrongly printed, should be 1968), 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 w.e.f. 01.01.2008, 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 services will be reckoned as ten years.
>
> 7. The appeal as well as special leave petitions are disposed of in above terms."

17. In aforesaid judgment, in *Sunder Singh's* case, the Supreme Court had held that Sunder Singh and other similarly placed daily wagers would be/shall be are entitled to weightage of service rendered as daily wager towards regular service for the purpose of pension and had issued a mandate that for extending such benefit, daily-wage service of 5 years would be treated equal to 1 year for regular service for pension, with further observation that if on that basis, their service was more than 8 years but less than 10 years, their service would be reckoned as 10 years, with further direction that Sunder Singh and other similarly situated employees would be entitled to pension, if they would have been duly regularized and would have completed total eligible service of more than 10 years.

18. Seeking benefit on the basis of the aforesaid mandate, large number of daily-wagers, who had not completed 10 years qualifying service,

post conferment of work-charge status/regularization, approached this High Court by filing petitions under Article 226 of the Constitution of India. Some of such petitions have been decided, whereas some petitions are still pending adjudication and present petition is one of such pending petitions, whereas CWP No.3396 of 2021 and CWP No.267 of 2015 are such decided petitions.

19. In CWP No.3396 of 2021, titled as *Tilak Ram v. State of H.P. & others,* Tilak Ram, petitioner therein, had completed 6 years 9 months post regularization service and he was denied the pensionary benefits and, therefore, he had approached this High Court, seeking direction to the Department to count ten years of daily waged service, equivalent to two years of regular service, and thereafter regular service of 8 years and 9 months be treated as 10 years for the purpose of qualifying service for pension, in terms of law laid down by the Supreme Court in *Sunder Singh's* case (Civil Appeal No.6309 of 2017).

20. The Division Bench, in aforesaid CWP No.3396 of 2021, took note of the judgment passed by learned Single Judge of this High Court in CWP No.2110 of 2020, titled as *Devi Singh v. State of Himachal Pradesh & others,* decided on 2.11.2020, wherein pensionary benefits were directed to be extended to the petitioner therein, who had served as daily-wager for 10 years with post-regularization regular service of more than 7 years and 5 months and by adding two years of regular service, on account of 10 years of daily-waged service, his service was counted as 9 years 5 months and applying judgment in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), 9 years 5 months were reckoned as 10 years.

21. Concurring with the aforesaid view, the Division Bench held that petitioner Tilak Ram having post-regularization service of 6 years 9 months, with ten years daily-waged service, shall be entitled for addition of two years regular service for ten years daily-waged service and, after adding these two years, his service would be 8 years 9 months which shall be treated as ten

years for the purpose of qualifying service for pension, in terms of law laid down in *Sunder Singh's* case (Civil Appeal No.6309 of 2017).

22. CWP No.267 of 2015, titled as *Sanehru Devi v. State of Himachal Pradesh and others,* was disposed of vide order dated 6.1.2015, with direction to the respondents to take appropriate action, keeping in view outcome of SLP (Civil) No.34038, titled as *Sunder Singh v. State of H.P.* pending, at that time, before the Supreme Court. After decision of *Sunder Singh's* case (Civil Appeal No.6309 of 2017), Sanehru Devi was not granted pension for not serving for 10 years after regularization. She filed Execution Petition No.117 of 2018 in CWP No.267 of 2015, titled as *Smt. Sanehru Devi v. State of Himachal Pradesh & others,* and during pendency of Execution Petition, claim of Sanehru Devi was rejected by the Department, whereafter, vide order dated 24.6.2019, passed in the said Execution, the Division Bench had held as under:

> "5. It is not in dispute that the husband of the petitioner Shri Ghulla Ram was initially engaged as Beldar on daily wage in the year 1984 and thereafter granted work charge status w.e.f. 1.1.1994 and served upto 31.5.2001 and had thus rendered 7 years 5 months period in the department as work charged Beldar. Now, in case the two years are added to this period as per the judgment rendered in Sunder Singh's case (supra), his total period worked out to be 9 years and 5 months, which definitely is more than 8 years though less than 10 years and thus his case is squarely covered for grant of pension as per the judgment rendered in Sunder Singh's case (supra), as the service put in by him has to be reckoned as ten years."

23. During the course of hearing of this Reference, we have been, it has been informed that the Division Bench, in *Sanehru Devi's* case, vide order dated 9.9.2021, passed in Review Petition No.91 of 2021, preferred by State in the said case, has reviewed its order dated 24.6.2019, passed in Execution Petition No.117 of 2018, and the Execution Petition has been ordered to be restored to its original number. Therefore, view taken in Execution Petition

No.117 of 2018 is no more in existence. Now only the view taken in CWP No.3396 of 2091 is in force.

24. Another Division Bench in CWP No.3598 of 2019, titled as *Balo Devi v. State of H.P,* has expressed the view that in case, after giving weightage of pre-regularization daily-waged service of an employee towards regular service, in terms of *Sunder Singh's* case (Civil Appeal No.6309 of 2017), his service does not become 10 years, then he cannot be held entitled for pensionary benefits, by considering service of less than 10 years as 10 years. According to this Division Bench, as expressed in Reference Order dated 14.9.2021, an employee shall be entitled for pensionary benefits in case he completes 10 years service after addition of daily-waged service, as mandated in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), i.e. 5 years of daily-waged service shall be treated equal to 1 year regular service. In case years of regular service of an employee, even after adding the weightage of daily-waged service remains less than 10 years then he shall not be entitled for pensionary benefits. 8 years regular service shall be reckoned as 10 years only by giving weightage of daily-waged service after adding it in his actual regular service.

25. We have heard learned counsel for the petitioner as well as learned Additional Advocate General, and have also gone through the record of *Sunder Singh's* case (CWP No.3396 of 2011), wherein alongwith copy of order passed by the Supreme Court of India, a copy of SLP No.34038 of 2012 preferred by Sunder Singh is also available.

26. From record, it is evident that Sunder Singh, who was regularized after 10 years daily-waged service, in terms of *Mool Raj Upadhyaya Vs. State of H.P. and Ors. 1994 Supp(2) SCC 316*, was seeking direction to the Department for counting 50% of his daily-waged service for the purpose of calculation of qualifying service necessary for pensionary benefits.

27. Learned counsel for the petitioner has supported the view taken by the Division Bench in CWP No.3396 of 2021 and similar view taken by a

Single Bench in CWP No.2110 of 2020 (supra). Reliance has also been placed on judgment of another Division Bench, passed in CWP No.5067 of 2020, titled as *Baryam Singh v. State of H.P. & others*.

28. It is contended on behalf of the petitioner that in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), the Supreme Court created a legal fiction by giving a mandate that in case, after adding benefit of daily-waged service towards regular service, service of employee becomes more than 8 years but less than 10 years, his service shall be reckoned as 10 years. It has also been submitted that though there would be a shortfall of service of about 2 years but because of legal fiction created by the Supreme Court, the length of service of such employee shall be reckoned as 10 years so as to extend benefit of pension to such employee who has been regularized after serving as daily-wager for a considerable long period. Learned counsel has further contended that in Para-6, in first sentence, of order in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), words "total eligible service" have been used for entitlement to pension by Sunder Singh and other similarly placed Class-IV employees, w.e.f. 1.1.2018, whereas, in second line, words "Daily wage service" have been used for treating 5 years of daily wage service equal to 1 year of "regular service" and in last line word "services" only has been referred. According to the learned counsel, four references of the word "Service", i.e. "total eligible service", "daily-wage service", "regular service" and "service" have been used in different contexts. In the first sentence, "total eligible service" means period of post-regularization service plus period treated to be regular service on the basis of daily-waged service being weightage for such daily-waged service directed by the Supreme Court and plus any shortfall between 8 and 10 years to be taken into consideration for reckoning that service as 10 years, in terms of fiction created by the Supreme Court. It has also been contended that the last line of para-6 clearly says that if after adding years to regular service on the basis of daily-waged years, as directed by the Supreme Court, service of an

employee becomes between 8 and 10 years then his service would be reckoned as 10 years and the words "on that basis" refer to the service counted on the basis of benefit extended to an employee as per direction of the Supreme Court for his daily-waged service.

29. Learned counsel for the petitioner has also contended that where two interpretations, with respect to a beneficial legislation, are possible, then the interpretation beneficial to the beneficiary should be preferred and, thus, it is submitted on behalf of the petitioner that in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), the Supreme Court has introduced a provision for extending benefit to daily-waged employee and, therefore, interpretation of such direction, extending the benefit to daily-waged employee, should be construed and preferred in a manner which extends maximum benefit to the employee, but not prejudicial to his right of pension.

30. Learned Advocate General has supported the view expressed by the Division Bench in order dated 14.9.2021, whereby matter has been referred to this Larger Bench, with submissions that though earlier, in terms of O.M. dated 14.5.1968, 50% of daily-waged/contingent service was being counted by adding it in regular service of the employee for calculating qualifying service for granting pensionary benefits, however, after enactment of CCS (Pension) Rules, 1972, no such provision for counting daily-waged or contingent service is in existence, and further said issue has been set at rest by a Division Bench of this High Court in CWP No.180 of 2001, decided on 31.5.2012. He has further submitted that after verdict of the Supreme Court of India in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), a daily-waged employee, after regularization, will be entitled for counting 5 years daily-waged service equal to 1 year of regular service, for the purpose of calculation of qualified service for granting pension, but in case even after adding such benefit on the basis daily-waged service, an employee does not complete requisite years of qualifying service, as required under CCS(Pension) Rules,

1972, he shall not be entitled for pension and in such eventuality his service of more than 8 years but less than 10 years cannot be treated as 10 years for the purpose of granting pension. According to him, the order of Supreme Court does not extend benefit of 2 years on the basis of daily-waged service plus 2 years by way of legal fiction as claimed by the petitioner. He has also submitted that in case intention of the Supreme Court would have been for extending benefit of 2+2 = 4 years, then instead of extending benefit of daily-wage service of 5 years to treat equal to 1 year of regular service, the Supreme Court would have directed to count 2½ years of daily-waged service equal to 1 year regular service, instead of as directed in Para-6 of judgment/order in *Sunder Singh's* case (Civil Appeal No.6309 of 2017).

31. In rebuttal, it is argued on behalf of the petitioner that reference in last line of Para-6 of *Sunder Singh's* case (Civil Appeal No.6309 of 2017), of service of more than 8 years but less than 10 years, for reckoning such service as 10 years service, has been made with the intention to bring all those employees under the umbrella of pensionary benefit, who, after serving as daily-wagers for long period, were not able to complete the qualifying service even after addition of year(s) on the basis of daily-waged service and, according to him, therefore, the reason, on the basis of which reference has been made by expressing that less than 10 years can never be 10, is a wrong interpretation of *Sunder Singh's* case (Civil Appeal No.6309 of 2017) because in said case there is an unambiguous direction of the Supreme Court to reckon service, of more than 8 years but less than 10 years, to be 10 years service for extending benefit of pension to employees regularized after serving as daily-wager and direction of the Supreme Court is to be interpreted on the basis of proportionate equality, instead of numeric equality. It is also contended that in case view explained by the Division Bench in order dated 14.9.2021 is accepted then Rule 39 of CCS (Pension) Rules, 29172 shall

become redundant and even those employees who are eligible for pension in terms of Rule 49 (supra) shall also be excluded from pensionary benefits.

32. It has also been submitted that in case 10 years is to be taken 10 years only, then it would be contrary to the provision of Rule 49 of the CCS (Pension) Rules, 1972, wherein service 9 years 9 months is taken as 10 years service for granting pension.

33. In judgment dated 2.3.2021, passed in CWP No.5067 of 2020 (supra), the Division Bench has not interpreted the directions passed by the Supreme Court in *Sunder Singh's* case (Civil Appeal No.6309 of 2017). In that case, submissions of learned counsel for the petitioner made on the basis of *Sunder Singh's* case (Civil Appeal No.6309 of 2017) have been recorded, whereby it was claimed that after serving for 8 years, petitioner therein, was entitled to reckon his service as 10 years for the purpose of pension. Thereafter, it is observed that it has been held that where a person has completed 8 years but less than 10 years, it would be reckoned as 10 years for the purpose of pensionary benefits. Lastly, statement of learned Advocate General has been recorded in that case, wherein he submitted that in case the petitioner had rendered 9 years service, it will be counted 10 years qualifying service for the purpose of pensionary benefits, and thereafter, the petition was disposed of permitting the petitioner therein to make a representation to respondents for extension of the pensionary benefits, with further direction that such representation shall be considered by the respondents-State and if the petitioner is found entitled for the pensionary benefits, appropriate orders be passed and benefits of the same shall be released to him within a period of three months thereafter.

34. In *Baryam Singh's* case, there is no mandate of the Court that service of 8 years shall be reckoned as 10 years, but the petition was disposed of, on the basis of statement of learned Advocate General, with direction to pass appropriate order if petitioner was considered to be entitled for benefit of

pension. In any case, in that judgment, ratio of *Sunder Singh's* case (Civil Appeal No.6309 of 2017) has been considered on the analogy of view taken in CWP No.3396 of 2021 and CWP No.2110 of 2020, decided by this High Court, which view is already subject matter of this reference. As referred supra, view taken in Execution Petition No.117 of 2018 in CWP No.267 of 2015 stands recalled in Review Petition No.91 of 2021, preferred by the State and, therefore, the said view is not in existence. However, that view was similar to the view taken in CWP No.3396 of 2021, which is in existence and under reference.

35. For giving meaning to the direction issued by the Supreme Court in *Sunder Singh's* case (Civil Appeal No.6309 of 2017), in Para-6, vide order dated 8.3.2018, the said order is to be read in totality, as a single unit but not in piece-meal manner by picking up a line from the entire order, in isolation to the other observations, which, in fact, are background of the directions issued by the Supreme Court.

36. It has already been noticed that Sunder Singh was agitating for counting of his daily-waged service alongwith his post-regularization service of more than 9 years for the purpose of granting pensionary benefits. He was regularized in pursuant to decision of the Supreme Court in *Mool Raj Upadhaya's* case under a Scheme of Regularization after 10 years of daily-waged service.

37. It has been recorded by the Supreme Court that, undisputedly, post-regularization, an employee, who had served for 10 years, is entitled to pensionary benefits and for counting such service, work-charge service is counted, but for change in the Rules, no benefit of 50% of daily-waged service was available to an employee and, thus, it has also been observed by the Supreme Court that Sunder Singh and others have not rendered requisite 10 years service and, therefore, they were denied pension.

38. In Para-5 of *Sunder Singh's* case (Civil Appeal No.6309 of 2017), it has been observed that strictly construing the Rules, Sunder Singh and others, might not be entitled to pension, but a view was expressed by the Supreme Court that they were entitled to weightage of service rendered as daily-wagers towards regular service for the purpose of pension, in furtherance to provisions of Articles 14, 38 and 39 of the Constitution of India and applying the doctrine of proportionate equality. In the aforesaid facts and circumstances, direction in Para-6 in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) stood passed.

39. First sentence of Para-6 of *Sunder Singh's* case (Civil Appeal No.6309 of 2017) declares and affirms the Rules by stating that with effect from 1.1.2018, Sunder Singh and other similarly placed Class-IV employees will be entitled to pension only if after regularization, they have completed total eligible service for more than 10 years. The second sentence gives a formula for extending the weightage of daily-waged service rendered by them by providing that 5 years daily-waged service will be equal to 1 year of regular service for the purpose of pension. As petitioners before the Supreme Court had been regularized after serving for 10 years as daily-wagers, but post-regularization they were not having regular service of 10 years qualified service for the purpose of pension, and after applying the formula for counting their 5 years of daily-waged service equal to one year, they were to be considered entitled for benefit of 2 years regular service on the basis of their length of daily-waged service. Therefore, an illustration has been given by the Supreme Court in the last line of Para-6, by saying that in case of employees, whose service is more than 8 years but less than 10 years, then by adding benefit of 2 years of regular service on the basis of 10 years daily-waged service of such employees, their service, of more than 8 years but less than 10 years, shall be reckoned as 10 years.

40. First part of Para-6 of judgment in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) is the Rule. Its second part, directing to count 5 years daily-waged service equal to 1 year, is legal fiction, whereas third part is an illustration with reference to the facts of *Sunder Singh's* case and also of other connected matters. Words "total eligible service" in first part is referring to service prescribed as qualified service in Pension Rules. In second part "daily wage service" refers to pre-regularization daily-waged service to be counted for treating it as regular service for adding in post-regularization service, as directed by the Supreme Court, i.e. 5 years daily-waged service equal to 1 year regular service. In third part, i.e. illustration "service" refers to actual post-regularization service, which, by giving benefit of daily-waged service, is to be counted and reckoned as 10 years for completing deficit in total eligible service necessary for pension under relevant Rules. By doing so, services of Sunder Singh and other similarly situated persons were to be reckoned as 10 years. There is no other harmoniously possible plausible view or interpretation of direction of the Supreme Court which can be taken. Therefore, there is no question of adopting or taking view beneficial one as there is only one view. Other view, being propounded, is not a possible view because in that eventuality there was no necessity to create a legal fiction that 5 years daily-waged service shall be treated as 1 year, as petitioners before the Supreme Court had already served for more than 8 years regular service and without counting their daily-waged service, the direction would have been issued that service of such employees shall be reckoned as 10 years. Thus, to draw different meaning of word "service", as contended by learned counsel for the petitioner, is not tenable and submission with respect to proportionate equality and numeric equality as well as view beneficial to employee are also misconceived.

41. Word "reckoned" apparently has been used for the reason that as per Rule, qualifying post-regularization regular/work-charge service shall be

10 years but in case it is less than 10 years then after adding benefit of daily-waged service, as directed by the Supreme Court, it shall be reckoned as 10 years. The term "of more than 8 years" has been referred for the reason that the petitioners before the Supreme Court had been regularized after 10 years of daily-waged service and, therefore, the persons, who are having entitlement for benefit of 2 years regular service, on the basis of 10 years daily-waged service, then they would have been eligible to reckon their service as 10 years, but only after completion of post-regularization regular and work-charge service of more than 8 years but less than 10 years. Therefore, for reckoning the service, of more than 8 years but less than 10 years, equal to 10 years shall occur only after adding benefit of daily-waged service as provided in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) and as expressed in the reference order, but not as expressed in CWP No.3396 of 2021 or CWP No.2110 of 2020 and also not as construed in CWP No.5067 of 2020 or similar view taken in any other judgment.

42. Before parting, it would be appropriate to deal with the apprehension raised on behalf of the petitioner that the interpretation, as expressed in Reference Order, would be contrary to Rule 49 of the CCS (Pension) Rules, 1972, wherein 9 years 9 months are reckoned as 10 years. The apprehension is misconceived as for determining the qualifying service for the purpose of pension any benefit as provided in Rule 49 has not been taken away and an employee has not been precluded from getting such benefit. The benefit extended in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) is in addition to that and 10 years service, referred in that case, is to be calculated in the manner as provided under the CCS (Pension) Rules, 1972, but definitely an employee shall be entitled for benefit of daily-waged service as directed in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) that 5 years daily-waged service shall be treated equal to 1 year regular service for the purpose of granting pension and in case the person has served for 15 years or 20 years as

a daily-wager then he shall be entitled for benefit of 3 or 4 years, as the case may be, of regular service for the purpose of calculating qualifying service for pension and, in such eventuality, if an employee, post-regularization, is having 7 or 6 years of regular service, then after adding benefit of daily-waged service, such employee shall be entitled for pensionary benefits. The term "more than 8 years but less than 10 years" in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) is an illustration with reference to the petitioners therein, wherein the petitioners were having post-regularization service of more than 8 years with daily-waged service of 10 years and the cases of post-regularization service 6 years or 7 years or less than that with daily-waged service of 15 years or 20 years or more than that was not before the Supreme Court. But in any case if service of an employee does not become 10 years, as required under rule 49 of CCS (Pension) Rules, 1972, even after adding benefit of daily-waged service as mandated in *Sunder Singh's* case (Civil Appeal No.6309 of 2017) i.e. counting 5 years equal to one year, then such employee shall not be entitled to reckon his service as 10 years, in terms of Rule 49 (supra). Thus, we hold that in such case 8 years cannot be taken as 10 years.

43. In view of above discussion, we are of the considered opinion that view expressed in Reference Order dated 14.9.2021 by the Division Bench, in CWP No.3598 of 2019, is appropriate application of the judgment of Supreme Court passed in *Sunder Singh's* case (Civil Appeal No.6309 of 2017).

Reference is answered accordingly.

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

Between:-

RESIDENTS OF VILLAGE BHALECH,
GAWAI, JADEOG, SANANA, KUANAL
AND KARIYAL THROUGH THE
AUTHORIZED PERSON SH. RAKESH

S/O SH. MAST RAM, R/O VILLAGE
JADEOG, P.O. SANDHU TEHSIL THEOG
DISTRICT SHIMLA, H.P.

....PETITIONER

(BY SH. SANJEEV BHUSHAN, SR. ADVOCATE
WITH MR. RAJESH KUMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (PANCHAYATI RAJ)
TO THE GOVERNMENT OF HIMACHAL
PRADESH.

2. DIRECTOR PANCHAYATI RAJ,
HIMACHAL PRADESH,
SHIMLA.

3. DEPUTY COMMISSIONER, SHIMLA
DISTRICT SHIMLA, H.P.

4. BLOCK DEVELOPMENT OFFICER,
THEOG, DISTRICT SHIMLA.

5. PANCHAYAT SECRETARY
SANDHU TEHSIL THEOG,
DISTRICT SHIMLA, H.P.

6. THE DISTRICT PANCHAYAT
OFFICER, SHIMLA.

7. DISTRICT AUDIT OFFICER,
O/O DISTRICT PANCHAYAT
OFFICE, SHIMLA, H.P.

..RESPONDENTS

(MR. ASHOK SHARMA, A.G. WITH MR. R.S. DOGRA, SR. ADDL. A.G., MR. VINOD THAKUR, MR. SHIV PAL MANHANS AND MR. HEMANSHU MISRA, ADDL. A.Gs FOR THE RESPONDENT-STATE.
MR. CHANDRANARAYANA
SINGH, ADVOCATE FOR R-5)

CIVIL WRIT PETITION NO. 4588 OF 2020
Decided on: 01.09.2021

Constitution of India, 1950 - Article 226 - Resolution of Gram Panchayat- Official record tempered - Inquiry and F.I.R. ordered- Petition dismissed.

Cases referred:

Ganesan v. Rama Ranghuraman (2011) 2 SCC 83;
State of Uttar Pradesh v. Naresh, (2011) 4 SCC 324;
Kailash Gour and others v. State of Assam (2012) 2 SCC 34:
Narendra Singh v. State of Madhya Pradesh (2004) 10 SCC 699;
Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294;

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

O R D E R

On 14.12.2020, this Court had passed the following orders:-

> "In this case arguments were heard in detail by us on 08.12.2020 and thereafter the judgment was reserved. However, while going through the records submitted by the District Panchayat Officer, we came across two resolutions of the same date i.e. 25.11.2019 and both these resolutions were found to differ in the material contents.
>
> We refer to the first resolution as Resolution 'A' where the population is shown as 2996, whereas in the resolution which we will refer to as Resolution 'B' the population is stated to be 2417. But what is more glaring is that there is no reference or suggestion to the name ofthe new Gram Sabha to be carved out in Resolution 'A',whereas in the Resolution 'B', it is

> specifically stated that the name of the new Gram Sabha to be carved out shall be 'Jungle Nirguni'.
>
> Even though both these resolutions have been signed, however, Resolution 'A' is signed and bears date 25.11.2019, whereas Resolution 'B' is undated.
>
> In such circumstances, we are left with no other option but to fix the case for re-hearing. Ordered accordingly. The B.D.O., Theog and Panchayat Secretary,Sandhu, are ordered to be impleaded as party-respondents and shall figure as respondents No. 4 and 5,respectively.
>
> Let personal affidavits on behalf of newly added respondents be filed within one week from today.
>
> The personal presence of B.D.O. is dispensed with, however, the Panchayat Secretary shall personally remain present in the Court on the next date of hearing...."

2. In compliance to the aforesaid order, the Block Development Officer and Panchayat Secretary had filed their personal affidavits and after going through the contents thereof, this Court proceeded to implead District Panchayat Officer, Shimla and District Audit Officer, Shimla as party respondents.

3. Thereafter, after going through the respective affidavits and counter-affidavits, this Court felt that the matter was required to be probed by some person, who was well conversant with the working of the Panchayati Raj Department and accordingly, Sh. Surinder Maltu, Additional Director-cum-Joint Secretary (Panchayati Raj) was directed to investigate into the matter and submit his report.

4. Sh. Maltu thereafter submitted his report, however, the conclusions drawn by him were not very explicit and clear, therefore, vide order dated 04.08.2021, we directed him to give explicit and clear conclusions.

5. It is thereafter that Sh. Maltu has given his conclusions, which read as under:-

> *"That allegations made by respondent no.5 in the affidavit filed before the Hon'ble Court of Himachal Pradesh are correct to the*

extent that the errors/omissions committed at her level in the Resolution at annexure 'A' were sought to be corrected at the behest of the people of Gram Panchayat, Sandhu and due to the paucity of time for convening of Gram Sabha meeting of Gram Panchayat, Sandhu and on the verbal direction of the offices of the District Panchayat Office, Shimla. As far as the difference in population is in Resolution No 'A'&'B' is concerned she admitted that it was due to an inadvertent error as the population of Scheduled Caste residents were added twice to the total population. However, the correct population was 2417. It is also true that both resolutions were signed by the pradhan of Gram Panchayat, Sandhu but the resolution 'B' is undated. From the statement of the respondent no. 4-7, it is also clear that the office of gram panchayt, Sandhu and Block Development Officer, Theog have also omitted to exercise their duty while dealing with the Resolution at annexure 'A' as the same was forwarded from its office without going through it and correcting the errors and thereafter, the Resolution as annexure 'B' was prepared to cover up those errors. As far as the allegation regarding the pressure exerted on her by the District Audit Officer, Shimla and Block Development Officer, Theog is concerned it was due to the errors found in the resolution at Annexure-'A' w.r.t. the name of new Gram Panchayat to be carved out neither mentioned nor its head quarter at 'Devimod' being a revenue village and anomaly in the number of population of the villages. Therefore, the O/o District Panchayat Officer, Shimla had intimated the Block Development Officer, Theog and Panchayat Secretary, Sandhu to correct the same immediately as the matter was urgent and time bound as the process for the bifurcation of Gram Panchayat, Sandhu along with other gram panchayats were to be started well in time."

6. The complicity of respondent No.5 has *prima-facie* been established, therefore, we direct the respondent Department to hold a regular inquiry

against her and till the conclusion of such inquiry, the 5th respondent shall remain under suspension.

7. Since the 5th respondent has prima-facie interpolated and tampered with the official records, as such, we direct respondent No.2 to lodge an FIR under appropriate provisions of law against her within a period of one week from today.

8. As observed above, these views are only tentative and cannot be held to cast any aspersion or ascribe the petitioner guilty to misbehaviour. It is a matter to be proved in a proper proceeding after due opportunity to the petitioner by associating him in such proceedings in a regular inquiry.

9. The observations made above are, therefore, to be read down as one simply made in the interest of administration and to maintain un-vitiated atmosphere, both in the interest of the petitioner and others in the staff.

10. The observations made by this Court are to be read in light of the observations made by the learned Division Bench of this Court in ***LPA No. 480 of 2012*** titled ***State of H.P. and another*** *versus* ***Sakshi Sharma and others,*** along with connected matters, decided on 03.09.2014 which read as under:-

> *"10. We have considered the rival contentions and are of the considered view that since the matter was pending investigation/ disciplinary proceedings, it was not proper or appropriate at this stage for the learned Single Judge to have recorded firm findings regarding the guilt of the police officials leaving no room for these police officials to urge the contrary. The effect of the judgment if allowed to stand would be to pre-empt the entire decision leaving nothing for the disciplinary authority or competent criminal court to decide. The findings recorded by the learned Single Judge have therefore definitely prejudiced the case of the police officials. Further, in case the findings so recorded are allowed to stand, it would be an onslaught and encroachment and would also amount to taking over the reigns of the disciplinary authorities and/or the criminal courts.*

11. It has to be remembered that while exercising the powers of a Constitutional Court a firm finding of fact in such like case can be returned only in exceptional cases. The observations made by the learned Single Judge may though be founded upon the material on record, nonetheless they remain only tentative for want of conclusive proof and at best can be termed to be prima facie views only. No doubt, in the case in hand, the allegations are serious, even the circumstances somewhat seem to support them, even the consequences are quite apparent, yet the material on record is not within the degree of conclusive proof on the basis of which firm findings of fact could have been returned. These at best may have given rise to a strong suspicion, but yet could not have been held to be conclusive. The truth must surface in the interest of those who are accusing and/or are being accused, therefore, to reach a definite conclusion, the investigation and disciplinary proceedings are inevitable whereafter alone the guilt, if any, of the police officials can be established.

12. This Court otherwise cannot be oblivious to the fact that in teeth of such firm findings as recorded by the learned Single Judge, no subordinate court or even the disciplinary authority would dare to go beyond these findings. More so when the order passed by the learned Single Judge does not even state that the findings as recorded are only tentative or prima-facie. Obviously, therefore, the findings so recorded in our considered view amounts to pre-judging the issues because the matter is pending investigation/disciplinary proceedings and it is possible that on its conclusion the Court /disciplinary authority may have sufficient material with it on the basis of which whatever has been said in the judgment could be sustained. However, it is equally possible that the material which the Court/ disciplinary authority may collect may not be enough to substantiate those allegations. When both the possibilities are there, the learned Single Judge should not have returned firm findings at this pre-mature stage.

14. The findings recorded by the learned Single Judge are otherwise required to be taken only prima facie and tentative for yet another reason, because if taken to be final or conclusive, this would be contrary to the settled proposition of law that "unless a person is convicted, he is presumed to be innocent." The presumption of innocence is a human right. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence – be it an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent Court as held by the Hon'ble Constitution Bench of the Supreme Court in a recent decision in ***Manoj Narula*** *vs****. Union of India W.P.(C) No. 289 of 2005 decided on 27.8.2014*** *wherein it has been held as follows:*

> *"24. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence – be it in the form of an off-the-cuff allegation or an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Criminal Procedure Code or even on charges being framed by a competent Court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked – a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal – that person may stand 'condemned' in the public eye, but even that does not entitle anyone to brand him or her a criminal."*

Therefore, merely because a First Information Report is lodged against a person or a criminal complaint is filed against him or even a charge has been framed against a person, he cannot be presumed to be guilty because this itself would frustrate and, eventually, defeat the established concept of criminal

jurisprudence that an accused is presumed to be innocent till he is proved to be guilty and there is indeed a long distance between the accused "may have committed the offence" and "must have committed the offence" which must be traversed by the prosecution by adducing reliable and cogent evidence. [See: ***Narendra Singh v. State of Madhya Pradesh (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294, Ganesan v. Rama Ranghuraman (2011) 2 SCC 83, State of Uttar Pradesh v. Naresh, (2011) 4 SCC 324*** *and* ***Kailash Gour and others v. State of Assam (2012) 2 SCC 34****].*

11. Adverting to the facts of the instant case it could be noticed that the sheet anchor of the entire petition is founded on the Resolution which otherwise does not exist in the official records, therefore, obviously in such circumstances, no relief muchless relief as sought by the petitioners can be granted to them. Accordingly, the petition is dismissed.

12. However, we make it clear that this order shall not come in the way of the petitioners in case they muster-up the requisite majority and pass fresh Resolution regarding the renaming of the Panchayat. Pending application(s), if any, shall also stand disposed of.

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

CIVIL WRIT PETITION NO. 4954 OF 2021

Between:-

NAKUL CHAUHAN
S/O SH. DAYAL CHAUHAN,
R/O V&PO SHARLI MANPUR,
TEHSIL KAMRAU, DISTRICT SIRMOUR.

....PETITIONER

(BY SH. B.C. NEGI, SR. ADVOCATE WITH

MR. Y.W. CHAUHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY
(HPPWD) TO THE GOVERNMENT OF H.P.
SHIMLA-171 002.

2. CHIEF ENGINEER (SHIMLA ZONE)
HPPWD, NIRMAN BHAWAN,
NIGAM VIHAR, SHIMLA-171002.

3. SUPERINTENDING ENGINEER,
HPPWD NAHAN, DISTRICT SIRMOUR, H.P.

4. EXECUTIVE ENGINEER,
HPPW DIVISION SHILLAI,
DISTT. SIRMOUR, H.P.

..RESPONDENTS

(MR. ASHOK SHARMA, A.G. MR. RAJINDER DOGRA, SR. ADDL. A.G., MR. VINOD THAKUR, MR. SHIV PAL MANHANS, MR. HEMANSHU MISRA, ADDL. A.Gs AND MR. BHUPINDER THAKUR, DY. A.G.

CIVIL WRIT PETITION NO. 4370 OF 2021

Between:-

NARESH KUMAR VIJ
S/O SH. BABU RAM VIJ
GOVERNMENT CONTRACTOR,
R/O KAMLA NIWAS, CHOTTA SHIMLA,
H.P- 171002.

….PETITIONER

(BY SH. VIKRANT THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY(HPPWD)
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA.

2. SUPERINTENDING ENGINEER (D-III)
HPPWD, SHIMLA-02.

3. SUPERINTENDING ENGINEER, 12th CIRLCE
HPPWD NAHAN, DISTRICT SIRMOUR, H.P.

4. EXECUTIVE ENGINEER,
RAJGARH DIVISION,
HPPWD RAJGARH,
DISTT. SIRMOUR, H.P.

..RESPONDENTS

(MR. ASHOK SHARMA, A.G. MR. RAJINDER DOGRA, SR. ADDL. A.G., MR. VINOD THAKUR, MR. SHIV PAL MANHANS, MR. HEMANSHU MISRA, ADDL. A.Gs AND MR. BHUPINDER THAKUR, DY. A.G.

CIVIL WRIT PETITION NO. 4371 OF 2021

Between:-

NARESH KUMAR VIJ
S/O SH. BABU RAM VIJ
GOVERNMENT CONTRACTOR,
R/O KAMLA NIWAS, CHOTTA SHIMLA,
H.P- 171002.

....PETITIONER

(BY SH. VIKRANT THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY(HPPWD)
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA.

2. SUPERINTENDING ENGINEER (D-III)
HPPWD, SHIMLA-02.

3. SUPERINTENDING ENGINEER, 12th CIRLCE
HPPWD NAHAN, DISTRICT SIRMOUR, H.P.

4. EXECUTIVE ENGINEER,
RAJGARH DIVISION,
HPPWD RAJGARH,
DISTT. SIRMOUR, H.P.

..RESPONDENTS

(MR. ASHOK SHARMA, A.G. MR. RAJINDER DOGRA, SR. ADDL. A.G., MR. VINOD THAKUR, MR. SHIV PAL MANHANS, MR. HEMANSHU MISRA, ADDL. A.Gs AND MR. BHUPINDER THAKUR, DY. A.G.

CIVIL WRIT PETITION NO. 4954 OF 2021

RESERVED ON: 08.09.2021
DECIDED ON: 15.09.2021

Constitution of India, 1950- Article 226- Jurisdiction- Tender Cancellation- Held- Constitutional Courts can always exercise jurisdiction on all the matters including the matters arising from the Government contracts in case the transactions suffer from arbitrariness, irrationality, malafides or bias- Actions of respondent suffer from vice of arbitrariness and discrimination whereas fairness should be the hallmark of every public action- Petition dismissed.

Cases referred:
MAA Binda Express Courier Vs North East Frontier Railways and others (2014) 3 SCC 760;
Rishi Kiran Logistics Pvt. Ltd Versus Board of Trustees of Kandla Port, (2015) 13 SCC 233;
Silppi Constructions Contractors vs. Union of India and another, (2020) 16 SCC 489;
State of Jharkhand & Ors v/s Cwe-Soma Consortium, 2016 14 SCC 172;
State of Uttar Pradesh & Anr v/s Al Faheem Meetex Private Ltd & Anr, 2016 4 SCC 716;

These petitions coming on for orders this day, ***Hon'ble Mr. Justice Satyen Vaidya***, passed the following:

O R D E R

All these writ petitions are being decided by a common judgment due to identical questions of law and facts involved therein.

2. The common issue involved in all the cases is, whether the respondents could justifiably recall and cancel the tenders for the reasons which were not part of the terms and conditions of Notice Inviting Tenders (for short, "NIT").

3. In CWP No. 4954 of 2021, the NIT was issued for construction of link Road from Siyasu to Morar KM 00 to 3/500. In CWP No. 4370 of 2021, the NIT was for metalling and tarring on Maryog- Lana-Ravana road Km 0/00 to

20/265 and the NIT in CWP No. 4371 of 2021, was for metalling and tarring on Kawal Bandli Tharu road Km 0/02 to 5/600,

4. Whereas, the NIT in CWP No. 4954 of 2021 was for work pertaining to Shillai Division of Himachal Pradesh Public Works Department, the NITs issued in CWPs 4370 and 4371 of 2021 were for the Rajgarh Division. Both divisions are under Superintending Engineer, 12th Circle, HPPWD, Nahan.

5. In all the cases, the petitioners were found technically responsive and after opening of financial bids, they were found "**L-1"** in their respective tenders. The respondents, however, decided to recall and cancel the tenders in all the cases for the reasons that the bids could not be invited strictly in accordance with the provisions of CPWD Manual, which prohibited the grant of tender beyond (-10%) or (+ 5%)of the estimated value of the work. In all the cases, the bid amounts quoted by the petitioners were found below (-10%) of the estimated costs, which became the reason for impugned recalling and cancellation of tenders.

6. Petitioners have contended that the NIT did not provide for any such condition and, therefore, the actions of the respondents to recall and cancel the tenders on a condition which was not part of the NIT, were not only unreasonable and arbitrary, but also smeared with malafides.

7. The petitioners have further alleged that the orders whereby the NITs have been recalled and cancelled are non-speaking to the extent that these do not convey the reasons for cancellation of the tenders. The corrigendum issued only states "due to the administrative reasons/issues".

8. On notice, the respondents have contested the claims of the petitioners. It is stated that the issue raised by the petitioners is squarely covered by the judgment passed by this Court in CWP No. 4411 of 2021. The specific stand of the respondents is that upon evaluation of the bids, the same were submitted to the competent authority. On examination, the office of Chief Engineer, South Zone, Shimla-2 observed that the bids were not in accordance

with the instructions dated 22.07.2020 issued by the Principal Secretary (HP PWD), whereby the CPWD manual was made applicable to the HP PWD by the Government of Himachal Pradesh. As per salient features of CPWD working manual, the bids are required to fulfill the conditions contained at Serial No. 12, which states as under:-

> ***"12. Tenders will also be invited on the basis of working of estimates approved on market rates and shall be awarded without negotiation if the tendered amount is within limit of (+) 5% to (-) 10% (MORTH letter No. RW/NH-15017/12/2015-P&M dated 9th July, 2018), otherwise the tenders will be recalled and negotiation shall be governed as per CPWD Manual or CVC guidelines."***

9. As per stand of the respondents, the bids involved in the instant cases were not found to be in accordance with the above noted instructions of the Government and provisions contained in CPWD working manual, hence the recalling and cancellation of the tenders was justified.

10. We have heard learned counsel for the parties and have also gone through the record of the case.

11. We are not in agreement with the contention of petitioners that impugned cancellation orders, being bereft of reasons, need to be quashed on that ground alone. The impugned orders are purely administrative orders that too, in the realm of commercial contracts. The respondents have specified reasons for impugned cancellation of tender in their response to the petitions filed by the petitioner and that can be taken to be sufficient compliance in the context of matters in hand.

12. Evidently, all the NITs, involved in the cases herein, were silent on the applicability of the conditions contained in CPWD working manual to the works tendered thereby. The conditions of above noticed manual were not made applicable either in general or by incorporation of any specific condition thereof as integral part of the NIT.

13. The record reveals that before cancellation of NITs, the above mentioned Clause 12 of CPWD working manual was never sought to be incorporated in the terms of NIT and the petitioners or for that matter all other tenderers were not afforded opportunity to amend their bids accordingly. It can safely be assumed that in case such condition was made known to the petitioners beforehand, they definitely would have raised their bids to fall within the limit of (-) 10% of estimated costs.

14. Interestingly, the NITs have been recalled and cancelled on the ground that petitioners had quoted lesser prices than prescribed (-) 10% of the estimated tender cost. Respondents have tendered an explanation that the rates quoted by the petitioners were even lower than the prescription of Clause 12 of CPWD working manual, and thus it was apprehended that the execution of work would not be as per specification. The explanation so provided by the respondents is beyond comprehension. The NITs were issued by the State agency, which has no dearth of technical experts. It cannot be perceived that with the expertise available with respondents, still the possibility of below specifications works existed.

15. Respondents have taken strong exception even to the maintainability of these petitions. It is contended with vehemence that this Court in exercise of jurisdiction under Article 226 of the Constitution of India would not interfere with pure administrative decisions of respondents which are without any bias and malafides.

16. Respondents have placed reliance on **(2015) 13 SCC 233, Rishi Kiran Logistics Pvt. Ltd Versus Board of Trustees of Kandla Port** wherein it has been held as under:

> *"29. It thus stands crystalised that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element."*

17. In our considered view public law element is definitely present in the cases under consideration. It is question of proper utilization of public money. Respondents do not want to award work for lesser amounts for the reasons which, as discussed above, do not satisfy the conscience of the Court. In addition, the factor of escalation in costs with delay in completion of works also looms large.

18. Reliance has also been placed on judgment passed by Apex Court in **MAA Binda Express Courier Vs North East Frontier Railways and others (2014) 3 SCC 760,** in which it has been held as under**:**

> *"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent*

reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: Meerut Development Authority v. Association of Management Studies and Anr. etc., 2009 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd., 2000 1 SCR 505)."

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

19. The below observations made by Supreme Court in **STATE OF UTTAR PRADESH & ANR V/S AL FAHEEM MEETEX PRIVATE LTD & ANR, 2016 4 SCC 716** have also been relied upon by the respondents which reads as under**:**

"13. We find force in the aforesaid argument of the learned counsel for the appellants. In the first instance, it is to be noted that BEC is only a recommendatory authority. It is the Competent Authority which is to ultimately decide as to whether the recommendation of BEC is to be accepted or not. We are not entering into the discussion as to whether this Competent Authority is the State Government or the Municipal Corporation. Fact remains that there is no approval by either of them. Matter has not even reached the Competent Authority and no final decision was taken to accept the bid of respondent No.1 herein. Much before that, when the BEC was informed that there were only two

valid bids before it when it made its recommendation on September 08, 2010 and as per the Financial Rules there must be three or more bids to ensure that bidding process becomes competitive, the BEC realised its mistake and recalled its recommendation dated September 08, 2010. It cannot be said that such a decision was unfair, mala fide or based on irrelevant considerations. This, coupled with the fact that the authority has right to accept or reject any bid and even to annul the whole bidding process, the High Court was not justified in interfering with such a decision of the BEC.

14. The High Court has also gone wrong in finding fault with the decision of the BEC by holding that such a subsequent decision could not have been taken by the BEC without notice to or in the absence of the appellant. When the decision making process had not reached any finality and was still in embryo and there was no acceptance of the bid of respondent No.1 by the Competent Authority, no right (much less enforceable right) accrued to respondent No.1. In such a situation, there was no question of giving any notice or hearing to respondent No.1.

20. Respondents have also relied upon the judgment passed in **STATE OF JHARKHAND & ORS V/S CWE-SOMA CONSORTIUM, 2016 14 SCC 172,** wherein the Supreme Court held as under:

"12. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant and Ors. v. Satyawan and Ors., 1996 4 SCC 208; Rajasthan Housing Board and Anr. v. G. S. Investments and Anr., 2007 1 SCC 477 and Uttar Pradesh Avas Evam Vikash Parishad and Ors. v. Om Prakash Sharma, 2013 5 SCC 182).

13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
20. The government must have freedom of contract. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and Anr., 2005 6 SCC 138, in para (12) this Court held as under:-

> *"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

21. We are of view that judgments relied upon by respondents do not interdict this Court from exercising jurisdiction in appropriate cases. What has been laid down as law is that the Constitutional Courts can always exercise jurisdiction on all the matters including the matters arising from the Government contracts in case the transactions suffer from arbitrariness, irrationality, malafides or bias. However, the Constitutional Courts have to be conscious of the fact that in such cases, they have to exercise a lot of restraints while exercising their powers of judicial review.

22. Recently, in **Silppi Constructions Contractors vs. Union of India and another, (2020) 16 SCC 489**, after taking notice of a number of precedents, Hon'ble Supreme Court has held as under:-

> *19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of 12 2019 (6) SCALE 70 restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of* Article 12 *of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.*
>
> *20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the*

tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, malafides or perversity. With this approach in mind we shall deal with the present case."

23. Their Lordships, after discussing law on the issue in detail, proceeded to scrutinize the facts involved in that case and then found that the ground for interference were not made out in the facts and circumstances of the case .

24. While assessing the facts of the cases in hand at the touch stone of the above noticed expositions of law, we find that the action of the respondents is arbitrary and needs to be interfered with. We are not convinced that the impugned action of respondents is going to serve any public interest. On the contrary, we feel that said action of respondents is arbitrary and hence cannot be countenanced. It is strange that though the petitioners are ready to execute the tendered works on lower prices, yet the respondents want the public money to be wasted by making expenditure that can be avoided. In addition, the factor of delay in execution of work as also consequent escalated costs have also been conveniently ignored by respondents, which again cannot be said to be in public interest. Thus no public interest is evidently likely to be served by the impugned action of respondents.

25. During the course of hearing, learned counsel for the petitioners have brought to the notice of the Court a document dated 24.08.2021, whereby Chief Engineer, South Zone, HP PWD, Shimla-2 has conveyed the acceptance of tenders in respect of work i.e. construction of link road from Maninvi to Tharvi falling under the jurisdiction of Superintending Engineer, 11th Circle, Rampur. Perusal of contents of this communication reveals that bid of L-1 in that case was 37.14% below the estimated cost of tender and after negotiation though the bid amount remained the same, the bidder was asked to provide additional security amounting to Rs.15,00,000/- and the tender was accepted.

In response, the respondents have tried to explain that deviation in that case was made for the reason that the tender was called 2nd time and further delay would have caused escalation of costs.

26. Again we are not convinced with the explanation provided by the respondents. When the contractors are willing to execute the works on much lower prices, refusal to accept their bids, places the entire decision-making process of respondents in the realm of conjectures. Merely, the tender in other case was on 2nd call, does not make it different than the facts involved herein. The rates quoted by the tenderer in said case were still much lower than the estimated costs of work. Meaning thereby that applicability of CPWD manual was discretionary with respondents. This again raises a serious question on the bonafides of impugned actions of respondents. Fairness should be the hallmark of every public action.

27. In the light of the discussions made hereinabove, the actions of respondents impugned herein are held to suffer from vice of arbitrariness and discrimination.

28. Accordingly, all these writ petitions are allowed. The impugned order dated 17.08.2021 (Annexure P-4) in CWP No. 4954 of 2021, orders dated 28.07.2021 and 02.08.2021 (Annexure P-1 & Annexure P-4) in CWP Nos. 4370 & 4371 of 2021 are quashed and set aside. The respondents are directed to consider the award of works in question respectively in favour of the petitioners by virtue of their being L-1 in their respective tenders.

29. The writ petitions are disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Between:

SAROJ KUMARI WD/O SH. LACHHO RAM, R/O VILLAGE SULLAHA, TEHSIL PALAMPUR,

DISTRICT KANGRA, H.P.

....PETITIONER

(BY SH. ANUP RATTAN, ADVOCATE)

AND

1. STATE OF H.P., THROUGH SECRETARY (AYURVEDA), TO THE GOVERNMENT OF H.P, SHIMLA-02.
2. DIRECTOR AYURVEDA, H.P. KASUMPTI, SHIMLA.

....RESPONDENT

BY. SH. DESH RAJ THAKUKR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL.

CIVIL WRIT PETITON No. 5021 of 2020
Decided on: 27.08.2021

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Regularization of service - Held - Service is to be regularized as per Recruitment and Promotion rules as notified on 31.12.1998 from the date he completed 10 years service as part time class IV employee with 240 days in each calendar year with all the consequential benefits- Petition allowed.

Cases referred:
Bhagwati Prasad Versus Delhi State Mineral Development Corporation, (1990)1 SCC 361;

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

O R D E R

Being aggrieved and dissatisfied with the order dated 10.1.2020 ***(Annexure P-9)***, passed by Director Ayurveda, Himachal Pradesh in purported compliance of order dated 30.12.2019 ***(Annexure P-11)***, passed by this Court

in COPC(T) No.101 of 2019, whereby this Court disposed of the aforesaid contempt petition on the basis of the statement made by learned Additional Advocate General on the instructions of the Law Officer present in Court, that fresh consideration order in terms of order dated 19.11.2015 read with order dated 13.12.2012, shall be passed positively within a period of ten days, petitioner has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein following reliefs:-

(i) That the impugned order dated 10.1.2020 may kindly be quashed and set aside being illegal and erroneous.

(ii) That respondents be directed to regularize the services of the husband of the petitioner as per Recruitment and Promotion Rules as notified on 31.12.1998 or as per the Rules prevailing on completion of 10 years of service as Part Time Class-IV employee having 240 days in each calendar year by strictly and correctly complying with the judgment passed in CWP No.2031/2011 and TA No.1356/2015.

(iii) That respondent be directed to give all pecuniary benefits as well as service benefits and consequential benefits of regularization of services of the petitioner's husband when the vacancy is available with the respondent Department.

2. Precisely, the facts of the case as emerge from the record are that deceased Lachho Ram i.e. husband of the petitioner herein was appointed as Class-IV part time worker on 1.8.1969 and in this capacity, he served the Department till 10.8.2005 when he unfortunately expired. Respondents regularized the services of the petitioner on 19.10.2005, as is evident from Annexure P-3, whereas the services of the petitioner were required to be regularized on 01.01.1999 in terms of Recruitment and Promotion Rules, as such, he filed writ petition before this Court bearing CWP No.2031 of 2011,

which was allowed with the direction to the respondents to re-consider the case of the petitioner's husband in terms of Clause-11of the Recruitment and Promotion Rules counting his services as part time worker and then consider his case for regularization on the availability of vacancy on the date on which petitioner's husband Lachho Ram has completed 10 years service with 240 days in each calendar year. Apart from above, Co-ordinate Bench of this Court vide aforesaid judgment dated 13th December, 2021 also ordered that merely because the decision was taken in October, 2005 would not mean that it deprive the petitioner's husband from such regularization. It is the availability of the posts to be filled in, in accordance with the Recruitment and Promotion Rules. Co-ordinate Bench of this Court also held that since Lachho Ram, husband of the petitioner has died, his wife in such eventuality would be entitled to the consequential monetary benefits, if her husband is found eligible. Despite there being aforesaid positive directions to do the needful, respondents after having considered the case of the petitioner rejected the claim of the petitioner vide order dated 24.8.2013 ***(Annexure P-5***).In the aforesaid order, respondents observed that husband of the petitioner was illiterate and did not possess the requisite essential qualification and as such, he did not fulfill the provision of the Recruitment and Promotion Rules, which disqualifies his entitlement for regularization even though he has put in more than 10 years services. Besides above, respondents also observed in the aforesaid order that no post of Class-IV workers were filled up under Recruitment and Promotion Rules before 2005 as no daily waged workers were eligible for regularization at that time. In the aforesaid order, respondents claimed that services of 170 Part Time Worker including husband of the petitioner were regularized on 19.10.2005 with the prior consultation/approval of the Advisory Departments as well as Cabinet by relaxing the essential educational qualification.

3. Being aggrieved and dissatisfied with the aforesaid order dated 24.8.2013, passed by the respondents, petitioner once again approached this Court by way of CWP No.5415 of 2014, however such petition was transferred to erstwhile H.P. Administrative Tribunal on its establishment and was registered as TA No.1356 of 2015. Learned Tribunal vide judgment dated 19.11.2015 **(Annexure P-6**), allowed the petition and directed the respondents to consider the case of the deceased husband of the petitioner (Lachho Ram) for regularization against the available vacancies with all consequential benefits. Since, the respondents did not comply the judgment, petitioner filed contempt petition bearing COPC No.95 of 2016 before the learned Tribunal below, however respondent-State again passed consideration order (**Annexure P-7)**, rejecting the case of the petitioner on the same and similar ground as was raised prior to passing of judgment dated 19.11.2015 by learned Tribunal in Transfer Application No.1356 of 2015, titled as ***Saroj Kumari versus State of Himachal Pradesh and another.***

4. Record reveals that respondent-State also filed writ petition bearing CWP No. 263 of 2017-G against the judgment dated 19.11.2015, passed by learned Tribunal below in Transfer Application No.1356 of 2015, but same was dismissed on the basis of the statement made by learned Deputy Advocate General that impugned order already stands considered **(Annexure P-8).** In compliance to order dated 30.12.2019, passed by this Court in COPC(T) No.101 of 2019, respondent-State again passed order dated 30.12.2019, rejecting the case of the petitioner on the ground that there was no provision for regularization of services of part time employees in the Recruitment and Promotion Rules, however on the directions/ orders of learned Tribunal passed on 01.5.1997 in O.A No.875 of 1991, following provisions for the recruitment/appointment of the Peons and Sweepers were made in the R&P Rules for part timers for the first time and notified on dated 31.12.1998 which stipulated as under:-

> "11.) 50% by appointment from amongst the wholly paid daily waged Class-IV workers of the department who passes at least 10 years service having 240 days in each calendar year, failing which by appointment from amongst the departmental working part time workers who also possess at least 10 years service having 240 days in each calendar years as such, and fulfill the qualification as per Column 6 R &P Rules."

5. In the aforesaid order respondents claimed that no posts of Class-IV could be filled up under aforesaid R &P Rules before 2005 on account of the ban imposed by the Government on filling up of vacant posts, which is evident from the copy of instructions issued by Finance Department vide letter No.Fin.1-C(14)-1/83 dated 8th July, 1998. In the aforesaid order respondent also claimed that 170 Part Time workers alongwith 93 Part Time Sweepers were regularized on 19.10.2005, which also included late Sh. Lachho Ram after getting the approval from the Government by according one time relaxation in upper age limit to those part time workers who had crossed 45 years of age as well as in educational qualification for those who did not fulfill the same as per the R&P Rules. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein reliefs, as have been reproduced hereinabove.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that there is no dispute that husband of the petitioner was appointed as Class-IV part time worker on 1.8.1969 and he after having served the Department for more than 35 years unfortunately breathed his last on 10.08.2005. It is also not in dispute that prior to filing of the petition at hand, petitioner, who happens to be wife of late Sh. Lachho Ram had approached this Court by way of CWP No.2031 of 2011, wherein positive direction was issued to the respondents to consider the case of the petitioner's husband in terms of Clause-11 of the

Recruitment and Promotion Rules counting his services as part time worker and then consider his case for regularization on the availability of vacancy on the date on which petitioner's husband Lachho Ram completed 10 years service with 240 days in each calendar year, but it appears that respondents ignoring aforesaid positive direction issued by Co-ordinate Bench of this court vide judgment dated 13th December, 2012, proceeded to reject the case of the petitioner on the ground that husband of the petitioner was illiterate and did not possess the requisite essential qualification and as such, he is not entitled for regularization as per provision contained under Recruitment and Promotion. Since vide aforesaid judgment Co-ordinate Bench of this Court had categorically ruled that merely because the decision was taken in October, 2005 to fill up the posts would not mean that it deprive the petitioner's husband from such regularization and it is the availability of the posts to be filled in, in accordance with the Recruitment and Promotion Rules, which is to be kept in mind while considering the case of the petitioner's husband for regularization. However, at no point of time respondents denied that no post of Class-IV workers were available or filled up under Recruitment and Promotion Rules before 2005, but their consistent stand has been that since till 2005 there was ban imposed by the Government, case of the petitioner's husband for regularization could not be considered against the vacant post.

7. Learned Tribunal while passing order dated 19.11.2015 in TA No.1356 of 2015 specifically recorded that there were 313 vacancies available with the respondent-department when petitioner' husband had become eligible to be regularized against the post in question. It is not the case of the respondents that 313 vacancies were not available in the department when petitioner's husband had become eligible for regularization, rather there simple case is that unfilled vacancies could not be filled up till 2005 on account of the ban imposed by the State Government for filling up the vacant posts. However, such plea cannot be made basis to reject the eligible claim of

the petitioner's husband, who admittedly had become eligible for regularization on his having completed 10 years as part time Class-IV employee with 240 days in each calendar year in terms of the Recruitment and Promotion Rules as notified on 31.12.1998.

8. Reply filed by the respondents nowhere suggests that petitioner's husband had not become eligible for regularization after his having completed 10 years as part time employee with 240 days in each calendar year as per Recruitment and Promotion Rules as notified on 31.12.21998. Since petitioner had become eligible for regularization on his having completed 10 years services as part time Class-IV employee in terms of Recruitment and Promotion Rules as notified on 31.12.1998, he could not be denied such benefit on the ground that no posts of Class-IV were filled up under Recruitment and Promotion Rules as no approval was granted by the Government due to ban for filling up the posts. Since posts were available when petitioner's husband had completed 10 years regular service entitling him for regularization in terms of Recruitment and Promotion Rules as notified on 31.12.1998, mere delay in granting approval by the State Government cannot be made ground to deny rightful claim of the petitioner.

9. Record reveals that petitioner before his death rendered 35 years uninterrupted service with the department. Though, as per Recruitment and Promotion Rules petitioner' husband became entitled to be regularized after 10 years of his having completed part time service with 240 days in each calendar year, but yet for no fault of him, he was denied his rightful claim and as such, his wife repeatedly knocked the doors of court of law. Record reveals that despite there being positive directions issued by this Court in one petition or other respondents for no justifiable reasons kept on rejecting the case of the petitioner. Though, this court finds that after passing of judgment dated 13th December, 2012 by Co-ordinate Bench of this Court in CWP No.2031 of 2011, respondent had no reason to deny the claim of the petitioner, as has been

raised in the petition, but yet authorities on one pretext or other left no stone unturned to deny the rightful claim of the petitioner's husband. Since, there is no dispute that 313 vacancies were available when petitioner had completed 10 years regular service, submission made by learned Deputy Advocate General that till year 2005, no vacancy could be filled up on account of the ban imposed by the State Government has no relevance and deserves outright rejection. Even after lifting of van by the State, case of the petitioner' husband was required to be considered from the date when he had become eligible for regularization on account of his having completed 10 years regular service as part time worker with 240 days each in calendar year. Though, now petitioner's husband services have been regularized with effect from 19.10.2005 by granting one time relaxation qua qualification, but such order of regularization from 19.10.2005 is not sustainable for the reason that petitioner's husband ought to have been regularized from the date when he had completed 10 years regular service as part time worker. Secondly, case of the petitioner otherwise could not be rejected by the respondents on the ground of qualification. Hon'ble Apex Court in ***Bhagwati Prasad Versus Delhi State Mineral Development Corporation***, (1990)1 Supreme Court Cases 361, has already held that minimum education qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but is so at the time of the initial entry into the service. Once the appointments are made as daily rated workers and they are allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualification. In the aforesaid judgment, Hon'ble Apex Court has held that practical experience gained by daily wager before his regularization always aid him to effectively discharge the duties and is a sure guide to assess the suitability.

10. Consequently, in view of the above, the present petition is allowed and order dated 10.1.2020 ***(Annexure P-9),*** passed by Director Ayurveda, Himachal Pradesh is quashed and set-aside and respondents are directed to regularize the services of the petitioner's husband as per Recruitment and Promotion Rules as notified on 31.12.1998 from the date he had completed 10 years service as Part Time Class-IV employee with 240 days in each calendar year with all the consequential benefits. Pending applications, if any, also stands disposed of.

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

Between:-

PRADEEP KUMAR S/O LATE
AMAR SAIN, R/O VILLAGE SUNDHA
BHONDA, P.O. CHIRGAON, TEHSIL
CHIRGAON, DISTRICT SHIMLA, H.P.
PRESENTLY WORKING AS SR. ASSISTANT.

.....PETITIONER

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

AND

1. THE STATE ELECTRICITY BOARD LTD.,
   THROUGH ITS EXECUTIVE DIRECTOR
   (PERSONNEL), VIDYUT BHAWAN,
   SHIMLA-4.

2. THE DEPUTY SECRETARY (NGE)
   H.P.S.E.B.L. SHIMLA-4. .....RESPONDENTS

   (SH. VIKRANT THAKUR, ADVOCATE,
   FOR RESPONDENTS 1 & 2)

CIVIL WRIT PETITION No.2573 of 2021

Reserved On: 04.09.2021
Decided On: 10.09.2021.

Constitution of India, 1950- Article 226 - Transfer Policy - Judicial review of the order of transfer is permissible when the order is made on irrelevant considerations- The Court is competent to ascertain whether the order of transfer passed is bonafide or as a measure of punishment- It is for the bureaucrats and not for the politicians to effect transfer and postings- Petition allowed and impugned transfer order is quashed and set aside.

Cases referred:

Abani Kanta Ray vs. State of Orissa and others, 1995 Supp. (4) SCC 169;
Akash Sharma vs. State of U.P., 2007(4) AWC 2899;
Amir Chand versus State of Himachal Pradesh, 2013(2) HLR (DB) 648;
B. Varadha Rao vs. State of Karnataka, (1986) 4 SCC 131;
Chief General Manager (Telecom) N.E. Telecom Circle and another vs. Rajendra CH. Bhattacharjee and others, (1995) 2 SCC 532;
E.P. Royappa vs. State of Tamil Nadu, (1974) 4 SCC 3;
Kendriya Vidyalaya Sangathan vs. Damodar Prasad Pandey and others, (2004) 12 SCC 299;
National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash, (2001) 8 SCC 574;
Public Services Tribunal Bar Association vs. State of U.P. and another, (2003) 4 SCC 104;
Rajendra Singh and others vs. State of Uttar Pradesh and others, (2009) 15 SCC 178;
Sarvesh Kumar Awasthi vs. U.P. Jal Nigam and others (2003) 11 SCC 740;
Shilpi Bose (Mrs.) and others vs. State of Bihar and others, 1991 Supp (2) SCC 659;
Somesh Tiwari vs. Union of India and others, (2009) 2 SCC 592;
State of M.P. and another vs. S.S. Kourav and others, (1995) 3 SCC 270;
State of Haryana and others vs. Kashmir Singh and another,(2010) 13 SCC 306;
State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402;
State of U.P. vs. Siya Ram, (2004) 7 SCC 405;
Union of India and others vs. Ganesh Dass Singh, 1995 Supp. (3) SCC 214;
Union of India and others vs. H.N. Kirtania, (1989) 3 SCC 445;
Union of India and others Vs. Janardhan Debanath and another, (2004) 4 SCC 245;
Union of India and others vs. Muralidhara Menon and another, (2009) 9 SCC 304;
Union of India and others vs. S.L. Abbas, (1993) 4 SCC 357;

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

O R D E R

Aggrieved by the order of transfer, the petitioner has filed the instant petition for grant of the following reliefs:-

> *"(i) That the impugned order of transfer dated 17.04.2021 (Annexure P-1) may kindly be quashed and set aside.*
> *(ii) That the petitioner may be allowed to work as Sr. Assistant at Andhara Power House HPSEBL Chirgaon till the final disposal of this writ petition."*

2. The petitioner was appointed as a Clerk and joined as such in the year 1989 in the Office of ACT III Chirgaon where he worked till 30th April, 1990. Thereafter, the petitioner worked at various places and vide order dated 04.03.2019, he was transferred at Andhara Power House, Chirgaon, where he joined on 05.03.2019. Again, the petitioner was transferred vide order dated 17.04.2021 from Andhara Power House Division Chirgaon to Electrical Division, HPSEBL, Dalhousie (Chamba) and aggrieved thereby has filed the instant petition for the reliefs as set out above.

3. It is the specific case of the petitioner that his transfer has neither been effected in administrative exigency nor in public interest, but has been effected on the basis of a D.O. Note issued by someone, who has nothing to do with the Administration and the governance of the respondent-Board.

4. The petitioner has appended a letter dated 09.03.2021 issued by one Smt. Shashi Bala to the Hon'ble Chief Minister and the same reads as under:-

> *"Rural Development Bank Ltd.*
> *SDA Complex, Kasumpti,*
> *Shimla-171009 (H.P.)* *94595-72133*

Ref.No.ARDB/Chairperson/2020… Dated: 09/03/2021
PA…/2021

Respected Thakur Sahib,
Sadar Pranam.

Sir,

It is humbly that the following govt. employees are indulging in party politics and they are contaminating the working culture in their organization/institutes. It is, therefore requested to approve their transfer in the larger interest of the public as under:-

1. Sh. Ramesh Kumar Chauhan, JE presently posted at Power House Andhra (Chirgaon) may kindly be transferred to anywhere in Distt. Chamba.

2. Sh. Suresh Kumar, presently posted as fitter at Andhra Power House (Chirgaon) may kindly be transferred to anywhere in Distt. Chamba.

3. Sh. Pradeep Kumar, Sr. Asstt. presently posted at Andhra power house (Chirgaon)may kindly be transferred anywhere in Distt. Chamba.

4. Sh. Vinod Kumar, lecturer Political Science presented posted at GSSS (Girls) Chirgaon may kindly be transferred to anywhere in Distt. Una.

5. Sh. Dilawer Singh, SEBPO, presently posted at Development Block Chhohara, Distt. Shimla may kindly be transferred to anywhere in Distt. Una.

6. Sh. Vikrant Thakur, presently posted at technician Gr.II at Mechanical Division, HPPWD Rohru for the past 20 yrs. May kindly be transferred to anywhere in Distt. Kangra District.

With profound Regards.

Yours sincerely,

sd/-
(Shashi Bala)

(Dt.-09 March, 21)

Shri Jai Ram Thakur Ji,
Hon'ble Chief Minister,
Himachal Pradesh-171002."

5. We were informed in the open Court that the author of the aforesaid letter is the Chairperson of the Rural Development Bank Ltd., which fortifies the contention of the petitioner that she has nothing to do with the working of the Administrative Department of the petitioner.

6. In ***CWP No. 2862 of 2021*** titled ***Vipender Kalta*** *vs.* ***State of H.P. and others***, decided on 20.07.2021, we had clearly observed that how people, having nothing to do with the administration and the governance of the State are calling the shots being in some kind of dominating position and getting the employees, who happen to be the government servants, transferred as per their wishes and choice by issuing recommendations to this effect and the same, in turn, are unfortunately being acted upon.

7. Like in Vipender Kalta's case, here also, we are appalled to note that the transfer of the petitioner has been effected on the basis of the recommendations made by a politician, who as stated above, has no concern or connection with the Administration or functioning of the respondent-Board.

8. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the

other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

9. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redressal but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by mala fides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

10. However, this power must be exercised honestly, bonafide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration, that even administrative action should be just

and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

11. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The Court is competent to ascertain whether the order of transfer passed is bonafide or as a measure of punishment.

12. The law regarding interference by Court in transfer/posting of an employee, as observed above, is well settled and came up before the Hon'ble Supreme Court in ***E.P. Royappa vs. State of Tamil Nadu, (1974) 4 SCC 3; B. Varadha Rao vs. State of Karnataka, (1986) 4 SCC 131; Union of India and others vs. H.N. Kirtania, (1989) 3 SCC 445; Shilpi Bose (Mrs.) and others vs. State of Bihar and others, 1991 Supp (2) SCC 659; Union of India and others vs. S.L. Abbas, (1993) 4 SCC 357; Chief General Manager (Telecom) N.E. Telecom Circle and another vs. Rajendra CH. Bhattacharjee and others, (1995) 2 SCC 532; State of M.P. and another vs. S.S. Kourav and others, (1995) 3 SCC 270; Union of India and others vs. Ganesh Dass Singh, 1995 Supp. (3) SCC 214; Abani Kanta Ray vs. State of Orissa and others, 1995 Supp. (4) SCC 169; National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan and Shiv Prakash, (2001) 8 SCC 574; Public Services Tribunal Bar Association vs. State of U.P. and another, (2003) 4 SCC 104; Union of India and others Vs. Janardhan Debanath and another, (2004) 4 SCC 245; State of U.P. vs. Siya Ram, (2004) 7 SCC 405; State of U.P. and others vs. Gobardhan Lal, (2004) 11 SCC 402; Kendriya Vidyalaya Sangathan vs. Damodar Prasad Pandey and others, (2004) 12 SCC 299; Somesh Tiwari vs. Union of India and others, (2009) 2 SCC 592; Union of India and others vs. Muralidhara Menon and another, (2009) 9 SCC 304; Rajendra Singh and***

others vs. State of Uttar Pradesh and others, (2009) 15 SCC 178; and State of Haryana and others vs. Kashmir Singh and another,(2010) 13 SCC 306 and the conclusion may be summarised as under:-

> *1. Transfer is a condition of service.*
> *2. It does not adversely affect the status or emoluments or seniority of the employee.*
> *3. The employee has no vested right to get a posting at a particular place or choose to serve at a particular place for a particular time.*
> *4. It is within the exclusive domain of the employer to determine as to at what place and for how long the services of a particular employee are required.*
> *5. Transfer order should be passed in public interest or administrative exigency, and not arbitrarily or for extraneous consideration or for victimization of the employee nor it should be passed under political pressure.*
> *6. There is a very little scope of judicial review by Courts/Tribunals against the transfer order and the same is restricted only if the transfer order is found to be in contravention of the statutory Rules or malafides are established.*
> *7. In case of malafides, the employee has to make specific averments and should prove the same by adducing impeccable evidence.*
> *8. The person against whom allegations of malafide is made should be impleaded as a party by name.*
> *9. Transfer policy or guidelines issued by the State or employer does not have any statutory force as it merely provides for guidelines for the understanding of the Department personnel.*
> *10. The Court does not have the power to annul the transfer order only on the ground that it will cause personal inconvenience to the employee, his family members and children, as consideration of these views fall within the exclusive domain of the employer.*
> *11. If the transfer order is made in mid-academic session of the children of the employee, the Court/Tribunal cannot interfere. It is for the employer to consider such a personal grievance.*

13. Bearing in mind the aforesaid exposition of law, it would be noticed that the transfer in the instant case has been effected solely on political

consideration, that too, at the instance of a person, who has no concern with the administration or functioning of the respondents-Department.

14. The Courts are reluctant to interfere with the orders of transfer since this is an ordinary incidence of service, yet this Court has repeatedly held that the transfers and postings should be effected only by the administrative departments.

15. In this country, we follow the British system of a non-political bureaucracy and hence, it is for the bureaucrats, and not for the politicians, to effect transfers and postings.

16. The treatise on the subject is the judgment rendered by learned Division Bench of this Court in ***Amir Chand versus State of Himachal Pradesh, 2013(2) HLR (DB) 648***, wherein this Court prefaced the judgment with the following observations:-

> *"1. This Court is flooded with litigation filed by employees aggrieved by their transfer and sometimes, even by their non-transfer when they are not shifted out of tribal areas. The time has come when we must lay down the law with regard to the powers of the legislators to influence transfers. Should political pressure and political influence be necessary to run the administration? Should transfers be ordered on the asking of the legislators, members of a particular ruling party, persons belonging to certain groups without even making a reference to the administrative department concerned? Is the policy of transfer always binding upon the Government and its employees or can the Government flout with impunity the policy framed by it? No doubt, the employer is the master and can decide which employee is to be posted at which particular place, but we must remember that we are governed by the Constitution of India. Does not each and every employee have a right to claim that he should be treated fairly? Why is it that favoured employees, who are either well connected or can exercise political or bureaucratic clout are never transferred out of the main cities and those employees who do not enjoy such political or bureaucratic patronage have to stay in remote/tribal areas for years on end.*

2. *Another disturbing feature which we have found is that in the State of Himachal Pradesh after the period earmarked for normal transfers is over, the transfers have to be ordered only after approval of the competent authority which normally is the Hon'ble Chief Minister. We have found that people directly approach the Hon'ble Chief Minister using political influence and patronage without first making a representation to the department concerned. This is a total violation of the Conduct Rules. Despite this violation of the Conduct Rules, these requests of the employees who are backed by political patronage are accepted without even considering what will be the effect of such transfers on the people who are to be served by these employees, or on those employees who may be affected by such transfers.*
3. *Does anybody care about the students who are studying in the schools? If no teacher is willing to go to the rural/remote areas, where will the students of these rural and remote areas study? Does anybody care in some remote areas, dispensaries are without Doctors or paramedical staff whereas there is more than the sanctioned number of doctors in the State and District headquarters. It was only after the intervention of the Court that the Female Health Workers, who were to serve in the rural areas, were actually transferred there. Almost all the Female Health Workers had been adjusted in Shimla town itself. This shows that neither the interest of the public at large nor that of the administration was kept in view while adjusting these Female Health Workers at Shimla. When the employees want a job then they are willing to join at any place. However, soon thereafter, political patronage is employed to get themselves transferred to a particular place. There is more than sufficient material before the Courts to prove that transfers are made for extraneous reasons without considering the administrative exigencies and the interests of the students.*
4. *This does not speak well of the system of the administration. We are clearly of the view that normally we would not like to interfere in transfer orders passed in administrative interests. We are also of the considered view that all the employees, such as teachers, doctors, nurses etc., will necessarily have to be posted in rural/remote area at some stage in their careers. The administration has to be stern and strict in matters of transfers. At the same time, it also has to be fair and just and should treat all the employees equally. It is only because the administration itself is lax and transfer orders are passed on extraneous*

considerations and the administration reverses its decisions day in and day out, that the courts are forced to intervene. These types of cases clearly highlight the fact that transfers are being made not on the basis of administrative exigencies but on other extraneous considerations.

5. *Rule 20 of the Central Civil Services (Conduct) Rules, 1964 lays down that it will be misconduct for an employee to bring in political pressure or get recommendations from others in matters relating to his service. It seems that both, the administration as well as the employees, have forgotten that such a rule exits. Our experience is that unless an employee gets a "suitable recommendation" or brings in political pressure, he can never get posted to a station of his choice. If action is taken against the employee for breach of the Conduct Rules, the employee could very well say that he is damned if he does not use political pressure and damned if he does.*
6. *It would be apposite to quote a humorous poem from Shri A.S Bhatnagar's Commentary on Conduct Rules. 'Ban on recommendation', a humorous poem -Who am I? A victim to the jealousies of those Who, to me have been quite close, Suspended from work And, for no fault of mine. Oh Justice, what a heavy fine ! I am expected not to seek Help from one mighty or weak. They name it pressure or canvassing, A fruit from the Forbidden Tree. Which to touch none is free. Is this bar justified, When there are cases multiplied, Where in favours have been done, And ends foul have been badly won?"*

17. It was further observed that there can be no manner of doubt that a legislator, who is the elected representative of the people, has a right to place his difficulties before the Hon'ble Chief Minister or the Minister concerned. It would be well within his rights to complain to the authorities concerned in case he finds that a particular employee is not doing his job properly. The Court further went to observe that transfer is never meant to be a punishment but nobody can deny the fact that many times incompetent and inconvenient officials are transferred.

18. The Court thereafter, while discussing the judgments of the various High Courts including the one referred to above, observed as under:-

"33. From the files which this Court has seen including the files of these cases, it is apparent that transfers are being made day in and day out at the behest of public representatives. It is true that public representatives have a right to complain against the working of government officials. However, these complaints must be verified by the administrative department and final action has to be taken by the administrative department. Transfer is not a punishment and if transfer is inflicted as a means of punishment, then the whole purpose of making transfers in the public interest is set at naught. An employee who is rude or inefficient at one station will not become polite or efficient at another station. Transfer does not serve any purpose. If the allegations of the public representatives made in the complaints against the government servants are found to be correct, then disciplinary action should be taken against such government employees. We live in a democracy and our elected representatives under the constitution are to work in the legislature and not as administrators. They cannot start interfering in the administration or the working of the Executive. This has already resulted in government servants rushing to please the political masters at the cost of doing their duties. This also demoralizes the officers who are in charge of the administration of the department. It is they who are the best judges to decide how the department has to be administered and which employee should be transferred to which place. The politicians cannot don the role of administrators. The earlier such inherently illegal and improper practices are put to an end, the better it would be for the smooth functioning of the administration of the State.

34. As far as the concept of judicial review is concerned, the Apex Court again observed that the Court should be reluctant in interfering in transfer orders. The scope of judicial review in the matter of transfer of a Government employee is limited and the Court should not interfere in the transfer. The Court cannot substitute its own opinion for the opinion of the employee.

35. After reviewing the entire law on the subject, we can without any hesitation come to the conclusion that the scope of judicial review in transfer matters is very limited. This court cannot interfere in the day to day functioning of the Government departments and it is for the administrative heads to decide which employee should be posted at which place. Even earlier, we had clearly given a number of judgments on these lines.

36. At the same time, this Court cannot shut its eyes to the increasing number of transfers being made not for administrative reasons but only with a view to accommodate favoured employees. As indicated by us earlier, an employee of the department is also a citizen of the country and is entitled to the equal protection of laws. Therefore, the State should always be fair to its employees. They must all be treated equally."

19. It is then that the following directions came to be passed:-

"1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/ hard areas and other areas. We have increasingly found that people who are sent to the hard/ tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the must difficult stations in the remote corners of the State such as Pangi, Dodra Kawar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case

such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. *We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.*
4. *Coming to the issue of political patronage. On the basis of the judgments cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.*
5. *We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to show their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.*
6. *We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minster or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative department.*
7. *No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employees then the complaint must be made to the Minister In charge and/ or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."*

20. As held by this Court in ***Amir Chand's*** *case (supra)*, we live in a democracy and our elected representatives under the Constitution are to work in the legislature and not as administrators. They cannot start interfering in the administration or the working of the Executive. It is they (Administrative Heads) who are the best judges to decide how the department has to be administered and which employee should be transferred to which place. The politicians cannot don the role of administration.

21. It is rather unfortunate that cases are coming up repeatedly before this Court, in which the impugned transfer orders or transfer cancellation orders unabashedly and brazenly state that the transfer order or transfer cancellation is being done by or at the instance of persons, who have no role, position or authority in the administration of the department.

22. The result of such political interference in the matter of transfers and postings of government servants is that the government servants get demoralized and they become affiliated to some political party or politician, which is wholly destructive of all norms of administration.

23. This court has repeatedly held that the transfer of officials/officers is required to be effected on the basis of set norms and guidelines; and this power cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians, who has no concern with the working of the department.

24. For better administration, the employees/officers must be shielded from fear of being harassed by the repeated transfers or transfers ordered at the instance of someone, who has nothing to do with the business of administration.

25. In ***Sarvesh Kumar Awasthi vs. U.P. Jal Nigam and others (2003) 11 SCC 740***, the Hon'ble Supreme Court has clearly held in para 3 as under:-

> *"In our view, transfer of officers is required to be effected on the basis of set norms and guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians, whose work is not done by the officer concerned. For better administration, the officers concerned must have freedom from fear of being harassed by the repeated transfers or transfers ordered at the instance of someone, who has nothing to do with the business of administration."*

26. The citizens have a fundamental right to good governance, which is possible only if government servants including the employees of the Board/Corporation, who are governed and controlled by the State Government, are politically neutral and are not transferred or otherwise victimized at the instance of a political party or politician.

27. It is only when the Court notices gross irregularities being committed by the Government, Board/Corporation in the matters of transfer, it becomes necessary for the court to interfere. Therefore, its time to turn the searchlight on the State Government, Board/Corporation, as the case may be, and remind them that the transfer policy should not be taken lightly and or made a mockery or a tool to transfer the employees on the whims and fancies of the politicians.

28. The Government including the Board/Corporation as ideal employers have a bounden duty to strictly safeguard the interest of its employees against the machinations of politicians. The public servants need to discharge their functions without fear or favour and they need not to toe the line drawn by the politicians.

29. If such transfer is allowed to take effect, it would embolden the other political cadre and influential local level politicians of all hues to seek the transfer of unfavourable and upright government officials from their pocket boroughs and to see that they are posted somewhere else. This would demoralize the government servants, as the case may be, and may inspire

them to amend their ways in such a way of pleasing each and every one whoever come under the banner of some political party. If the government machinery has to serve well the people, their functioning and official routines are to be insulated against the extraneous influences. ***(Refer Akash Sharma vs. State of U.P., 2007(4) AWC 2899).***

30. Adverting to the facts of the case, what disturbs the Court is that the transfer of the petitioner along with many other employees working in various Departments has been recommended on the ground as is contained in the opening paragraph of the letter dated 09.03.2021, which is again reproduced and reads as under:-

> *"It is humbly that the following govt. employees are indulging in party politics and they are contaminating the working culture in their organization/institutes. It is, therefore requested to approve their transfer in the larger interest of the public."*

31. If that was not enough, the recommendations have been made to transfer the employees outside the District to anywhere in District Chamba, District Una and District Kangra. Under what authority such recommendations could have been made, is obviously wanting. But, more disturbing is the fact that these recommendations have been approved on administrative grounds.

32. We need to strongly emphasize that the government servants including the employees of the Board/Corporation are not at the mercy of the politicians and cannot be made subservient to any political person(s). These public servants are in service by virtue of dint of their hard work and majority of them have entered the service through a selection process and not because of the "blessings of the politicians".

33. Therefore, it is high time that the Employers, be it the State, Board or Corporation, strongly safeguard the interest of their employees against the mechanization of politicians so as to enable the employees-public

servants to discharge their functions without fear and favour and are not compelled to toe the line drawn by the politicians.

34. Even otherwise, upholding such kind of transfers would mean compromising with the rule of law, which is a basic feature of the Constitution, which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure.

35. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being.

36. Since the recommendations to transfer the petitioner had been mooted by an extra constitutional authority, who has no role in the functioning and business of the administration, therefore, the impugned transfer of the petitioner on the basis of such recommendations cannot be sustained and is accordingly quashed.

37. The Government including the Board/Corporation, as the case may be, would be well advised not to entertain much less encourage such extra constitutional authority to interfere with the administration and governance of the State, or else, there is every likelihood of there being a complete breakdown of rule of law.

38. As noticed above, the specific ground on which the petitioner and other employees have been recommended for transfer is that they are indulging in party politics and are alleged to have been contaminating the working culture in their organization/institute.

39. Firstly, as observed above, we are at a complete loss to understand as to the source of power and authority of the author of this letter to make the recommendations to the Hon'ble Chief Minister. After-all, we are governed by the rule of law.

40. That apart, the transfer cannot be used as a medium to scuttle or choke the voice of dissent. If at all there was any complaint regarding the

work and conduct of the persons proposed to be transferred including the petitioner, then the only legitimate legal course open was that of taking disciplinary action by initiation of disciplinary proceedings.

41. The voice of dissent cannot be silenced through administrative arbitrariness. However, we need to clarify that no freedom can be absolute. As freedom walks with its head held high, a shadow of responsibility follows it. Responsibility is the epiderm within which freedom stays free and secured and secured for all. Constitutional responsibility belongs to this variety and exists as an invisible layer, a membrane, between the right to free speech and the reasonable restrictions that may operate on it. Remove the responsibility from all, it will be chaos.

42. In view of the aforesaid discussion and for the reasons stated above, we find merit in this petition and the same is accordingly allowed. Consequently, the impugned transfer order dated 17.04.2021 (Annexure P-1) is quashed and set aside. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

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

Between:-

SH. NITI BIBHASH ACHARYA,
SANITARY INSPECTOR, MUNICIPAL
COUNCIL, KULLU, DISTT. KULL (H.P.)
R/O UPPER SULTANPUR, NEAR SANATAN
DHARAM SABHA, DISTRICT KULLU, H.P.

……PETITIONER

(BY SH. YOGINDER PAL KAPOOR
AND SH. DAYA RAM, THAKUR,
ADVOCATES)

AND

1. THE SECRETARY, URBAN DEVELOPMENT,
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. THE DIRECTOR, URBAN DEVELOPMENT,
HIMACHAL PRADESH, SHIMLA.

3. THE MUNICIPAL COUNCIL, KULLU,
H.P. THROUGH ITS EXECUTIVE
OFFICER. .....RESPONDENTS

(SH.ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. RAJINDER DOGRA,
SENIOR ADDITIONAL ADVOCATE GENERAL,
SH. VINOD THAKUR, SH. SHIV PAL MANHANS,
SH. HEMANSHU MISRA, ADDITIONAL
ADVOCATE GENERALS AND
SH. BHUPINDER THAKUR,
DEPUTY ADVOCATE GENERAL,
FOR RESPONDENTS 1 AND 2)

(SH. NAVEEN KUMAR BHARDWAJ
ADVOCATE, FOR RESPONDENT-3)

CIVIL WRIT PETITION No.2860 of 2019
Reserved On: 09.09.2021
Decided On: 16.09.2021.

Constitution of India, 1950 - Article 226 - H.P. Civil Services (Premature Retirement) Rules, 1976 - Central Civil Services (Pension) Rules, 1972- Petitioner has satisfied the required conditions for pre-mature retirement- Petition allowed.

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

O R D E R

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

> *"i) A writ in the nature of mandamus or any other appropriate writ, order or directions may be issued to the respondents to release the pension/family pension and other retiral benefits such as leave encashment, gratuity, etc. etc. etc.*
> *ii) To allow interest on the illegally withheld pension and other retiral benefits from the date of expiry of 3 months notice for volunteer reitrement i.e. 31-05-2017 till the date of release."*

2. The petitioner was appointed as a Sanitary Inspector on 28.06.1984 in the erstwhile Municipal Committee, Kullu, now Municipal Council, Kullu. On 28.02.2017, he submitted an application to 3rd respondent for voluntary retirement. The same, according to the petitioner, was considered and accepted by the Municipal Council, Kullu on 22.04.2017 and then sent to the Director, Urban Development, who returned the same vide Office letter dated 09.05.2017 with a direction to the Executive Officer, Municipal Council, Kullu, to provide certain documents.

3. The Executive Officer, Kullu, in turn, vide letter dated 24.07.2017 asked the petitioner to account for/reconcile a sum of Rs.26,08,550/- plus Rs.10,000/- given as an advance from time to time and even in reply thereto, the petitioner submitted the details of vouchers that have already been submitted.

4. However, Since, the monthly pension/family pension and other retiral benefits were not released in favour of the petitioner, therefore, he got served a legal notice upon the respondents followed by a reminder, but of no avail, hence this petition.

5. Respondent No.3 i.e. Municipal Council, Kullu, alone has contested the petition by filing reply wherein it is averred that the replying respondent vide resolution No. 6 dated 12.04.2017 after considering the application for premature retirement of the petitioner forwarded such application for approval vide letter dated 01.05.2017.

6. The Director, Urban Development, vide letter dated 09.05.2017 directed the replying respondent to examine the required documents provided under the H.P. Civil Services (Premature Retirement) Rules, 1976. The replying respondent looked into the matter and found some irregularities/misappropriations in the matters of advance(s) that had been given to the petitioner by the replying respondent from time to time for maintaining sanitary facilities within the area of Council.

7. The advances outstanding in the name of the petitioner were pointed out by the Audit Officer vide memo No.23 dated 10.05.2016 worth Rs.26,18,550/-. This amount was received by the petitioner in advance and was not adjusted even after a period of 9 to 57 months from the date it was granted.

8. The replying respondent thereafter issued a letter dated 24.07.2017 to the petitioner to produce the documents in respect of the advance given to him and asked him to reconcile the aforesaid amount. When the petitioner failed to do so, the replying respondent once again issued a letter dated 11.12.2017 asking the petitioner to clear all the adjustments with respect to the advance given to the petitioner as his pension case was pending because of such irregularities/misappropriations in the outstanding advances.

9. Thereafter, the petitioner produced the vouchers with respect to the expenditure and adjustments of advance taken by the petitioner, but the same were only to the tune of Rs.17,30,650/- out of an amount of Rs.26,18,550/- and failed to produce the vouchers/documents with respect

to remaining amount of Rs.8,89,900/-. In these circumstances, the case for premature retirement of the petitioner was not accepted by respondent No.2.

10. The documents forwarded by the replying respondent were returned by the Director, Rural Development, to re-examine the case and to take necessary action in the matter. The application moved by the petitioner has not been accepted and consequently the request made by him for premature retirement has not been allowed.

11. The petitioner has filed the rejoinder wherein it is averred that once the application moved by the petitioner for premature retirement is accepted, then the version put-forth by the respondent is not correct. It is further averred that since respondent No.3 has admitted to have reconciled the amount of Rs.17,30,650, the remaining amount of Rs.8,89,900/- needs to be sorted out at the level of respondent No.3.

12. It is claimed that the petitioner was drawing basic pay of Rs.25,250/- plus Rs.4400/- grade pay and Rs. 38,545/- as D.A. at the time of retirement. The emoluments of the petitioner comes to Rs.68,204/-. The amount of retiral benefits with-held by the respondents for 4 years and 5 months are given below in the chart:-

1.	Pension per month i.e. 50% of the emoluments	Rs.34000/- Approx 4.5 years=18,02,000/-
2.	Total Leave due 178 days i.e. for 6 months @ 68000/- salary per month admissible for leave encashment	Rs.4,08,000/-
3.	Gratuity restricted to 10 Lakhs	Rs.10,00,000/-
	Total retiral benefits	Rs.32,10,000/-

13. This amount, according to the petitioner, is subject to increase due to Sixth Pay Commission and enhancement of D.A. from time to time. It is averred that when three months' notice was served upon the respondents

for voluntary retirement after completion of 33 years of service and serving of three months' notice under Rule 37-A read with Rule 48 of CCS Pension Rules stands accepted vide resolution, then the same is deemed to be accepted. In further paragraphs of the rejoinder, it has been reiterated that advance worth Rs.8,89,900/- has to be reconciled by respondent No.3.

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

15. Section 3 of the H.P. Civil Services (Premature Retirement) Rules, 1976, as relied upon by the respondents reads as under:-

"PREMATURE RETIREMENT

3.(1)xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
(2) Any Government employee may, after giving atleast three months previous notice in writing to the appropriate authority retire from service on the date on which he:-
(a) Completes 30 years of qualifying service; or
(b) attains the age of:
(i) 50 years in respect of Class-I and Class-II officers who have entered Govt. service before attaining the age of thirty five years;
(ii) 55 years in case of all other Class-I and Class-II officers and all the Class-III employees; and
(iii) 55 years in case of such Class-IV employees who entered Govt. service after 23rd July, 1966.

Provided that any Government servant with satisfactory service record may, after giving notice of not less than 3 months in writing to the appropriate authority, retire from service on completion of 20 years of regular service after such notice has been accepted by the appropriate authority;

Provided further that no employee under suspension or against whom disciplinary proceedings are either contemplated or have already been initiated shall be allowed to retire except with the specific approval of the appropriate authority."

16. The aforesaid Rule came up for consideration before the learned Division Bench of this Court in ***C.W.P.(T) No. 14176/2008*** titled ***Dr. S.S. Negi*** *vs.* ***State of H.P.*** , decided on 22.04.2010, wherein it was observed that

Rule 3(2) itself is intended to give option to the incumbent concerned to retire voluntarily from service subject to the satisfaction of the required conditions under the rules.

17. It was further held that once an employee satisfies the conditions required for premature retirement as prescribed under Rule 3(2) of the Rules, no other formal order is required for the employee to retire from service. The rule itself enables the employees to retire even without any formal order. If the retirement cannot be permitted, the employee is to be intimated about the same during the period of service that too on the grounds available under the rules.

18. The petitioner in the instant case has satisfied the required conditions since he has completed 50 years of age and joined the service before the age of 35 years. The rule clearly provides that a government employee after giving at least three months prior notice in writing to the appropriate authority is to retire from service on the date on which he completed the age or intended date of retirement. The second proviso would indicate that in case of an employee against whom disciplinary proceedings are either contemplated or initiated, such employee cannot be allowed to retire except with the specific approval of the appropriate authority.

19. The inference can only be that in case of an employee, who has otherwise satisfied the required conditions under rule 3(2), no formal sanction is required for retirement as the retirement takes effect from the date as per the rules.

20. However, it is open to the State or the Appointing Authority to decline to accept the request for premature retirement in two contingencies (i) disciplinary proceedings are in contemplation (ii) disciplinary proceedings had already been initiated. In the instant case, even on facts, none of the aforesaid contingencies exists.

21. Once, an employee satisfied the conditions for premature retirement as prescribed under rule 3(2) of the Rules, no other formal orders are required for the employee to retire from service as the Rules itself enable the employee to retire even without any formal order.

22. It would be noticed that the petitioner submitted his application for voluntary retirement on 28.02.2017 and the same along with copy of Resolution No. 6 dated 12.04.2017 was forwarded to the Director, Urban Development. The Director, Urban Development, did not reject the request of the petitioner, but only directed the Municipal Council, Kullu, to supply certain information/documents at once for taking further necessary action in the matter as the petitioner had to retire on 31.05.2017.

23. The Council instead of sending the said information at once to the Director issued a letter dated 24.07.2017 to the petitioner for reconciling the accounts, as is evident, from the letter dated 24.07.2017, which reads as under:-

"...From

Executive Officer,
Municipal Council, Kullu,
District Kullu, H.P.

To

Sh. Bhibash Acharya,
Sanitary Inspector,
Municipal Council Kullu,
District Kullu, H.P.

Dated : Kullu the 24-07-2017

Subject:- ***Volunteer Retirement (V.R.S.) regarding.***

Sir,

With reverence to this office letter No. 8718 dated 06-07-2016 vide which you were asked to give account of advance Rs. 26,08,550/-, which has not been given by you till date.

Therefore, you are again asked regarding above advance Rs.26,08,550/- + 10,000/- which was advanced to you on dated 04-04-2016 and you are required to give the total account of Rs. 26,18,550/- to this office otherwise it will be considered that there is no documents with you regarding this transaction.

Yours faithfully

sd/-
Executive Officer,
Municipal Council,
Kullu..."

24. It is only after lapse of 11 months that the Council finally submitted the documents to the Director, who returned the same vide his letter dated 01.05.2018 with a direction to the Council to re-examine the case in light of the observations made in the letter. It shall be apposite to reproduce the aforesaid letter which reads as under:-

"From

Director,
Urban Development,
Himachal Pradesh.

To

Executive Officer,
Municipal Council Kullu,
District Kullu, H.P.

Subject:- Regarding pension/family pension case of Sh. Niti Bibhash Acharya, Sanitary Inspector, MC Kullu.

Memo;

Reference your letter No. MCK/EA/ Pension/ 17/ 1055 dated 16.03.2018, on the subject cited above.

In this context, your attention is invited towards this office letter No. UD-H(B)(2)-1/95-2683-84 dated 09.05.2017 (Photocopy enclosed) vide which you were directed to examine the case of Sh. Bibhash Acharya, Sanitary Inspector under H.P. Civil Services (Premature Retirement) Rules, 1976 and supply certain information/documents for deciding the pre-mature retirement case of the official, whereas you have forwarded the pension case of above official for sanction of pension in his favour after lapse of 11 months period without supplying the requisite information/documents prior to deciding the voluntary retirement of the above official from the competent authority.

In view of the above, pension papers and Service-Book of the official received (in original) are returned herewith with the directions to re-examine the case in view of the facts elaborated above and take further necessary action in the matter, accordingly.

Encl: Service-Book
& other relevant
documents.

Sd/-
(Dr. D.K. Gupta)
Director, Urban
Development,
Himachal Pradesh."

25. The aforesaid narration of facts would go to indicate that the request of the petitioner for voluntary retirement was though not expressly accepted, but then there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

26. Apart from the above, there were no disciplinary proceedings contemplated or initiated against the petitioner at the relevant time, therefore, also no specific approval of acceptance of request for voluntary retirement

was required from the respondents, rather, such acceptance was automatic in the instant case.

27. Therefore, in the given facts and circumstances of the case, the petitioner is deemed to have voluntarily retired from service from the date as mentioned in the application for voluntary retirement i.e. 31.05.2017. However, since the amounts qua advances taken by the petitioner are yet to be reconciled and the petitioner infact has made a specific request to intimate him about the balance amount vide his letter dated 14.03.2019, therefore, in the given facts and circumstances of the case, we deem it proper to allow this petition and pass the following directions:-

> "(i) That the petitioner shall be deemed to have retired from service from the date as mentioned in the application i.e. 31.05.2017;
> (ii) Respondent No.3 shall after giving an opportunity of producing the documents/ records, reconcile the same with the petitioner and intimate the balance amount to be paid by the petitioner to the Council on or before 15.11.2021;
> (iii) The due and outstanding amount shall be paid by the petitioner on or before 31.03.2022; (iv) In the event of such deposit, the petitioner shall be entitled to pension/family pension and other retiral benefits such as leave encashment/gratuity etc.;
> (v) Since, both the parties are entitled to recover the amount from each other, therefore, in the peculiar facts and circumstances of the case, no interest shall be payable on the amount due to the respective parties.

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

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

Dr. Dharam Pal Singh Petitioner.

Versus

State of H.P and others Respondents.

CWP No. 2380 of 2021
Reserved on : 23.7.2021
Decided on : 29.7.2021

Constitution of India, 1950 - Article 226- Writ of quo warranto - University Grant Commission Regulations, 2019- H.P. University Act, 1970- Appointment of Vice Chancellor- University Grants Commission Regulations, 2010, are directory under the purview of State Legislation, as the matter has been left to the State Government to adopt and implement the scheme- Petition dismissed.

For the petitioner: Petitioner in person.

For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Hemant Vaid and Mr. Narender Guleria, Addl. Advocate Generals for respondents No.1 and 2.

Mr. T.S Chauhan, Advocate for respondent No.3.

Mr. Surender Verma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The writ petitioner, through the instant writ petition,has made an endeavor,for this Court making a writ of *quo warranto,* to set aside the selection and consequent appointment of co-respondent No.3, as,Vice-Chancellor of respondent No.4/ Himachal Pradesh University.

2. Through, an advertisement borne in Annexure P-4,the Governor (Chancellor) constituted a Search Committee for recommending a panel of names for appointment as Vice-Chancellor of the Himachal Pradesh University, Shimla.Also, through Annexure P-4, the Search Committee invited applications from the aspirants concerned. Annexure P-4 of6.1.2018, spells

therein allthe requisite terms and conditions, and, as, become embodied in Para 7.3.0 of the University Grants Commission Regulations-2010 read with Section 12(1) of the Himachal Pradesh University Act, 1970 (For short "UGC Regulations 2010")and also projects them,to be the prime anchor for the Search Committee making selection(s) of the aspirants concerned, to, the coveted post.However, through Annexure P-5,made on 30.6.2018, the date for the aspirants making an application for appointment to the post of Vice Chancellor, became extended till 20th July, 2018.

3. Annexure P-6of 18.7.2018,encloses the qualificationspossessed by co-respondent No.3, for his hence succoring his claim, vis-à-vis, his fullest eligibility for his being considered for selection, and, for his being appointed to the coveted post of Vice Chancellor of Himachal Pradesh University, Shimla.

4. On 2.8.2018, respondent No.3 was appointed as Vice-Chancellor, Himachal Pradesh University, and, on 3.8.2018, respondent No.3 assumed the charge of the Office of Vice-Chancellor of respondent No.4/Himachal Pradesh University.

5. The gravamen of the entire lis is rested, upon, Para 7.3.0 (i) (for short "clause") of UGC Regulations 2010, which is extracted hereinafter:-

> "*persons of the highest level of competence, integrity, morals and institutional commitment are to be appointed as Vice-Chancellors. The Vice-Chancellor to be appointed should be a distinguished academician, with a minimum of ten years of experience as Professor in a University system or ten years of experience in an equivalent position in a reputed research and/or academic administration organization."*

6. A perusal of clause(supra)reveals that any aspirant, aspiring forappointment tothe coveted post of Vice-Chancellor,hence compulsorily being a distinguished academician, and,his also holding a minimum of ten years of experience as Professor in a University system or ten years of

experience in an equivalent position in a reputed research and/ or academic administrative organization.

7. Though the writ petitioner, does not challenge, the constitution of theSearch Committee for its hence making recommendations, of the aspirants concerned, to the post of Vice-Chancellor of respondent No.4. However he challenges the trite factum of co-respondent No.3, possessing the requisite experience (supra) and as appertains to his serving for 10 years as Professor in a University. The writ petitioner draws, the, attention of this Court to Annexure P-10. Annexure P-10 are the minutesof the proceedings of the Executive Council, as, become drawn on 19.3.2011. Though, he does not challenge the recommendations,as made therein, for the promotion of respondent No.3 as a Professor w.e.f 1.1.2009. However, he argues that even if co-respondent No.3 became recommended to the promotional post of Professor w.e.f 1.1.2009, nonetheless he contends that co-respondent No.3,did not work, or function, as, a Professor from the year 2009 till 2011. He hence submits that the non-working of co-respondent No.3 as a Professor in a university from the year 2009 till 2011, does not confer, in him the requisite functional experience of 10 years, as a professor, in the Himachal Pradesh University, as is required rather by the afore extracted clause,to be possessed by him.

8. The afore submission is merit-worthy, as it is supported, bya judgment rendered by the Hon'ble Apex Court in Civil Appeal No. 5410 of 1991, titled as Union of India versus M. Bhaskar and others (reported in 1996(4) SCC 416), relevant paragraph 15 whereof stands extracted hereinafter:-

> *"The aforesaid decision has been challenged in this appeal by the Union of India by contending that 2 years' period of experience has to be reckoned, not from 11.10.1988, but from 21.9.1989. There is no dispute that the eligibility condition is 2 years' experience in Grade II. Now, this*

> *respondent having really started working in Grade –II pursuant to the order of 21.9.1989, he could not have gained experience prior to the date he had joined pursuant to this order. The mere fact that his promotion in Grade II was notionally made effective from 11.10.1988 cannot be taken to mean that he started gaining experience from that day, because to gain experience one has to work. Notional promotions are given to take care of some injustice, inter alia, because some junior has come to be promoted earlier. But we entertain no doubt that the person promoted to higher grade cannot gain experience from the date of the notional promotion; it has to be from the date of the actual promotion."*

9. Be that as it may any validation by this Court of the afore submission may not perse constrain this Court to make a writ of *quo warranto,*whereupon the selection and consequent appointment of respondent No.3, as,Vice Chancellor of Himachal Pradesh University, may hence become annulled. The reason(s) for forming the afore conclusion becomes drawn from a supplementary affidavit sworn by the Secretary, to the Governor, wherein it has been suggested, that the writ petitioner has filed the instant writ petition with an oblique motive. Further more, it has been clarified in paragraph 5 of the supplementary affidavit sworn by the Secretary of the Governor, that thefacts relating to the notional and actualpromotion werenot in the knowledge of the Search Committee, as, the same were not categorically and specifically mentioned by respondent No.3 in his application, and, that any contention carried in the reply on affidavit of 28.4.2021, that respondent No. 3 in his application rather purportedly falsely revealing qua his possessing the requisite qualification, becomes sequelled by mere oversight, and, that the afore contention as carried in the afore reply on affidavit, as, furnished to the writ petition may not be assigned any credence. Even though care and caution was required to be made by the Officer swearing the reply on affidavit of 28.4.2021. However the fulcrum of the lis may not be rested upon the afore,

rather may hence become rested, upon, the factual matrix available hereat, and upon the application/non-application, vis-à-vis, the respondent No.3, of the requisite functional experience, as, becomes enshrined in the clause (Supra).

10. The State of Himachal Pradesh/respondent No.1, while making a reply to the writ petition, has contended that the mandate of clause (supra) of UGC Regulations, 2010 has not been adopted by the State Government. Consequently, it has to beadjudicatedwhether (a) clause (supra) was mandatorily required to be adopted by the State of H.P (b) and if adopted whether clause supra holds the fullest clout and sway in so far as the writ petitioner's claim is concerned (c) and whetherfor validnon-adoption of clause (supra) by the State Government,the writ petition becomes dismissable.

11. Initially it has to be adjudged whether the mandate of clause supra,as carried, in the UGC notification of 18.9.2010,required its adoption by the State of Himachal Pradesh. The afore conundrum is set at rest by adecision, of the Hon'ble Apex Court rendered in 2015 (6) SCC 363 titled as ***Kalyani Mathivanan*** versus ***K.V Jeyaraj and others***. Relevant paragraphs 62.4 and 62.5 whereof, stand extracted hereinafter:-

> *"62.4 The UGC Regulations, 2010 are directory for the universities, colleges and other higher educational institutions under the purview of the State legislation as the matter has been left to the State Government to adopt and implement the Scheme. Thus, the UGC Regulations, 2010 are partly mandatory and is partly director.*
>
> *62.5 The UGC Regulations, 2010 having not been adopted by the State of Tamil Nadu, the question of conflict between the State legislation and the statutes framed under the Central legislation does not arise. Once they are adopted by the State Government, the state legislation to be amended appropriately. In such case also there shall be no conflict between the State legislation and the Central legislation."*

12. In Kalyani'case (supra), It has been explicitly spelt that UGC Regulations, 2010 are directory for Universities, colleges and other higher educational institutions, under the purview of State legislations, as the matter has been left to the State Government, to adopt and implement the scheme. In sequel, the nuance of the mandate carried in Paragraphs 62.4 and 62.5 of Kalyani's case (supra), is that latitude and leverage, is, left to the State Government, to adopt and implement the UGC Regulations, 2010, especially when Colleges and other higher educational institutions are under the purview of the State legislation. Since Himachal Pradesh University is governed by its own statutes, as, become enacted by the H.P State legislative Assembly.Therefore the mandate carried in paragraphs (supra), of the verdict recorded in Kalyani's case (supra), that in so far as colleges and other higher educational institutionshence falling under the purview of State legislation(s),and, in respect whereof there existsvalidly enacted ordinances and statutes,hence governing and regulating, any academic activity or courses streams taught therein(s) rather the aforesaid rule(supra) is merely directory. In sequel in respect of Himachal Pradesh University, the UGC Regulations of 2010, are not mandatory rather are directory, given the State of Himachal Pradesh in its reply to the writ petition rather speaking about valid non-adoption of clause(supra) by it.Consequently, any detraction from clause (supra) may not invite or attract the ill-sequel, of the selection asVice Chancellor of respondent No.3, rather warranting annulment.

13. Be that as it may, sincethe necessity of adoption of the clause (supra) by the State of Himachal Pradesh, has also been with vividity, pronounced in paragraphs 62.4 and 62.5 of Kalyani's case (supra), whereas, the mandate of clause (supra) remains un-adopted by the State of Himachal Pradesh. Therefore, this Court reiteratedly concludes, that the UGC Regulations of 2010, and, especially the mandate supra carried therein, and, appertaining to the requisite functional experience (Supra)to be possessed, by

the aspirants concerned who seek their selection and appointment, to the post of Vice Chancellor,rather are not mandatory in nature,contrarily are directory in nature, and, any breach visited upon the mandate (supra) of UGC Regulations, of 2010,by co-respondent No.3, and or, by the Search Committee or by the appointing authority, would not make this Court,to become constrained to issue a writ of *quo warranto,*for therethrough(s)the selection and appointment ofco-respondent No.3, as,Vice Chancellor of Himachal Pradesh University, becoming annulled.

14. However, the petitioner has contended,on anvil of a notification existing at page 154, of the paper book labeled as Annexure R-1,contents whereof are extracted hereinafter, that the stand as projected by respondent No.1 that UGC Regulations of 2010, more specifically, the mandate of clause (supra)of UGC, Regulations, 2010, has not been adopted by the State Government,is both flimsy, and, spurious.

> *"I am directed to refer to the subject cited above and to say that the UGC has notified the Regulations 2010 on 30th June 2010 vide which the stages of promotion under CAS of incumbent and newly appointed Assistant Professors/Associate professors has also been notified. Now, the Government has decided to adopt the Academic Performance Indicator (API) and Performance Based Appraisal System (PBAS) for holding the meeting of DPC for the grant of scales under CAS. It is, therefore, requested to send the proposal to the Government to hold the DPC of incumbents who are becoming eligible on or after 1-1-2009 to be placed in Pay Band-IV. In addition to this it has also been decided that the action in the letter No. EDN-H (8) B (7)34-2/2009 (Sr. Sel.) dated 18th May, 2011 be deferred till further order.*
>
> *You are therefore, requested to send the proposal to the Government after collecting the API and PBAS proforma from the eligible incumbents to hold the meeting of DPC so that the eligible lecturer be placed in pay Band-IV."*

15. However in his making the afore submission he has faltered, as, in the opening sentence thereof,there is a reference to the UGC Regulations of

2010 ratheronly with respect to the promotion of newly appointed AssistantProfessors and Associate Professors. Therefore, the afore opening sentence, does not gain any conclusion, that the mandate of clause (supra) of UGC Regulations, 2010 has also been adopted. Contrarily, when the second sentencethereof makesechoings, that a decision has been made to adopt the Academic Performance Indicator (API)and Performance Based Appraisal System (PBAS), hence for holding the meetings of the DPC(s)concerned,rather hence in the making(s) of selection(s)/appointment(s), and, promotion(s)to the post of Assistant Professor/Associate professor. Consequently,the inference which is garnered from Annexure R-1, is that when there is completest reticence therein, with respect to the State of Himachal Pradeshrather adopting the clause (supra) carried in UGC Regulations, 2010, and, as appertains to the coveted post. Thereupon, no capital can be drawn from Annexure R-1,by the petitioner, in so far as its purportedly making anechoing thatthere-through, the Government of Himachal Pradesh, has adopted clause 7.3.0 of UGC Regulations 2010, which however, remains unexplicitly adopted, whereas, it was required to be explicitly adopted, and, as appertaining to the qualificationsto be possessed by the aspirants,who seek selection and appointment to the coveted post of Vice Chancellor of Himachal Pradesh, University, Shimla. Even otherwise, since the petitioner does not either label as tainted, the membership of the search committee nor when he casts malafies qua the members of the search committee. Consequently, when the search committee is taint free, thereupon its expertise in making the apposite selection, is unquestionable nor its opinion can be substituted by the Court.

In view of the above, I find no merit in the petition, the same is accordingly dismissed. All pending applications are dismissed as such.

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

Between:-

1. THE STATE OF HIMACHAL PRADESH

THROUGH ADDITIONAL CHIEF SECRETARY
(FORESTS) TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. THE DIVISIONAL FOREST OFFICER,
WILDLIFE DIVISION, HAMIRPUR,
DISTRICT HAMIRPUR, H.P.

...PETITIONERS

(BY MR. RAJINDER DOGRA, SENIOR ADDITIONAL
ADVOCATE GENERAL)

AND

SH. RAKESH KUMAR SON OF SH. RANJEET SINGH,
RESIDENT OF VILLAGE AND POST OFFICE NAKRANA,
TEHSIL SHREE NAINA DEVI JEE,
DISTRICT BILASPUR, H.P.

....RESPONDENT.

(MS. ARCHANA DUTT, ADVOCATE**).**

CIVIL WRIT PETITION No. 2599 of 2017
RESERVED ON: 10.09.2021.
DECIDED ON: 17.09.2021.

Industrial Disputes Act, 1947 - Section 25-G – Award - Award assailed- Retrenchment- No fault found with the findings recorded by the Learned Labour Court- Petition dismissed.

This petition coming on for hearing this day, ***Hon'ble Mr. Justice Satyen Vaidya****, passed the following:*

O R D E R

By way of instant petition, petitioners have assailed the Award dated 21.3.2016 passed by learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (for short 'Labour Court') in Reference No. 135 of 2015.

2. The respondent herein (for short 'workman'), on 8.10.2009, issued demand notice under Section 2A of the Industrial Disputes Act, 1947

(for short 'Act')upon petitioner No.2 (for short 'employer') whereby he sought redressal of his grievance in accordance with the provisions of the Act.

3. Workman claimed that he had worked as "Beldar" in Wildlife Division, Hamirpur on daily wage basis during the entire year of 2008 and he was illegally retrenched w.e.f.01.01.2009. It was further alleged that after his retrenchment the employer engaged 17 workmen during 2009 without affording any opportunity of re-engagement to the workman.Principle of 'last come first go' was stated to have been violated. It was also the allegation of the workman that he was not allowed to complete 240 days in one year by employing fictional breaks. Thus, violations of Sections 25-F, 25-G and 25-H of the Act were alleged.

4. The conciliation proceedings were unsuccessfully conductedby Conciliation Officer, whereafter failure report was submitted to the appropriate Government. Accordingly, the dispute was referred to the Labour Court by the appropriate Government with following reference:

"Whether the termination of services of Shri Rakesh Kumar S/o Shri Ranjeet Singh, R/o Village and P.O. Nakrana, Tehsil Shree Naina Devi Jee, District Bilaspur, H.P. by the Divisional Forest Officer, Wild Life Division, Hamirpur, District Hamirpur, H.P. w.e.f. 01.01.2009 without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and relief the above workman is entitled to?"

5. In his claim submitted before the Labour Court, the workman reiterated his pleas as raised in the demand notice and prayed for directions to the employer to re-engage the workman with benefits of due seniority and continuity in service.

6. The employer contested the claim of the workman on the grounds that the workman had worked only as a casual labour. The employer used to have seasonal works for raising of nursery and plantation etc. and workers were engaged as per availability of works and funds. It was further

submitted that the workman used to attend the work as per his own wish. He was not regular in attending the work. The allegation of retrenchment of worker was specifically denied. As per employer, the workman had worked intermittently during the year 2008 for total 72 days. It was clarified that thepersons engaged after 01.01.2009 were employed under the H.P. Zoos Conservation Breeding Society, in Monkey Sterilization Centre Saster, District Hamirpur and Gopalpur, District Kangra on contract basis after obtaining necessary permission from the Additional Chief Secretary (Forests) to the Government of H.P. It was stated that the workman was not entitled to seek parity with the persons so employed under the contract.

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

8. The Labour Court framed the following issues:

1. Whether termination of the services of the petitioner by the respondent w.e.f. 01.01.2009 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 the claim petition is not maintainable in the present form? OPR
4. Relief.

9. The claim of workman was allowed partly and an award in the following terms was passed:
"As a sequel to my findings on foregoing issues, the reference/claim petition is allowed partly. The respondent is hereby directed to re-engage the petitioner forthwith. The petitioner shall be entitled to seniority and continuity in service from the date of his illegal termination except back wages. The parties, however, shall bear their own costs."

10. Before entering the arena of merits of instant case, this Court is reminded the following excerpts from judgment rendered by the Hon'ble Supreme Court in ***Harjinder Singh vs. Punjab State Warehousing Corpn. (2010) 3 SCC 192*** and intends to gainfully use them for guidance:

"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act *and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues."*

11. Learned Labour Court, after taking into consideration the seniority list Ext.PW-1/D and the man-days charts Ext.PW-1/B and Ext.PW-1/C, has held violation of Section 25-G of the Act on account of non-adherence to the principle of 'last come first go'. This conclusion, in the considered view of this Court, is not sustainable.The last day when workman worked was 31.12.2008. Ext.PW-1/D is the mandays Chart/Seniority List of daily wagers (month-wise in each calendar year) from year 1999 onwards (upto 31.7.2010) in respect of Wildlife Division Hamirpur. The name of workman is reflected at serial No.18 of this document and after him at serial Nos. 19 and 20 are the persons, who were also engaged in July and August, 2008, respectively. However, the person at serial No.19 had worked in July and August, 2008 only for 46 days and the person at serial No.20 had worked only for 2 days in the month of August, 2008. Meaning thereby workman remained the last employed person for the year 2008 because he worked till 31.12.2008. In light of this fact, it cannot be said that there was violation of the principle of 'last come first go'.

12. Similarly, reliance on documents Ext. PW-1/B and Ext.PW-1/C by learned Labour Court for holding violation of Section 25G, cannot be countenanced. Perusal of these documents reveal that these relate to the persons, who were employed on daily wages in the Forest Division, Bilaspur, which was distinct and separate from the Wildlife Division Hamirpur. It has

been clarified by RW-1 in his cross-examination that the seniority lists were maintained at Circle level and the Wildlife Division, Hamirpur and the Forest Division, Bilaspur fell under different Circles.

13. Notwithstanding that the reasoning adopted by the learned Labour Court for holding violation of Section 25-G is held to be incorrect, still the violation of Section 25-G is made out in the facts of the case.

14. Retrenchment is the sine qua non for violation of Section 25-G, which reads as under:

*" **25G. Procedure for retrenchment.**- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."*

15. Retrenchment has been defined in Section 2 (oo) of the Act, as under:

"retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-
(a) voluntary retirement of the workman; or
(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
(c)termination of the service of a workman on the ground of continued ill-health."

16. Thus, for retrenchment, termination has to be by the employer and it should not be the result of any voluntary act of the workman.

17. Admittedly, workman in the instant case was not a contract employee. As per workman, he was not allowed to perform work w.e.f. 01.01.2009 on the ground of want of work and funds. In cross-examination, a simple suggestion

has been put to workman that he was not removed from the work by the department which was categorically denied by him. The case represented by the employer otherwise is that the employer used to have only seasonal work. Sh. H.K. Sarwata, IFS, the then Divisional Forest Officer, Bilaspur, as RW-1 deposed that workman was engaged as seasonal worker on daily wage basis for seasonal forestry work as per availability of works and funds during June, July and December, 2008. Thus, even if disengagement of workman was on account of non-availability of work, still it will amount to retrenchment because it suffices that the termination of the service of a workman had taken place, reason being immaterial.

18. Since violation of principle of 'last come first go' has not been established in the facts of the present case, as such, despite the retrenchment of workman being there, Section 25-G, cannot be said to have been infringed.

19. It is the violation of Section 25-H, which is evident on record. It has been proved that about 17 persons were engaged in September and October, 2009 by employer in Wildlife Division, Hamirpur. The plea of employer that these persons were employed on contract basis with prior approval of competent authority against a specific project makes no difference. It is not the case of employer that the persons so employed had some special qualification or the persons with special qualifications were required to be engaged for the claimed project.

20. Section 25-H of the Act, reads as under:

*"**25H. Re- employment of retrenched workmen**.- Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen] who offer themselves for re-employment shall have preference over other persons."*

21. Admittedly, when the above noted 17 persons were engaged by employer, the workman was not afforded requisite opportunity to afford himself for re-employment and, thus, there is clear violation of this provision

of Section 25-H of the Act. No fault can be found with the findings recorded by learned Labour Court in this respect.

22. The findings returned by the learned Labour Court to the effect that the workman had worked only for a period of 72 days

in the entire calendar year 2008, are also based on the facts proved on record. However, the number of days for which workman was engaged will not make any difference insofar as the violation of Section25-H of the Act is concerned. The only requirement is that the workman should have been retrenched and he should not have been afforded opportunity to offer himself for re-engagement at the time when the employer seeks to re-engage persons subsequent to his retrenchment.

23. Learned Senior Additional Advocate General, on behalf of petitioners, has also contended that the claim of the workman was stale and should not have been allowed. This argument deserves rejection for the reason that the cause of action accrued to the workman in September 2009, when new persons were engaged by employer and the workman had issued demand notice under Section 2A of the Act on 8.10.2009.

24. Though some of the findings returned by learned Labour Court, as detailed above, have been interfered with by this Court, but that will not affect the final outcome.

25. In the light of above discussion, there is no merit in the petition and the same is dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

AMIT KUMAR S/O LATE SH. KARTARCHAND
R/O VILLAGE BAGH, PO-ALAMPUR,

TEHSILJAISINGHPUR, KANGRA H.P.

...PETITIONER

(BY SH. AJIT SHARMA, SH. PRASHANT SHARMA
AND MS. RAGINI DOGRA, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH
   SECRETARY (HOME)TO THE GOVERNMENT
   OF H.P. SHIMLA-171002.
2. DIRECTORGENERAL OF POLICE,
   HIMACHAL PRADESH, SHIMLA - 9.
3. SUPERINTENDENT OF POLICE,
   DHARAMSHALA, DISTRICT KANGRA,
   HIMACHAL PRADESH.
4. STATION HOUSE OFFICER,
   POLICE STATION LAMBAGAON,
   DISTRICT KANGRA, HIMACHAL PRADESH.
5. SH.ANDRESH SAYAL
   S/O LATE PRITAM CHAND SYAL,
   R/O VILLAGE BAGH, POST OFFICE ALAMPUR,
   TEHSIL JAISINGHPUR. DISTT. KANGRA.
6. SH. MANOHAR LAL S/O SH. DIWAN CHAND
   R/O VILLAGE POST OFFICE, ALAMPUR,
   JAISIGHPUR, LAMBAGAON, KANGRA HP.

7. SH. SHASHI PAL,
   THE THEN CONSTALE, P.S. ALAMPUR,
   PRESENTLY POSTED AT POLICE LINE,
   DHARAMSHALA.
8. SH. SANJEEV KUMAR,
   THE THEN HEAD CONSTABLE,
   P.S. ALAMPUR, PRESENTLY POSTED
   AT POLICE CHOWKI TANDA.

9. SH. ASHOK KUMAR, THE THEN HOME GUARD,
   P.S. ALAMPUR.
10. CENTRAL BUREAU OF INVESTIGATION,

SHIMLA, THROUGH ITS
SUPERTENDENT OF POLICE.

....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. RAJINDER DOGRA, SR. ADDL. A.G.,
SH.VINOD THAKUR, SH. HEMANSHU MSRA,
SH. SHIV PAL MANHANS, ADDL. A.GS. WITH
SH. BHUPINDER THAKKUR, DY. A.G.
FOR RESPONDENTS NO. 1 TO 4.

SH. ARVIND SHARMA, ADVOCATE, FOR
RESPONDENT NO.5.

SH. TARA SINGH CHAUHAN, ADVOCATE
FOR RESPONDENT NO.6.

SH. NAVEEN K. BHARDWAJ, ADVOCATE,
FOR RESPONDENTS NO. 7 AND 8.

SH. SAT PRAKASH, ADVOCATE, FOR
RESPONDENT NO.9.

SH. ANSHUL BANSAL, ADVOCATE, FOR
RESPONDENT NO.10.

SH. ASHWANI KUMAR, INSPECTOR, SV&ACB,
SHIMLA.)

CIVIL WRIT PETITION No. 6287 of 2020
RESERVED ON: 02.09.2021.
DECIDED ON: 07.09.2021.

Constitution of India, 1950 - Article 226 - Transfer of investigation to the Central Bureau of Investigation- Petitioner apprehends a serious foul play in the investigation for the reasons that the police intended to protect and save its officials- Held, it is well settled that investigation can be transferred from local police to Central Bureau of Investigation only in exceptional cases and not as a matter of routine- Investigation is credible and not biased in any manner- Petition dismissed.

Cases referred:

Arnab Ranjan Goswami vs. Union of India and others (2020) 14 SCC 12;

K.V. Rajendran vs. Superintendent of Police, CBCID South Zone, Chennai and others (2013) 12 SCC 480;
Mithilesh Kumar Singh vs. State of Rajasthan and others (2015) 9 SCC 795;
State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others (2010) 3 SCC 571;

This petition coming on for final hearing this day, ***Hon'ble Mr. Justice Satyen Vaidya****, passed the following:*

O R D E R

By way of instant petition, petitioner has prayed for transfer of investigation of the case registered *vide* FIR No. 99/2020 dated 18.08.2020 at Police Station, Lambagaon, District Kangra, Himachal Pradesh to the Central Bureau of Investigation (for short, 'CBI').

VERSION OF PETITIONER:

2. Petitioner is son of late Sh. Kartar Chand, who breathed his last on 17.8.2020. On the fateful day, late Sh. Kartar Chand informed the petitioner at about 7.30 P.M. that he was invited by Sh. Manohar Lal, President, Gram Panchayat, Alampur along with Andresh Sayal alias Raju for a get together at Walia Restaurant. On the asking of his father, petitioner brought a bottle of liquor for him. Thereafter, Andresh Sayal purchased "Chicken Rahra" from the shop of petitioner and left on his scooty with late Sh. Kartar Chand on the "pillion.

3. Petitioner after 9.00 p.m. made various phone calls to Andresh Sayal to enquire about the whereabouts of his father and every time it was assured that Sh. Kartar Chand would return shortly. Petitioner went home after waiting for his father at shop expecting his father to reach home by himself.

4. On reaching home, the petitioner received a phone call from Andresh Sayal at about 10.21 p.m. and it was informed that they were sitting near a"Peepal tree" and father of petitioner would return in 10

minutes. Petitioner again made a phone call to Andresh Sayal after some time, on which, he was informed that his father had fallen down from the terrace of Police Station, Alampur and was not able to speak.

5. Petitioner thereafter rushed to the spot along with his brothers and found the main door of Police Station locked. Soon they found the body of their father lying on a road outside the Police Station without slippers which were lying aside. It was noticed by them that the hair, shirt and trouser worn by late Sh. Kartar Chand were wet and the body had cooled down. No blood was found on the body except some blood particles on the button of shirt of the deceased. Petitioner and his brothers noticed Andresh Sayal and Constable Shashi Pal hiding behind the bushes. Andresh Sayal was standing in a submissive state with folded hands and Shashi Pal was in his underwear and vest. They arranged for a taxi and took their father to the hospital where he was declared brought dead.

6. Constable Shashi Pal had also forcibly entered the taxi when it was about to leave for hospital and on the way he had tried to impress upon the petitioner and his brothers that their father had died due to fall and there was nothing in the case. They were threatened to hush up the matter. This was repeated by Constable Shashi Pal in the hospital also. The FIR was registered on 18.8.2020 on the statement of petitioner recorded under Section 154 Cr.P.C.

GRIEVANCE OF PETITIONER:

7. Feeling dis-satisfied with the investigation carried by the police, in the case, petitioner has approached this Court by way of present petition. According to petitioner, he and his brothers apprehended a serious foul play. According to him, late Sh. Kartar Chand was murdered by Andresh Sayal in conspiracy with Manohar Lal, President, Gram Panchayat, Constable Shashi Pal, Head Constable Sanjeev Kumar and Home Guard Ashok Kumar, who were present and posted in Police Station, Alampur at

the time of incident. As per petitioner, the investigation conducted by the police was not fair for the reasons that the police intended to protect and save its officials. Petitioner alleged the motive of murder of his father to be inimical relations between Andresh Sayal and his father.

8. Petitioner has pleaded the following reasons for his apprehension of biasness:

(i) The factum of death of Sh. Kartar Chand was not communicated to the petitioner in time;
(ii) The body of Sh. Kartar Chand was found to have cooled down by petitioner and his brothers when they reached the spot;
(iii) Hair, shirt and trouser of Sh. Kartar Chand were wet;
(iv) There were no blood on the body of Sh. Kartar Chand except a few stains of blood on the shirt;
(v) Ambulance was not timely called by the persons accompanying Sh. Kartar Chand;
(vi) Constable Shashi Pal was heavily drunk and had forced his entry into the car carrying Sh. Kartar Chand along with petitioner and his brothers with a purpose to threatened him to hush up the matter;
(vii) There were no blood stains on the spot where Sh. Kartar Chand was stated to have fallen;
(viii) The body of Sh. Kartar Chand was intentionally removed to the road with a purpose to obliterate the evidence.

9. Challenge to the investigation carried by the Police has been laid on following grounds:

i) Inaction of police in not investigating the role of police officials present in the premises on the date of incident;
ii) Police had intentionally omitted to incorporate all the crucial facts narrated by the petitioner in his statement under Section 154 Cr.P.C.;

iii) No eye witnesses were associatedby the police, according to whom, the police officials were heavily drunk on the night of incident;

iv) Questions have been raised about the medical reports of respondents No. 7 to 9 who were found to have not consumed alcohol on the night of incident;

v) The injury found on the head of Sh. Kartar Chand could not be result of a fall;

vi) Absence of blood stains on the spot where Sh.Kartar Chand had fallen, cast serious doubt on the story propounded by the police;

vii) The police ignored the statement of Sh. Vishal S/o Sh. Jagat Ram, Sh. Vishal Kumar S/o Sh. Sunil Kumar and Sh. Anil Kumar S/o Sh. Pratap Chand.

10. Per contra, the respondents have denied the allegations levelled in the petition. It has been averred on their behalf that the investigation was done in unbiased manner. Only a Police Post is located in Alampur and on the night of 17.8.2020 only three officials namely Constable Shashi Pal, Head Constable Sanjeev Kumar and Home Guard Ashok Kumar were present in the Police Post. On receipt of information about the incident, SHO, Police Station, Lambagaon had initiated inquiry even before registration of FIR and in order to avoid possibility of obliteration of evidence, he had got conducted the medical examination of all the three officials present in the police post. They were not found to have consumed alcohol. In investigation, it was found that Andresh Sayal was in possession of a premises adjoining to the Police Post and had a common staircase through which he could reach the terrace of his building. Since the main door of police post was closed during night, Andresh Sayal in the first

instance entered the Police Post from back side door and climbed up the stairs where three officials were making preparations to have meal. He sought permission from officials to bring Sh. Kartar Chand with him, who did not object. After having gossip for some time, it was found that Kartar Chand had walked out and later it was found that he had fallen from the stairs and was lying in injured condition. In order to take him to hospital, he was lifted towards the road from backdoor of Police Post. Head Constable Sanjeev Kumar had gone towards market on his motorcycle to search for some conveyance, but due to night hours, he could not readilyfind any vehicle. In the meantime, petitioner and his brothers arrived and they took the injured Sh. Kartar Chand towards hospital where he was declared brought dead.

11. On 18.08.2020, after registration of FIR, the spot was got inspected from a team of forensic experts, who after detailed analysis had opined that the nature of injuries suffered by Sh. Kartar Chand and also the spot position suggested a fall from staircase as cause of injuries suffered by Shri Kartar Chand. In the postmortem report of the deceased also nothing incriminating was found. The reports prepared by the Forensic Science Laboratory, after analyzing the evidence collected from the spot, were also not suggestive of any foul play. The deceased, in fact, was found to have consumed a huge quantity of alcohol as the Chemical Analyst had reported presence of 196.45mg% of ethyl alcohol in the blood sample of Sh. Kartar Chand. Similarly, ethyl alcohol to the extent of 113.84 mg%was found to be present in the blood sample of Andresh Kumar.

12. During investigation, Andresh Sayal was discharged under Section 169 Cr.P.C. The investigation is not yet closed.

13. We have heard learned counsel for the parties and learned Advocate General for the State.

ANALYSIS

14. The prayer of the petitioner for transfer of investigation of the case from the State Police to CBI is based upon his apprehension as to the fairness in investigation of the case. Merely because the petitioner perceived the events to have happened in a particular manner, cannot be a ground to transfer the investigation of the case. There has to be existence of some tangible material to afford credence to the apprehensions expressed by petitioner.

15. There is nothing unusual in the fact that the body of Sh. Kartar Chand was found on the roadside by petitioner and his brothers instead of the place where he had fallen. It is but natural that once an incident of the sort had happened, the persons around would have immediately lifted the injured from the spot to a place from where he could be taken to hospital in some mode of conveyance. The fact that Sh. Kartar Chand was without slippers cannot also be a ground to raise suspicion on the conduct of the respondents. Admittedly, Sh. Kartar Chand was wearing loose slippers which could have fallen on the road in the process when the injured was being carried.

16. The allegation that no blood was found on the body of Sh. Kartar Chand doesnot appear to be genuine. It is not the case of petitioner that they had not noticed grievous injury/wound on the head of his father when he first saw him lying on the road. It has also not been stated by petitioner that the blood in fact had clotted and was not oozing or flowing from the wound.

17. Why Andresh Sayal and police officials had not removed the injured to the hospital is not without plausible explanation It has been explained that though Head Constable Sanjeev Kumar had gone towards the market side on his official motorcycle to look out for a conveyance, but had not found the same immediately due to night hours. Nothing has been placed on record to suggest that ambulance was immediately available on call. Because the petitioner and his brothers could arrange the taxi, does not imply that respondents No. 5 and 7 to 9 had intentionally omitted to arrange the conveyance.

18. The allegation as to destruction of evidence is also falsified by fact that on 18.8.2020, a team of forensic experts had inspected the spot and had found blood stains on the spot as well as on the footrest of scooty lying parked nearby.

19. The allegation that Andresh Sayal had murdered Sh. Kartar Chand on account of past enmity also does not appear to be convincing. It is the case of petitioner himself that on the fateful night Andresh Sayal and Kartar Chand had gone together to have marry making in the company of Manohar Lal, President, Gram Panchayat. There is nothing to suggest that Andresh Sayal had any friendship or special relationship with police officials so as to join them in accomplishing murder of Sh. Kartar Chand.

20. The contention that the Investigating Agency i.e. the State Police is trying to save its own officials also appears to be mere assumption of petitioner. It is on record that on the intervening night of 17/18.08.2020 all the three officials who were present in the Police Post, Alampur were got medically examined and their blood/urine samples were preserved to assess the presence of alcohol. No alcohol was detected in either of the samples of the officials. Had there been any intent or attempt to suppress the genesis

of the happening by police, the SHO, Police Station, Lambagaon would not have resorted to the immediate action of getting his own officials medically examined.

21. It is well settled that the investigation can be transferred from local police to CBI only in exceptional cases and not as a matter of routine. In **State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others (2010) 3 SCC 571,** a Full Bench of Hon'ble Supreme Court has held as under:

> *"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would beflooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."*

22. Reference can also be made to the judgment passed by Hon'ble Supreme Court in **K.V. Rajendran vs. Superintendent of Police, CBCID South Zone, Chennai and others (2013) 12 SCC 480**, wherein it has held as under:

> *"13. The issue involved herein, is no more res integra. This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies……*
>
> *17. In view of the above, the law can be summarised to the effect that the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."*

23. In the case of **Mithilesh Kumar Singh vs. State of Rajasthan and others (2015) 9 SCC 795**, the Hon'ble Supreme Court reiterated the legal position as under:

> *"12. Even so the availability of power and its exercise are two distinct matters. This Court does not direct transfer of investigation just for the asking nor is transfer directed only to satisfy the ego or vindicate the prestige of a party interested in such investigation. The decision whether transfer should or should not be ordered rests on the Court's satisfaction whether the facts and circumstances of a given case demand such an order. No hard and fast rule has been or can possibly be prescribed for universal application to all cases. Each case will obviously depend upon its own facts. What is important is that the Court while exercising its jurisdiction to direct transfer remains sensitive to the principle that transfers are not ordered just because a party seeks to lead the investigator to a given conclusion. It is only when there is a reasonable apprehension about justice becoming a victim because*

> *of shabby or partisan investigation that the Court may step in and exercise its extra ordinary powers. The sensibility of the victims of the crime or their next of kin is not wholly irrelevant in such situations. After all transfer of investigation to an outside agency does not imply that the transferee agency will necessarily much less falsely implicate anyone in the commission of the crime. That is particularly so when transfer is ordered to an outside agency perceived to be independent of influences, pressures and pulls that are common place when State police investigates matters of some significance. The confidence of the party seeking transfer in the outside agency in such cases itself rests on the independence of that agency from such or similar other considerations. It follows that unless the Court sees any design behind the prayer for transfer, the same must be seen as an attempt only to ensure that the truth is discovered. The hallmark of a transfer is the perceived independence of the transferee more than any other consideration. Discovery of truth is the ultimate purpose of any investigation and who can do it better than an agency that is independent."*

24. Recently, the Hon'ble Supreme Court had occasion to deal withan identical issue in **Arnab Ranjan Goswami vs. Union of India and others (2020) 14 SCC 12** and after exposition of the past precedents of Hon'ble Supreme Court on the issue, it has been held as under:

> *"46. The principle of law that emerges from the precedents of this Court is that the power to transfer an investigation must be used "sparingly" and only "in exceptional circumstances". In assessing the plea urged by the petitioner that the investigation must be transferred to the CBI, we are guided by the parameters laid down by this Court for the exercise of that extraordinary power. It is necessary to address the grounds on which the petitioner seeks a transfer of the investigation. ……."*

CONCLUSION:

25. On examination of the facts of the case at the touch-stone of the above noticed elucidation of law, we don't find it to be an exceptional case warranting transfer of investigation from local police to CBI. From the record

that has been perused by us, we are satisfied as to the credibility of the investigation carried by the police. There is nothing to suggest that the investigation has been done in a biased manner. Petitioner has not been able to place on record any material sufficient to shake the judicial conscience of the Court.

26. In the light of above discussion, we do not find any merit in the petition and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Between:

1. SMT. HANSO DEVI
   WIFE OF LATE SHRI PURAN CHAND;
2. SMT. AMRO DEVI
   DAUGHTER OF LATE SHRI PURAN CHAND;
3. PARSI DEVI
   DAUGHTER OF LATE SHRI PURAN CHAND; AND
4. ROMALI
   DAUGHTER OF LATE SHRI PURAN CHAND
   ALL RESIDENT OF VILLAGE CHURAN, TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.

…APPELLANTS

(BY MR.K.D. SOOD, SENIOR ADVOCATE WITH MR. MUKUL SOOD, ADVOCATE, FOR THE APPELLANTS)

AND

1. SHRI DESH RAJ,

S/O OF LATE SHRI DAYA RAM,
RESIDENT OF VILLAGE CHURAN,
TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.
(SINCE DECEASED THROUGH HEIRS AND LEGAL REPRESENTATIVES)

1(A) SHRI GURMEET SINGH
SON OF SHRI SHAMSHER SINGH
SON OF LATE SHRI DESH RAJ;
RESIDENT OF CHUARAN, TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.
..PROFORMA RESPONDENTS

(BY MR. BIMAL GUPTA, SENIOR ADVOCATE WITH MS. POONAM MOGHTA, ADVOCATE, FOR THE RESPONDENTS)

2. REGULAR SECOND APPEAL NO. 183 OF 2008

Between:

1. SMT. HANSO DEVI
   WIFE OF LATE SHRI PURAN CHAND;
2. SMT. AMRO DEVI
   DAUGHTER OF LATE SHRI PURAN CHAND;
3. PARSI DEVI
   DAUGHTER OF LATE SHRI PURAN CHAND; AND
4. ROMALI
   DAUGHTER OF LATE SHRI PURAN CHAND
   ALL RESIDENT OF VILLAGE CHURAN, TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.

…APPELLANTS

(BY MR.K.D. SOOD, SENIOR ADVOCATE WITH MR. MUKUL SOOD, ADVOCATE, FOR THE APPELLANTS)

AND

1. SHRI DESH RAJ,
S/O OF LATE SHRI DAYA RAM,
RESIDENT OF VILLAGE CHURAN,

TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.
(SINCE DECEASED THROUGH HEIRS AND LEGAL REPRESENTATIVES)

1(A) SHRI GURMEET SINGH
SON OF SHRI SHAMSHER SINGH
SON OF LATE SHRI DESH RAJ;

1(B) SMT. CHAMELI DEVI DAUGHTER OF LATE SHRI DESH RAJ;
RESIDENT OF CHUARAN, TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.
...PROFORMA RESPONDENTS

REGULAR SECOND APPEALs NO. 182 and 183 of 2008
Reserved on: 11.8.2021
Decided on:20.08.2021

Code of Civil Procedure, 1908 - Section 100 - RSA - Suit for declaration to set aside the deed of relinquishment and subsequent appeal thereto dismissed - Suit properties are ancestral coparcenery properties- Held- Valid execution of relinquishment deed has been completely proven- Conclusion well founded and does not warrant any interference- Appeal dismissed.

These appeals coming on for orders this day, the Court passed the following:

J U D G M E N T

The plaintiffs instituted a civil suit, bearing No. 40/1 of 2014,before the learned Civil Judge (Jr. Division), Sirmour District at Nahan, H.P. In the afore civil suit, the plaintiffs claimed the making of a declaratory decree, for setting aside the deed of relinquishment, bearing No. 307, of, 2.8.1999, executed by Puran Chand, vis-à-vis, suit khasra Nos, and, qua the defendants. The plaintiffs afore suit became dismissed by the learned Civil Judge (Jr. Divn), Sirmour, at Nahan, through a verdict made thereon on 30.12.2006. The aggrieved plaintiffs constituted, against the afore made verdict, of the learned trial Court, a civil appeal, bearing No. 8-N/13 of 2007, before the learned first appellate Court. The learned first appellate Court, through its verdict,

made upon Civil Appeal (supra), proceeded to dismiss the plaintiffs' appeal and, obviously, affirmed the judgment and decree, as made by the learned trial Court concerned.

2. Against the afore concurrently recorded verdicts, as made by both the learned Courts below, the aggrieved plaintiffs instituted the instant appeal, before this Court. When RSA bearing No. 182 of 2008, came up for hearing, before this Court, on 31.3.2009, it came to be admitted, on the hereinafter extracted substantial questions of law:

1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence and the pleadings of the parties and the finding that there was a valid relinquishment deed executed by Puran Chand which was not vitiated as a result of fraud and misrepresentation is sustainable in law?
2. Whether in view of the findings in civil suit No. 40/1 of 2004 and civil appeal No. 8-N/13 of 2007 in respect of the same property the same relinquishment deed that the plea of Order 2 Rule 2 CPC, suit was barred by limitation and the decree in the suit in respect of the second relinquishment deed the decree for injunction was not sustainable when the plaintiff was not in possession of the property?
3. Whether in view of the fact that defendant was in possession of the property and the plaintiff not in exclusive possession thereof, the suit for injunction was maintainable and decree is sustainable in law?

3. Moreover, civil suit No. 59/1 of 2004 was instituted before the learned trial Court, by one Desh Raj, claiming therein the relief, of a decree of permanent prohibitory injunction, being pronounced against the defendants, and, vis-à-vis, suit khasra Nos. The learned trial Judge, through its verdict made on 30.12.2006, upon the civil suit (supra) hence decreed the plaintiffs' suit. The aggrieved defendants carried thereagainst civil appeal bearing No. 9-N/13 of 2007, before the learned first appellate Court. The learned first appellate Court, through its verdict, made thereon, on 3.3.2008, dismissed the defendants' appeal, and, obviously, affirmed and maintained the verdict

hence decreeing the plaintiffs' suit, as made by the learned trial judge concerned. The defendants are aggrieved from the afore concurrently made verdicts, by both, the learned Courts below, and, constituted before this Court, the instant regular second appeal, bearing No. 183 of 2008, which came to be admitted on the hereinafter substantial questions of law:

1. Whether the findings of the Court below are perverse and based on misreading of oral and documentary evidence, more particularly, the basis documents of the title relinquishment deed Ext. PW1/B and D-1 and the compromise deed, statements of the parties and Decreesheet D-7,D-8 and D-6.
2. Whether in view of the fiduciary relations between Puran Chand and the defendant and the lack of independent advise before executing the relinquishment deed raised inference of undue influence, coercion and fraud and the judgment and decree in appeal is not sustainable?
3. Whether the Court below was justified in not drawing adverse inference against the defendant for his non-appearance as a witness and the findings are based on wrong assumptions in ignoring the admissions, particularly D-1, D-5, D-6,D-7 and D-8 whereby the other relinquishment deed was not accepted and matter compromised?

SUBSTANTIAL QUESTIONS OF LAW

3. It is not disputed amongst the contesting litigants, that the suit properties, are ancestral coparcenery properties. Moreover, it is also not in dispute amongst the contesting litigants, that the deceased maker of the relinquishment deed, as executed by him, vis-à-vis, one of the defendants, held rights as co-owner, alongwith other co-sharers in the undivided suit property. All the apposite co-owners are reflected in Ext. PW1/A, exhibit whereof is the Jamabandi, appertaining to the suit khasra Nos. Moreover, the maker of the contentious relinquishment deed, one Puran Chand, and, the defendant in whose favour, the disputed relinquishment deed, was executed,

are real brothers. Therefore, unless it is proved on record, that the relinquishment deed, comprised in Ext. D-1, did not, come to be validly executed by deceased Puran Chand, thereupon, the afore Puran Chand, could validly cause conferment of title, through Ext. D-1, vis-à-vis, the defendant concerned. Consequently, it has to be gauged from the evidence on record, whether the valid execution of Ext. D-1, has been unflinchingly proven. In the afore endeavour, the son of defendant Desh Raj, one Shamsher Singh, stepped into the witness box, and, narrated in his affidavit, Ext. D-B, exhibit whereof came to be tendered in evidence, during the course of his examination-in-chief, that deceased Puran Chand used to live with his daughter, who is married in Haryana. He also narrated therein that the wife of deceased, did not, live with the deceased, rather, she used to live in Haryana. Furthermore, he has made echoing(s) therein, that on 2.8.1999, the deceased alongwith Kreshni, went to Nahan. Alongwith the defendant, one Mam Raj, Ram Sarup and Jetho Ram, Numberdar, also went to Nahan. One Devender Singh, Advocate, is, deposed to be approached by the defendant, to prepare a relinquishment deed, qua the house of the afore deceased Puran Chand. The afore Devender Singh Advocate, is, further deposed to prepare the apposite relinquishment deed, and, after contents thereof, being read over and explained, in vernacular, to the afore Puran Chand, the latter, in the presence of the witnesses thereto, namely one Mam Raj, Ram Sarup and Jetho, appended his thumb impressions, upon Ext. D-1. Also, in the presence of the afore Puran Chand, the apposite witnesses thereto, made their respective thumb marks on Ext.D-1. Subsequently, Ext. D-1 was presented before Sub-Registrar, Nahan, who after inquiring from Puran Chand, vis-à-vis, the veracity of the contents of relinquishment deed, and, upon the afore inquiry, Puran Chand admitting that all the contents carried therein are truthful, hence proceeded to, after his ensuring the identification before him, of, Puran Chand, by Jethu, Numberdar, make all the relevant signatured

statutory endorsements, on Ext. D-1. He also echoed in Ext. DB, that at the relevant time, deceased Puran Chand, was in a sound and disposing state of mind. Even though, he was thoroughly cross-examined by the learned counsel for the plaintiff. However, in the afore endeavor, no elicitation, became un-earthed from him, vis-à-vis, any fraud or coercion, becoming exerted, upon one Puran Chand, in his executing Ext.D-1. The afore made deposition is, corroborated by the scribe of Ext. D-1, inasmuch as by DW-3, one Devender Singh, Advocate.

4. Moreover, DW-4, one Mam Raj, who is an attesting witnesses of Ext. D-1, completely supported, the version, as deposed earlier by both DW-3, and, DW-2. Consequently, since even during the course of the cross-examination of DW-4, nothing emerged from him, rather suggestive, that the deceased executant of Ext. D-1, one Puran Chand, at the relevant time, was not in a sound and disposing state of mind, nor when any elicitation emanated from him, rather suggestive that the thumb impressions, of, the afore, were not made by him, in the presence of DW-4, rather when he has also deposed, that after the deceased testator appending his thumb impressions, on Ext.D-1, his also appending his thumb marks thereon(s) hence, in the presence of the deceased executant. Therefore, this Court concludes, that the valid execution of Ext.D-1 has been unflinchingly proven.

5. Be that as it may, Ext. D-1, became registered by the Sub-Registrar concerned. On Ext. D-1 occur the sealed and signatured statutory endorsements, of the Sub-Registrar concerned, whereabove there occur(s) recitals, that only after the Sub-Registrar concerned, reading over and explaining in vernacular to Puran Chand, all the contents of Ext.D-1,and, also ensuring that all the contents carried therein being comprehended by Puran Chand, hence, his ensuring the making in his presence rather the apposite thumb impressions, on Ext. D-1, by Puran Chand,. Therefore, the sealed and signatured statutory endorsements as made by the Sub-Registrar

concerned, on Ext. D-1, do acquire completest evidentiary vigor. Conspicously, when no evidence in rebuttal to the making of the afore sealed, and, signatured statutory endorsements, became hence adduced by the plaintiffs, nor when the identification, before the Sub-Registrar concerned, of, the deceased testator, by Jethu Numberdar, has been challenged. Consequently, the Court concludes, that the valid execution of Ext.D-1 has been completely proven.

6. The learned counsel for appellants submits, before this Court, that since in an earlier suit, interse litigants similar in the instant suit, and also, when in the earlier suit, rather similar to the extant suit property, hence, khasra Nos, became borne, and, whereupon a compromise, occurred before the Lok Adalat, compromise whereof is borne in Ext. D-6. Therefore, the learned counsel concerned argues that omission, on the part of the plaintiffs, to, in the earlier suit, make a challenge, upon the impugned relinquishment deed, constitutes a bar of estoppels(s), as becomes carried in order 2 Rule 2 CPC, against the plaintiffs, rather constituting the extant suit. However, the learned first appellate Court, in its verdict, made upon Civil Appeal No. 8-N/13 of 2007, made a conclusion that the afore bar is not attracted, as there exists no evidence on record, rather suggestive that the plaintiffs in Civil Suit No. 40/1 of 2004, were ever, in contemporaneity to the institution of the earlier suit or during pendency thereof, hence aware qua existence of the apposite relinquishment deed. Therefore, an inference became aroused that in contemporaneity to the institution of the earlier suit, or during its pendency, the plaintiffs were not aware of the existence of the impugned relinquishment deed, and, obviously could not at the afore phase cast any challenge thereto. Consequently, the learned first appellate Court aptly concluded, that the bar contained in Order 2 Rule 2 CPC, is not attracted, vis-à-vis, the plaintiffs' instant suit, and, thereafter, proceeded to reverse the findings contrary thereto, as became returned on the apposite

issue, by the learned trial Judge. The afore made conclusion is well-founded, and, also does not warrant any interference from this Court. Consequently, substantial questions of law No. 1 and 2, carried in RSA No. 182 of 2008, are answered in favour of the defendant(s), and also substantial questions of law No. 1, 2 and 3 carried in RSA No. 183 of 2008, are, answered in favour of the plaintiffs and, against the defendant.

Substantial questions of law with respect to the validity of decree of injunction, granted to the plaintiff, one Desh Raj in Civil Suit No. 59/1 of 2004

7. The suit property, is recorded in the apposite Jamabandi, to be co-owned by all the recorded co-owners. All the co-owners hold unity of title, and community of possession over every inch of the undivided suit property.

8. Assumingly, if the plaintiff, one Desh Raj is not in physical possession of the suit land, none of the recorded alongwith him hence co-owners or co-sharers in the undivided suit property, even if are holding physical possession thereof, cannot deny to Desh Raj the relief of injunction, nor can proceed to exclusively utilize rather to his complete ouster, any portion of the undivided suit property, nor can proceed to cause construction, upon any prime portion, of the undivided suit property, rather without the consent of other co-owners concerned.

9. Consequently, there is no merit in both the appeals, and, the same are dismissed. The impugned judgments and decrees, respectively, passed by both the Courts below, are affirmed and maintained. Decree-sheet be prepared accordingly. Also, the pending application(s), if any, are also disposed of. No costs.

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

Sh. Badru alias Badri Dass Appellant.

Versus

State of H.P and others Respondents.

RSA No. 30 of 2021
Reserved on: 27.4.2021
Decided on : 29.04.2021

Land Acquisition Act, 1894 - Suit for damages and subsequent appeal thereto dismissed – Held - Suit is amenable for being dismissed as the apt statutory remedies, as contemplated in the Land Acquisition Act, available to the plaintiff- Omission on the part of the plaintiff to recourse to specific statutory remedies bring the causality of dismissal of suit, as, aptly done by both the court below- Suit for possession was highly belated, as, it fell outside the period of 12 years prescribed for the afore purpose and fatally hit by the bar of limitation- Appeal dismissed.

For the Appellant: Mr. Virender Chauhan, Sr. Advocate with Mr. Ajay Kashyap, Advocate.

For the respondents: Mr. Hemant Vaid, Mr. Narender Guleria, Additional Advocate Generals with Mr. Vikrant Chandel, Deputy Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiff/appellant herein (for short "the plaintiff") instituted Civil Suit bearing No. 221/1 of 2013, before the learned Senior Civil Judge, Solan, claiming therein rendition of a decree of pecuniary damages quantified in a sum of Rs.12,50,000/-. Through a verdict recorded on 10.11.2017, the afore suit became dismissed by the learned trial Court. The aggrieved plaintiff instituted there-against Civil Appeal No. 56-S/13 of 2018 before the learned District Judge, Solan, and, upon the afore Civil Appeal, the learned first appellate Court affirmed the judgment and decree pronounced by the learned trial Court. The concurrent dismissal(s) by both the Courts below of the

plaintiff's suit/appeal, has brought grievance to him, and, has also led him to institute there-against the instant appeal before this Court.

2. When the instant appeal came up for admission before this Court on 2.3.2021, this Court admitted the appeal, on the hereinafter extracted substantial questions of law:-

> *1. Admittedly the land in question is in the ownership of appellant-plaintiff till date, whether the findings of Ld. Courts below holding that the suit is not maintainable on account of delay and latches and whether in given circumstances Ld. Court could have been granted decree for possession on the basis of title.*
>
> *2. Whether the findings as returned by Ld. Courts below are the result of misinterpretation of fats and law, misreading of documentary evidence and relevant provisions."*

3. The construction of pump house on the suit khasra numbers by the defendants, is, not contested by the latter. The afore construction occurred in the year 1980-1981. In contemporaneity to the raising of construction of pump house, the plaintiff, though, did not mete any scribed consent to the defendants. However, he also did not deter or forbade the defendants, through his seeking an interim injunction, from the Civil Court concerned, from theirs constructing a pump house on the suit khasra numbers. Even though, the afore may not constitute any waiver or abandonment, on the part of the plaintiff, to, receive compensation in accordance with law, from the statutory authority concerned, as, contemplated in the Land Acquisition Act. However, the afore specific contemplation encapsulated in a special legislation appertaining to acquisition of land, utilized for construction of pump house, by the defendants hence in the year 1980-1981, became enjoined to be strived to be meted compliance by the plaintiff, through his encapsulating in the plaint, relief for mandatory

injunction seeking therethrough the making of an injunction, upon, the defendants to ensure the issuance of a notification, under the relevant statute, and, thereafter for compensation becoming assessed vis-a-vis the plaintiff's land utilized for the afore purpose. Apparently, the afore relief of mandatory injunction is not claimed in the Civil Suit. The effect of the afore omission, is that the suit for recovery of pecuniary damages, quantified in a sum of Rs.12,50,000/- was amenable for being dismissed as the afore legal recoursing rather constituted the apt statutory remedies available to the plaintiff. Resultantly, omission on the part of the plaintiff to recourse the afore specific statutory remedies, does for reiteration, bring the causality of dismissal of his suit, as, aptly done by both the Courts below.

4. Be that as it may, even the plaintiff's suit for possession with respect to the suit khasra numbers, was highly belated, as, it fell outside the period of 12 years prescribed for the afore purpose. Moreso, when the construction of pump house, upon, the suit khasra numbers, occurred in the year 1980-1981, whereas the plaintiff's suit becoming instituted, more than 12 years thereafter, in as much as, in the year 2013, obviously would render the plaintiff's suit, even if therein relief of possession was claimed, to be completely, and, fatally hit by the bar of limitation.

5. Moreover, though waivers or abandonments may not constitute any estoppel against the plaintiff's suit for rendition of a decree for mandatory injunction, hence, seeking therethrough, the making of an injunction upon the defendants concerned to launch proceedings for acquisition of the plaintiff's land, for thereafter compensation in accordance with law, becoming assessed, vis-a-vis, the land acquired, (i) nonetheless, the afore belated institution of the plaintiff's suit seeking there-through the making of a decree of monetary damages against the defendants, does attract the bar not only of limitation but also the bar of estoppel arising from waivers or abandonments.

6. At this stage, it is important to allude to CMP No. 2283 of 2021 cast under the provisions of Order 6 Rule 17 readwith Section 151 of Code of Civil Procedure wherethrough leave of the Court is asked for, for making in the Civil Suit the hereinafter extracted amendments:-

> " Suit for recovery of damages of Rs. 12,50,000/- (Rupees twelve lacs and fifty thousands only) along with interest at the rate of 18% per annum till its realization and decree of mandatory injunction and in the alternative decree for possession on the basis of title.
>
> It is therefore, prayed that a decree for the recovery of Rs. 12,50,000/- (Rupees twelve lacs and fifty thousands only) alongwith interest at the rate of 18% per annum may kindly be passed in favour of the plaintiff and against defendants, the defendants may kindly be directed by passing a decree of mandatory injunction to acquire the suit land comprised in khata/khatauni No. 42/75 khasra No. 935 measuring 0-02-63 hectares, situated at mauza Malawan, Tehsil Arki, Distt. Solan, in accordance with law and to pay compensation and in the alternative a decree for possession of land comprised in khata/khatauni No 42/75 khasra No. 935 measuring 0-02/63 hectares situated at Mauza Malawan, Tehsil Arki, Distt. Solan in the interest of justice.

7. The afore amendment is highly belated, as, It is made post pronouncement of concurrent judgments and decrees by both the Courts below. More so, therein the relief of possession is claimed, relief whereof, is for the aforestated reasons completely hit by the bar of limitation. Consequently, inclusion of the afore relief in the plaint, is legally fallacious and is declined. In addition, the relief of mandatory injunction is also claimed to be included in the relief clause of plaint. However, the afore claim is highly belated and appears to be an afterthought, besides, changes the nature, frame and complexion hence of the suit, and, is rather amenable for its being declined.

8. Moreover, juxta posing the initially claimed relief in the suit in as much as, for assessment of monetary damages, vis-a-vis, the plaintiff's land utilized for construction of pump house by the defendants, and, with thereon the estopping bars, as, arising from waivers and abandonments, becoming hence sparked, (I) with, and, when the afore belated amendment changes, the, complexion and structure of the suit, besides the frame of the suit, thereupon, obviously render(s) hence the afore striving for addition(s) in the plaint, the relief of mandatory injunction to be also highly belated besides there-against the ill-consequences of waivers or abandonments become attracted

9. In view of the above, the instant appeal and CMP No. 2283 of 2021, are dismissed. The impugned verdict is maintained and affirmed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly.

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

Between:

SH. PREM CHAND SON OF SH. RATTI RAM,R/O VILLAGE LAGOG, PARGNA GHARSIANG, SUB-TEHSIL KRISHANGARH, TEHSIL, KASAULI, DISTRICT SOLAN, H.P.

....APPELLANT

(BY SH. V.S.CHAUHAN, SENIOR ADVOCATE WITH MR. HARISH SHARMA, ADVOCATE).

AND

1. SH. KRISHAN LAL SON OF SH. BHAGAT RAM,
2. SH. DILA RAM SON OF SH. MAST RAM,

3. SH. NEK RAM SON OF SH. MAST RAM,
4. SH. MOHINDER SON OF SH. KRISHAN LAL,
ALL RESIDENTS OF VILLAGE LAGOG, PARGNA GHARSIANG, SUB-TEHSIL KRISHANGARH, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

....RESPONDENTS

(BY SH.SUDHIR THAKUR, SENIOR ADVOCATE WITH MR. KARUN NEGI, ADVOCATE)

REGULAR SECOND APPEAL No.108 of 2021
DECIDED ON: 03.09.2021

Hindu Succession Act, 1956 - Sections 8, 9, 15 & 16 - Female succession- Inheritance of property of female who dies in intestate- Held- That the property of a female Hindu, who dies intestates in the absence of her son and daughter and the husband shall be devolved upon the heirs of her husband, if the property is inherited by her from her husband or upon the heirs of her father-in-law in case she inherited property from her father-in-law- Judgments and order passed by the Courts below upheld- Appeal dismissed.

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

J U D G M E N T

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, lays challenge to judgment dated 22.12.2018, passed by learned Additional District Judge-1, Solan, District Solan, H.P., in Civil Appeal No.12-S/13 of 2018, affirming the order dated 15.01.2018, passed by learned Civil Judge (Junior Division) Kasauli, District Solan, H.P in an application under Order 7 Rule 11 CPC in Civil Suit No.24-1 of 2016, titled as ***Prem Chand vs. Krishan Lal and others***, having been filed by the respondents (***hereinafter referred to as the defendants***), whereby, suit for declaration filed by the plaintiff-appellant to declare that Will, dated 15.11.2010 registered in the Office Sub Registrar, Krishangarh, Solan vide

No.26/2010 and mutation No.201 entered on the basis of aforesaid Will in favour of the defendants are null and void and for grant of decree for permanent prohibitory injunction, came to be dismissed being barred by law.

2. Briefly stated facts as emerge from the record are that the appellant-plaintiff ***(hereinafter referred to as the plaintiff)*** filed suit in the Court of learned Civil Judge (Junior Division) Kasauli, District Solan, H.P., seeking therein declaration that Will dated 15.11.2010 executed by Smt. Julfi Devi, bequeathing her property in favour of the defendants is null and void and mutation No.201 entered on the basis of aforesaid Will in favour of the defendants, is also null and void. Besides above, plaintiff also prayed for decree of permanent prohibitory injunction, restraining the defendants from interfering in the peaceful possession of the plaintiff over the suit property.

3. Precisely, the case of the plaintiff as projected in the plaint was that no Will ever came to be executed by deceased Smt. Julfi Devi in favour of the defendants and as such, he is also entitled to equal share with defendant No.1 and father of defendants No.2 and 3 except defendant No.4 in the entire estate left by Smt. Julfi Devi and for permanent prohibitory injunction, restraining the defendants from interfering in the peaceful possession. Plaintiff claimed that Smt. Julfi Devi widow of late Sh. Sheesh Ram was owner in possession of the land in village Lagog, Sub Tehsil Krishangarh, District Solan, H.P., and over that property she has also constructed house. Smt. Julfi Devi died issueless on 28.02.2016 and after her demise plaintiff, defendant No.1 and father of defendants No.2 and 3 being legal heirs have inherited her property as co-sharers. Plaintiff claimed that Sh. Piru Ram was the common ancestor of the parties and as per the pedigree table of the parties, Smt. Julfi Devi with their predecessor, also became owner of the suit property to the extent of 1/4th share in the abadi as detailed in the jamabandi after the death of her husband Sh. Sheesh Ram. Plaintiff claimed that Smt. Julfi Devi being old and weak was being looked after by him and at the time of her death, she

was not in fit state of mind. Plaintiff claimed that after the death of Smt. Julfi Devi, he came to know that on the basis of Will dated 15.11.2010 mutation has been entered in the name of defendants showing them to be owner of the suit property qua the share of Smt. Julfi Devi. Plaintiff claimed that defendants in connivance with the revenue officials prepared false and fabricated Will in their favour and got the mutation sanctioned on the basis of said Will, which was never executed by Smt. Julfi Devi in their favour. Since, despite repeated requests defendants failed to admit the claim of the plaintiff, he is compelled to file the suit.

4. Aforesaid claim put forth by the plaintiff came to be resisted on behalf of the defendants, who by way of filing written statement took specific objection with regard to maintainability, locus-standi, cause of action and estoppel. On merits, defendants though admitted that Smt. Julfi Devi died issueless, but denied that she had never executed any Will in favour of the defendants. Defendants in their written statement claimed that plaintiff has given wrong pedigree table in the plaint and during her life time Smt. Julfi Devi was looked after by the defendants and she in lieu of the services rendered by them executed valid registered Will dated 15.11.2020, bequeathing her entire property in favour of the defendants. Defendants while claiming themselves to be owner in possession of the suit property further claimed in written statement that there was no legal heir of Sheesh Ram husband of Smt. Julfi Devi, who was pre-deceased to Smt. Julfi Devi and plaintiff is not legal heir of Smt. Julfi Devi under Section 8 or under Section 15-B of the Hindu Marriage Act and as such, he has no locus standi to file the suit.

5. Aforesaid claim of the defendants came to be rebutted by the plaintiff by way of filing replication.

6. Before framing of issues on the basis of the pleadings adduced on record by the respective parties, defendants filed an application under

Order 7 Rule 11 CPC, praying therein for rejection of plaint on the ground that plaintiff does not fall in the category of succession as per his own pleadings and as such, plaint is liable to be rejected in terms of provisions contained under Order 7 Rule 11 CPC.

7. Plaintiff filed reply to the aforesaid application, wherein he reasserted his claim as was set up by him in the plaint. Learned trial court on the basis of the pleadings adduced on record as well as averments contained in the application filed under Order 7 Rule 11 CPC, passed order dated 15.01.2018, accepting therein prayer made on behalf of the defendants for rejection of plaint.

8. Being aggrieved and dissatisfied with the aforesaid order, dated 15.01.2018, passed by learned Civil Judge(Junior Division) Kasauli, District Solan, H.P., plaintiff preferred an appeal in the Court of learned Additional District Judge-1, Solan, District Solan, H.P., which also came to be dismissed vide judgment dated 22.12.2018. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein to decree his suit after setting aside the impugned impugned judgment and order passed by learned Courts below.

9. Having heard learned counsel representing the parties and perused material available on record vis-à-vis reasoning assigned by learned Courts below while passing impugned judgment dated 22.12.2018 and order dated 15.01.2018 respectively, this Court finds it difficult to agree with Mr. V.S.Chauhan, learned Senior Counsel representing the plaintiff that both the courts below have failed to appreciate the provisions of law as well as pleadings adduced on record in its right perspective, especially Sections 15-B and 8 of the Hindu Succession Act, rather this Court finds that since plaintiff miserably failed to prove his locus to file suit, no fault, if any, can be found with the order dated 15.01.2018, passed by learned Civil Judge(Junior Division) Kasauli, District Solan, H.P., accepting the application filed by the

defendants under Order 7 Rule 11 CPC, whereby specific prayer came to be made for rejection of plaint on the ground that plaintiff has no locus to file the suit.

10. Pleadings available on record clearly reveals that one Sh. Piru Ram was the common ancestor of the parties and late Sh. Ratti Ram was one of the son of Sh. Piru Ram, brother of deceased Seesh Ram, deceased late Sh. Bhagat Ram and Sh. Mast Ram. It is also not in dispute that present plaintiff Prem Chand is the son of late Sh. Ratti Ram and as such, he is entitled to property, if any, inherited by his father Ratti Ram from Sh. Piru Ram. Late Sh. Sheesh Ram, who was brother of Ratti Ram was married to Smt. Julfi Devi. Since, Sheesh Ram died prior to Smt. Julfi Devi, property falling in his share came to the share of Smt. Julfi Devi, who admittedly died issueless.

11. Now question, which needs to be determined in the instant proceedings is whether property belonging to Smt. Julfi Devi, which she had inherited from her late husband Sheesh Ram can be claimed by the plaintiff being her legal heir or not, especially when other Class-1 legal heir namely, Mast Ram i.e. brother of late Sh. Seesh Ram is alive. Smt. Julfi Devi before her death executed a Will, dated 15.11.2010, bequeathing her share of property in favour of the defendants, who happen to be sons of Sh. Bhagat Ram and Sh. Mast Ram i.e. brother of late Sh. Seesh Ram and Krishan Lal son of Sh. Bhagat Ram.

12. Though, in the case at hand plaintiff made an attempt to carve out a case that Will, dated 15.11.2010 was never executed by Smt. Julfi Devi and same is result of fraud and misrepresentation, but whether such contention of him, if accepted, shall have a bearing, if any, on the main case is another question, which needs to be determined in the instant case. Since plaintiff has not been able to prove his locus-standi to file suit, other pleas with regard to validity of Will allegedly executed by Smt. Julfi Devi in favour of

the defendants is of no relevance as far as present *lis* is concerned. Since legal heirs of late husband of Smt. Julfi Devi are still alive, plaintiff otherwise in terms of Section 15 of the Hindu Succession Act, cannot claim any right in the property left behind by Smt. Julfi Devi.

13. At this stage it would be apt to take note of Sections 8,9, 15 and 16 of the Hindu Succession Act, herein below:-

> "**8. General rules of succession in the case of males**.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—
>
> (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
> (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
> (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
> (d) lastly, if there is no agnate, then upon the cognates of the deceased.
>
> 9. **Order of succession among heirs in the Schedule**.—Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.
>
> **15. General rules of succession in the case of female Hindus.**(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—
> (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
> (b) secondly, upon the heirs of the husband;
> (c) thirdly, upon the mother and father;
> (d) fourthly, upon the heirs of the father; and
> (e) lastly, upon the heirs of the mother.

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

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. **Order of succession and manner of distribution among heirs of a female Hindu**.—The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestates property among those heirs shall take place according to the following rules, namely:—

Rule 1.— Among the heirs specified in sub-section (1) of section 15,those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously.

Rule 2.— If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.— The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) to section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such

person had died intestate in respect thereof immediately after the intestate's death."

14. Bare perusal of aforesaid provisions of law, clearly reveals that property of a female Hindu, who dies intestates, in the absence of her son and daughter including the children of any pre-deceased son or daughter and the husband, shall be devolved upon heirs of her husband, if the property is inherited by her from her husband or upon the heirs of her father- in- law in case she inherited property from her father-in-law.

15. It is admitted case of the parties that deceased Smt. Julfi Devi inherited the suit property from her husband and she died issueless and as such, as per provisions of Section 15(1)(b) of the Act, her estate shall be succeeded by heirs of her husband even if she died intestate. Pedigree table of the parties clearly indicates that real brother of husband of deceased Smt. Julfi Devi namely, Mast Ram is still alive and as such, on the demise of Smt. Julfi Devi her brother-in-law Mast Ram being real brother of her husband Sheesh Ram is to succeed to the entire estate of Smt. Julfi Devi in terms of Section 8 of Hindu Succession Act. This Court finds considerable force in the submission made by learned Senior Counsel representing the defendants that even if it is presumed that deceased Smt. Julfi Devi had not executed any Will, the present plaintiff, who admittedly falls in entry-IV of Class-II legal heirs of husband of Smt. Julfi Devi, would not succeed any share. Section 16 Rule 1 which clearly provides manner in which the estate of female Hindu, who dies intestates is to be distributed among the heirs specified in sub section (1) of Section 15. Person detailed in entry I shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously. Section 9 of the Act, specifically provides the order of succession among heirs in the Schedule i.e. among the heir specified in the schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs and those in the first entry in Class-II shall be preferred to those in

second entry and similarly, those in the second entry shall be preferred to those in the third entry and so on in succession. The Schedule of the Hindu Succession Act, 1956 specifies the list of Class-II heirs with entry-I to IX and as per this Schedule, real brother of the husband of Smt. Julfi Devi falls in entry-II, whereas present plaintiff being son of deceased brother of husband of Smt. Julfi Devi falls in entry IV of the Schedule (Class-II) and certainly as per provisions of Section 9, second entry in Class-II shall be preferred to those in the 3rd entry and so on in succession.

16. It is quite clear from the aforesaid provisions of law that plaintiff otherwise would not get any share even if Smt. Julfi Devi died intestate. Since real brother of Seesh Ram late husband of Smt. Julfi Devi is still alive, who otherwise being real brother of husband of Smt. Julfi Devi would have inherited the estate of Smt. Julfi Devi being legal heir falling in second entry in Class-II, plaintiff cannot claim any right over the property left by Smt. Julfi Devi. Suppose prayer made on behalf of the plaintiff is accepted that Will, dated 15.11.2010 executed by Smt. Julfi Devi is not valid Will, even then plaintiff would not get anything for the reason that he falls in entry No. IV of Class –II legal heirs of husband of Smt. Julfi Devi, especially when real brother of husband of Smt. Julfi Devi i.e. Mast Ram is still alive.

17. Consequently, in view of the detailed discussion made hereinabove as well as provisions contained in Hindu Succession Act, this Court finds no illegality and infirmity in the impugned judgment and order passed by the Courts below and as such, same are upheld. Moreover this Court finds that no question of law much less substantial is involved in the case for adjudication/determination of this case and as such, appeal under Section 100 CPC otherwise is not maintainable. Accordingly, the preset petition is dismissed being devoid of any merit alongwith pending applications, if any.

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

Between:

MOHINDER SINGH
SON OF SH. SUNAKI RAM, R/O VILLAGE SOHARI, MAUZA BEH, TEHSIL BANGANA, DISTRICT UNA, H.P. SINCE DECEASED THROUGH HEIRS AND LEGAL REPRESENTATIVES:-

1(a). SMT. SARWANI DEVI WIDOW OF LATE SH. MOHINDER SINGH,

1(b). SMT. ASHA DEVI DAUGHTER OF LATE SH. MOHINDER SINGH,

1©. SMT. PUSHPA DEVI DAUGHTER OF LATE SH. MOHINDER SINGH,

1(d). SMT. ANJU DEVI DAUGHTER OF LATE SH. MOHINDER SINGH,

1(e). SH. DEVI RAJ SON OF LATE SH. MOHINDER SINGH,

1(f). SMT. SEEMA DEVI DAUGHTER OF LATE SH. MOHINDER SINGH.

ALL RESIDENTS OF VILLAGE SOHARI, MAUJA, BEH, TEHSIL BANGANA, DISTRICT UNA, H.P.

….APPELLANTS

(BY SH. K.D.SOOD, SENIOR ADVOCATE WITH SH. HET RAM THAKUR, ADVOCATE).

AND

1. GURDASS RAM (SINCE DECEASED) THROUGH HIS LRS:-

1(a). KUSHAL SHARMA
SON OF LATE SH. GURDASS RAM,

1(b) RAMESH CHAND,
S/O LATE. SH. GURADASS RAM,

1(c) NARESH CHAND
S/O SH.LATE SH. GURDASS RAM.

1(d) SAROJ KUMARI
D/O LATE SH. GURDASS RAM.

1(e) SANTOSH KUMARI
D/O LATE SH. GURDASS RAM.

1(f) SUMANA DEVI
D/O LATE SH. GURDASS RAM.

ALL RESIDENTS OF VILLAGE AND P.O.
SOHARI, MAUZA BEH, TEHSIL BANGANA,
DISTRICT UNA, H.P.

....RESPONDENTS

(BY.SH.N.K.THAKUR, SENIOR ADVOCATE WITH SH. DIVYA RAJ SINGH, ADVOCATE).

REGULAR SECOND APPEAL No.537 of 2008
RESERVED ON: 4.9.2021
DECIDED ON:07.09.2021

Code of Civil Procedure, 1908 - Section 100 - **Transfer of Property Act, 1982**- Section 52- Suit for possession decreed wherein defendant pleaded to have perfected title to suit land by way of adverse possession- Held- Transaction made during the pendency of the suit shall be subject to the outcome of the suit- To constitute adverse possession, it is specifically required to be proved that possession is open, without any attempt of concealment and it is not necessary that such possession must be so effective so as to bring it to the specific knowledge of the owner- Plea of adverse possession not proved- Appeal dismissed.

Cases referred:

Bhismadev Taria and another versus Radhakishan Agarwalla and others, AIR 1968 Orissa 230 (V 55 C 66);

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;

Smt. Lalita Devi versus Smt. Kamla Devi, AIR 1995 Allahabad 21;

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

J U D G M E N T

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, lays challenge to judgment dated 6th September 2008, passed by learned Additional District Judge-I, Una, District Una, Himachal Pradesh in Civil Appeal No.79 of 2005, affirming the judgment and decree dated 31.08.2005, passed by learned Civil Judge (Senior Division) Una, District Una, Himachal Pradesh in Civil Suit No.95 of 2000, whereby suit for possession having been filed by the respondents ***(hereinafter referred to as the plaintiffs),*** came to be partly decreed.

2. For having bird's eye view, certain facts, which are relevant for adjudication of the case are that the plaintiff filed a suit for possession by removal of structure denoted by letters A B C D E F G H shown in red colour in the site plan, standing on the land measuring 0-0-47 hectares, Khewat No.60min, Khatauni Nos.79, 83 Khasra Nos. 705

and 707 to 711 as per jamabandi for the year 1995-96 situate in Village Sohari, Tehsil Bangana, District Una, District Una, Himachal Pradesh ***(hereinafter referred to as the suit land).*** In the aforesaid suit, plaintiffs claimed that suit land is owned and possessed by them, but defendant being head strong person raised construction over part of the suit land under the pretext that land belongs to him and he is in illegal possession of vacant and constructed portion without their consent. Plaintiffs averred in the plaint that prior to filing of the suit at hand, they had filed a suit for injunction against the defendant qua the land comprised in Khasra No.4403/2234, measuring 1 kanal 7 marlas titled as ***Gurdas Ram versus Mohinder Singh*** being civil suit No.32/88, wherein defendant by way of written statement had admitted that Khasra No.4402/2234 belongs to him and thereupon he had made Khurlies cups on 5 marlas, which are of temporary nature and he has nothing to do with the remaining land in Khasra No.4403/2234. Aforesaid civil suit having been filed by the plaintiff was dismissed on 17.5.1993, as the plaintiffs were found to be out of possession. Though, plaintiff laid challenge to aforesaid judgment and decree dated 17.05.1993, but before same could be decided on its own merits, plaintiffs were permitted to withdraw the suit with liberty to file afresh in respect of the same subject matter subject to cost of Rs.250/.Plaintiffs claimed that since possession of the defendant over the suit land is illegal and he is trespasser, they are entitled to possession after demolition of the structure. Since defendant failed to accede to the request of the plaintiffs to handover the vacant possession of the suit land, they were compelled to approach the competent court of law by way of civil suit.

3. Defendant by way of written statement refuted the aforesaid claim of the plaintiffs and claimed before the court below that the earlier part of the suit land was owned by the plaintiffs but

w.e.f.1970, he is coming in possession over such part of the suit land and since his possession is open, continuous and hostile to the knowledge of the plaintiffs, he has perfected his title and has become owner in possession of such part of the suit land, upon which he has constructed 'Khurlies' and cattle-shed. Defendant also claimed that in previous suit the plaintiffs in their statement had admitted his possession over the part of the present suit land for the last 15 years. In nutshell, defendant claimed himself to have become owner in possession of part of the suit land by way of adverse possession.

4. Plaintiffs by way of replication refuted the claim of the defendant that defendant has become owner in possession of the suit land by way of adverse possession.

5. Learned trial Court on the basis of the pleadings adduced on record by the respective parties framed following issues:-

1. ***Whether the plaintiffs are entitled to a decree for possession of the suit land? OPP.***

2. ***Whether the defendant has become owner in possession of suit land by way of adverse possession OPD.***

3. ***Whether the suit is not within time? OPP.***
4. ***Relief.***

6. Learned trial Court on the basis of the pleadings as well as evidence adduced on record by the respective parties, decreed the suit of the plaintiff partly and passed the decree of possession of the suit land after removal of superstructure of any kind existing thereover as shown by letters A B C D E F G H in red colour in the site plan Ex.PW2/A ,except the construction/ super structure existing on the portion of Khasra No.705 in the shape of Tin Posh Veranda, Tin Posh Cattle-Shed, Slate Posh Shed and Slate Posh Pucca Construction as shown in the site plan Ex.PW2/A.

7. Though, plaintiffs accepted the aforesaid judgment and decree passed by learned court below, but appellants/defendants (***hereinafter referred to as the defendant)*** filed an appeal under Section 96 of CPC in the court of learned Additional District Judge, Una, District Una, Himachal Pradesh. Record reveals that during the pendency of the appeal before learned Additional District Judge, Una, defendant filed an application under Order 6 Rule 17 CPC, seeking therein permission of the court to amend the written statement on the premise that defendant has purchased the share one of the plaintiff Bidhi Chand alias Prakash Chand vide registered sale deed dated 26.4.2006 and as such, he has become a co-sharer in the suit land. Aforesaid application was allowed by learned First Appellate Court on 25.3.2008, whereafter defendant also filed amended written statement.

8. On the basis of amended pleadings adduced on record defendant, filed an application, praying therein to frame additional issues as reproduced herein-below:-

> "***Whether the defendant is a co-sharer and is in exclusive hissadari possession of the suit land as alleged? OPD".***

9. Aforesaid application also came to be heard along with the main appeal. Learned First Appellate Court besides dismissing the aforesaid application, also dismissed the appeal, as a consequence of which, judgment and decree dated 31.8.2005 passed by learned trial Court, came to be upheld. In the aforesaid background, defendant has approached this Court in the instant proceedings, with a prayer to dismiss the suit of the plaintiffs after setting aside the judgment and decree passed by learned Courts below.

10. Aforesaid appeal having been filed by defendant came to be admitted on following substantial questions of law:-

1. ***Whether the findings of the courts below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties and drawing of wrong inferences from the facts proved on record particularly the documents Exhibit. DA, DB, D1 to D4 and PW2/A.***

2. ***Whether in view of the fact that the plaintiffs have been denied the decree for possession of portion ABCDEFGH in red colour in respect of the constructed portions in the site plan PW2/A on the ground of adverse possession, the land appurtenant thereto in the shape of khurli and kups, the decree could be passed.***

3. ***Whether in view of the fact that the appellant had purchased the share of Bidhi Chand alias Parkash Chand plaintiff had become owner, the decree of the trial court had become un-executable and the provisions of Section 44 and 52 of the Transfer of property Act have been misread and misconstrued which was vitiated the findings.***

4. ***Whether the judgment of District Judge is vitiated for non-consideration of oral and documentary evidence of non-compliance of the provisions of Order 20 Rule 5 CPC and the judgment of this Hon'ble Court in case reported in AIR 2001 Himachal Pradesh 18.***

11. Since all the substantial questions of law, as reproduced hereinabove, are inter-connected and interrelated, they are taken up together for consideration.

12. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by learned First Appellate Court while upholding the judgment and decree passed by trial court, this Court finds no reasons to agree with the contention of Sh. K.D.Sood, learned Senior Advocate representing the defendant that both the courts below have failed to appreciate pleadings as well as evidence led on record in its right perspective, as a consequence of which, erroneous findings to the detriment of the defendant has come to fore. Rather, this court having carefully scanned the material available on record finds that defendant in earlier Suit bearing No.32/1988 titled as ***Gurdass Ram versus Mohinder Singh*** having been filed by the plaintiff had admitted in his written statement (Ex.D-2) that he is owner in possession of land measuring 1 Kanal, comprised in Khasra No. 4402/2234 and the abadi of the defendant is situate in this Khasra number only. Besides above, defendant in the aforesaid suit had categorically claimed that the suit land i.e. Khasra No.4403/2234 is adjacent to the abadi of the defendant, which is measuring 1kanal 12 marlas and defendant has constructed 'khurlies' and 'koops' over the suit land adjacent to his own Khasra no. 4402/2234 to the extent of 0-5 marlas.

13. Plaintiff while deposing as witness in earlier suit (Ex.D3) admitted that the Teen posh veranda was raised by the defendant on the suit land 15 years back. Plaintiff in aforesaid suit also admitted Slate Posh Portion to be in ownership and possession of the defendant. Though, documentary evidence available on record clearly establishes the ownership of the plaintiff over the suit land, but since plaintiff in previous suit admitted that Tin Posh Veranda raised by the defendant is on the suit land for the last 15 years, claim of the defendant that he is in possession of land and construction thereupon in the shape of shops,

'Khurlies' and 'koops' since 1970, was rightly accepted by the courts below. Besides claiming that cattle-shed and Veranda were constructed in the year 1970, defendant also claimed that the houses were kacha and at that time he had raised two cemented shops in the year, 1970, but aforesaid claim of him with regard to construction of two cemented shops never came to be proved in accordance with law. With a view to prove his aforesaid deposition though defendant claimed that persons namely, Jagdish, Nanku and Situ were employed by him for construction of the shops and he had been also paying electricity bills, but such plea of him rightly was not accepted by the courts below for the reason that in earlier Civil Suit No. 32/1988 (Ex.DB) he claimed that construction was got done by him through mason namely, Mehar Chand. Record reveals that apart from solitary statement of defendant that he had raised two cemented shops in the year 1970, there is no evidence, be it oral or documentary and as such, claim of adverse possession qua the entire suit land rightly came to be not accepted by the courts below. Sole testimony of the defendant is not sufficient to prove adverse possession, especially qua two shops in question. Moreover, when documentary record is totally against the defendant, mere long possession does not entitle party to claim adverse possession, rather it is required to be specifically pleaded and proved on record that from what point of time a person is in adverse possession.

14. Claim qua the possession vis-à-vis the Khurlies, koops and the veranda of defendant has been duly proved by DW-2, Sh. Banta Singh, who deposed that defendant had raised construction in the year, 1970 at the spot comprised of 'koops Khurlies and veranda. Though, aforesaid witness has not fully supported the case of the defendant that he is in adverse possession of the entire suit land, but it can be safely inferred from the statement of DW-2 that defendant had constructed

Khurlies koops and veranda in the year 1970 and since than he is in possession of the same.

15. Leaving everything aside, cross-examination of plaintiff Gurdas Ram conducted on 17.3.1990 in the earlier civil suit No.32/88, having been filed by him, clearly reveals that plaintiff admitted that there is a road on the western side of the suit land and three rooms of Mohinder Singh are constructed alongwith such road. Though, aforesaid deposition made on behalf of the plaintiff is not sufficient to establish that such construction was raised 12 years back, but this witness in his cross-examination has categorically admitted that Slate Posh portion of the house of Mohinder Singh is under his ownership and part of Tin structure Posh thereof is in the suit land, which makes it amply clear that Slate Posh Construction is in Khasra No.705 as shown in the site plan Ex.PW2/A has been admitted by the plaintiff Gurdas Ram in earlier proceedings to be belonging to the defendant, whereas Tin Posh construction has been admitted by him to be existing on the suit land. Plaintiffs in the aforesaid suit have also admitted that Tin Posh Veranda belongs to the defendant and same was constructed 15 years back. Though, plaintiff in the aforesaid suit denied that defendant Mohinder Singh is in possession over 5 marlas of Khasra No.4403, but self-stated that he is in possession of 10 marlas of such Khasra number. This witness also admitted in his earlier statement recorded in Civil Suit No.32/88 that Tin Posh Veranda in Khasra No.4403 is in the suit land. From the aforesaid statement made by the plaintiff in earlier suit having been filed by him, it becomes clear that though the defendant has not been able to establish that construction over the whole of the suit land was made in the year, 1970, but it has been successfully proved/established by him that Tin Posh Veranda over the suit land

was constructed 15 years back. Needless to say that possession cannot be treated to have become adverse unless it is proved to be in express or implied denial of the title of the true owner.

16. Even if the defendant is assumed to be coming in possession over the part of the suit land on account of construction as has been shown in site plan Ex.PW2/A, but same is not sufficient to conclude that predecessor-in-interest of defendants was in adverse possession over such part of the suit land. To constitute adverse possession, it is specifically required to be proved that possession is open, without any attempt of concealment and it is not necessary that such possession must be so effective so as to bring it to the specific knowledge of the owner.

17. Since plaintiff Gurdas Ram himself admitted that Slate Posh construction belongs to the defendant and tin posh construction existing on the suit land is in the shape of veranda etc., is there for the last 15 years, meaning thereby, plaintiffs were aware of the existence of tin posh veranda over the suit land as shown in the site plan Ex.PW2/A to be existing on Khasra No.705 and as such, learned courts below rightly held aforesaid construction sufficient to constitute adverse possession without any concealment thereof on the part of the defendant. Since, construction in the shape Tin Posh Veranda is more than 12 years old, as has been admitted by the plaintiff Gurdas Ram himself, learned courts below rightly held defendant to have become owner of the same by way of adverse possession.

18. Since plaintiffs by way of oral as well as documentary evidence successfully established their title over the whole part of the suit land, except the land comprised in Khasra 705, where Slate Posh Construction, Tin Posh Veranda and cattle shed of the defendant exist as shown in site plan Ex.PW2/A, learned trial court rightly decreed the suit

of the plaintiff for possession of the suit land after removal of super structure of any kind existing thereover as shown by letters A B C D E F G H in red colour in the site plan Ex.PW2/A, expect construction/ super structure existing in portion of Khasra No. 705 in the shape of Tin Posh Veranda, Tin Posh cattle-shed, Slate Posh Shed and Slate Posh Pucca construction as shown in the site plaint Ex.PW2/A. Since, plaintiff Gurdas Ram himself admitted that slate posh pucca construction and shed belong to defendant, as is evident from his statement given in cross- examination (Ex.D3), learned courts below rightly held him not entitled for decree of possession over the suit land over which defendant has raised aforesaid construction.

19. Claim of the defendant as has been raised in the instant appeal is that decree of possession by removal of super structure on the remaining portion of the land could not have been passed by the courts below once it stood established on record that defendant is in possession of the same for 30 years back and he was found to be in adverse possession over some portion of the land. However, such plea/stand taken by the defendant cannot be accepted being totally untenable. Though, defendant claims himself to have become owner of the entire land by way of adverse possession, but since he was only able to prove construction, if any, raised by him 15 years back prior to filing of the suit on some portion of land comprised in Khasra No. 705, Courts below rightly passed decree for possession by removal of super structure of any kind existing thereon as shown by letters ABCDEFGH in red colour except the construction/super structure existing on the portion of Khasra No.705.

20. Though, Mr. K.D.Sood, learned Senior Counsel representing the appellant-defendant vehemently argued that ingredient of adverse possession had been pleaded or proved and as such,

learned court below ought to have held that defendant has become owner of the entire suit land by way of adverse possession, but pleadings as well as evidence led on record nowhere suggests that defendant specifically pleaded all the ingredients required to claim adverse possession. Mr. Sood, vehemently argued that once factum with regard to purchase of share of one of the plaintiff Sh. Bidhi Chand alias Prakash Chand by registered sale deed stood admitted by the plaintiff, no decree for possession of the land could have been passed. He argued that decree of trial court, dated 31.8.2005 had become un-executable with the purchase of share of Bidhi Chand alias Prakash Chand by defendant and as such, findings of the court below could not have been upheld by the First Appellate Court. However, this court finds it difficult to accept aforesaid contention raised by defendant for the reason that right of defendant as co-sharer was fructified on 22.6.2006 that too during the pendency of the first appeal having been filed by him. It cannot be disputed that at time of filing of the suit defendant was not a co-sharer. It is also not in dispute that share of Bidhi Chand, which ultimately came to be purchased by the defendant was a part of the suit land.

21. No doubt, as per Section 44 of the Transfer of Property Act, any co-owner of immovable property legally competent in that behalf can transfer his share and transferor's acquire such share or interest, but the transferor's right to joint possession or part enjoyment of the property shall be subject to the conditions and liabilities affecting on the date of transfer of the share or interest so transferred. Section 52 of Transfer and Property Act, clearly suggests that suit property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or

order which may be made therein, except under the authority of the court and on such terms as it may impose.

22. In the case at hand, share of one of the plaintiff Bidhi Chand came to be purchased by the defendant by way of registered sale deed on 28.1.2006 that too without the permission of the court, where dispute interse parties involving portion of the land purchased by defendant from Bidhi Chand was also involved.

23. At this juncture, Mr. K.D.Sood, learned Senior counsel representing the appellant-defendant placed reliance upon the judgment rendered by Hon'ble Apex Court in ***Thomson Press (India) Ltd. versus Nanak Builders and Investors Private Limited and others***, AIR 2013 Supreme Court 2389, to claim that doctrine of lis pendens as contained under Section 52 of Transfer and Property Act does not annul transaction/transfer made during the pendency of lis, rather merely makes such transfer subject to rights of the parties to the suit .

24. Having perused aforesaid judgment, this Court is of the view that there cannot be any quarrel with the aforesaid proposition of law laid down by the Hon'ble Apex Court, but definitely transaction/transfer made during the pendency of the suit shall be subject to the outcome of the suit, meaning thereby purchaser of the property, which was subject matter of the suit cannot claim himself to be exclusive owner till the time rights of the parties are settled in the suit.

25. Admittedly, in the case at hand, defendant was not a co-owner in the suit land in the year 2000 when the suit was filed, rather as per his own pleadings (amended till statement) he became a co-share on 22.6.2006 by virtue of registered sale deed and as such his right at best can be relegated back to 26.6.2006 and not beyond that time. Definitely, not to 2.5.2000, when the suit has been filed.

26. Since subsequent purchase of the share of one of the plaintiff by defendant had no bearing in the suit filed by the plaintiff in the year, 2000, application having been filed by him, praying therein to frame additional issue rightly came to be rejected. Precisely, the grouse/claim of the defendant, as has been raised in the instant appeal, is that since defendant has become one of the co-owner after purchase of share of one of plaintiff Bidhi Chand, he has become one of the co-sharer of the land alongwith other plaintiffs and as such, cannot be dispossessed from the suit land on the strength of judgment and decree passed by trial court till the time land jointly owned and possessed by all co-sharers is not partitioned in accordance with law. No doubt, it is well settled that possession of one of the co-sharer is the possession of all, but once it is admitted case of the parties that all the co-sharers of the land in question are in possession of their respective shares, coupled with the fact that defendant has only purchased one of the share of plaintiff Bidhi Chand, defendant cannot be allowed to defeat the mandate of judgment and decree passed in favour of the plaintiffs on the ground that he cannot be dispossessed till the time suit land is partitioned interse parties by metes and bounds. Since all the plaintiffs and other co-sharers are in specific possession of their specific shares, mere purchase of one share of plaintiff Bidhi Chand by defendant would not make him entitled to claim that the judgment and decree passed by learned court below is not executable, especially when the shares of the parties are distinct and separable. Mere transfer of one share by decree holder to judgment debtor would not make the decree in-executable as a whole, but can be executed by one of the decree holder under Order 21 Rule 15 CPC.

27. Hon'ble High Court of Allahabad in case titled **Smt. Lalita Devi versus Smt. Kamla Devi,** AIR 1995 Allahabad 21 has

categorically held that in case of a joint decree where the shares of the parties are distinct or separable and even though some of the decree holders have transferred their shares to the judgment debtors, the decree does not become in-executable as a whole but can be executed by one of the decree holders under the provisions of Order 21, Rule 15 CPC at least to the extent of the share of the decree holder. The relevant para No.9 to 11 of the judgment is reproduced as under:-

> "9. In the case of Kudhai v. Sheo Dayal reported in ILR 10 All 570, it was held by Mahmood, J, that where subseqeunt to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, hut is extinguished only protanto. In the case of Peria Sami v. Krishna Ayyan reported in ILR 25 Madras 431 (FB), it was observed that a joint decree may no doubt sometimes becomes divisible and executable inpart to the extent of such severence when by operation of law or by act of parties, the judgment debtor has acquired the interest of one or some of the decree holders in the decree and thus, a partial satisfaction or extinguishment of a decree takes place. In the case of Smt. Champak Devi v. Rekhal Chandra Sen Gupta reported in AIR 1964 Pat 363, it was held by a Division Bench that where a decree for eviction is passed in favour of several decree holders against the lessee and the decree holders hold separate shares in the house porperty the subject of lease, then an adjustment between some of the decree holders and thejudgment debtors lessee whereby lessee steps into the shoes of those decree holders should legally be taken as satisfaction of the eviction decree portanto. In such a case one of the remaining decree holders can execute the said decree with respect to his shares only in the leasehold property. The decree does not become entirely inexecutable. From the decisions referred to above, the law appears to be settled, that in case of a joint decree where the shares of the parties are distinct or seperable even though some of the decree holders have transferred their shares to the

judgment-debtor, the decree does not become inexecute-able as a whole but can be executed by one of the decree-holders under the provisions of Order 21, Rule 15, C.P.C. at least to the extent of the share of the decree-holder. However, in the present case at hand it is noteworthy that in the decree the share of the plaintiff have not been specified and it is a joint decree passed in favour of the decree holders. Such a decree in my opinion can be executed as a whole by one of the joint decree-holders, specially when the other decree-holders who have allegedly transferred their shares in the property have not come to oppose the application or denied that the same are not for their benefit. It will also be noticed that the decree passed in the present case was not only for the possesison but for recovery of mesne profits and damages. The sale deed has not been filed by the judgment-debtor to show that the rights under the decree has been transfereed in her favour by some of the decree holders. Situation in the present case, is, therefore, somewhat different. It has been held by the Bombay High Court in the case of Val Chand Gulab Cahnd Shah v. Manek Bai Hira Chand Shah and another reported in AIR 1953 Bombay 137 that where the shares of the respective decree-holders are not apparent on the face of the decree, either expressly or by necessary implication, the decree which is sought to be executed is a joint decree and the judgment-debtors must render satisfaction to the whole body of the decree-holders. Order 21, Rule 15, C.P.C. does not contemplate the splitting up of a joint decree into one in favour of individual decree-holders in respect of their own shares. Such a procedure would mean permitting the executing court to go behind the decree as such. Ascertaining the respective shares of the decree holders in a joint decree is thus foreign to the nature of the execution proceedings. Following the aforesaid decision in the case of Val Chand Gulab Chand Shah (supra), a learned single Judge of the Calcutta High Court in the case of Mihir Bose v. Jobeda Khatun reported in 63 Cal Weekly Notes 570 took the view that a joint decree for khas possession of certain premises stood on a different footing than that of a decree for payment of money, and adjustment of ajoint decree of this nature by some out of the entire body of the decree holders is not valid in law. It was further held that the remaining decree-holders were entitled to execute the

whole decree as it was originally passed. In the facts of the said case a suit for eviction was brought against the tenant-judgment debtor jointly by seven respondents which was decreed. The said decree was put in execution on behalf of the decree holders but an objection was raised to the execution of the decree on the ground that two of the decree holders had adjusted the decree with the judgment-debtor and allowed him to continue as tenant in occupation and they were receiving rent from him. Hence, the remaining decree holders were not entitled to khas possession of disputed premises by evicting the appellant. This objection was rejected by the learned single Judge as mentioned above and the decree was found to be executable.

10. In almost similar facts as in the case at hand our High Court in the case of Bansraj Singh v. Krishna Chandra reported in AIR 1981 All 280 held on the facts of the said case that such a joint decree was executable on behalf of the other decree holders. The facts of the said case were that a decre for possession over the vacant land and constructed portion after demolishing the same, and for mesne profits was passed in favour of the decree holders who were brothers. It appears that one of the decree holders transferred his share in the property in dispute in favour of wife of one of the judgment debtors. The remaining decree-holder put the decree in execution on behalf of all the decree-holders for the benefit of all of them. The wife of the judgment-debtor who was the transferee from one of the decree-holders and her transferor filed objections that the execution was not for their benefit and was liable to be dismissed. The executing court dismissed the execution application for mesne profits and for possession of the property and held that the constructions in dispute could not be demolished as the execution was not for the benefit of all the decree-holders. On the said facts it was held as follows at page 283:---

"On the consideration of the arguments of the learned counsel for the parties and after going through the authorities cited by them I am of the view that the dispute between the co-decree-holders is foreign to the scope of Section 47, Civil P.C. and one of the decree-holders can execute the decree for the benefit of all of them even without impleading them and without mentioning this fact in the execution application that the decree is being ; executed for their benefit as an execution of the decree is permissible always for the benefits of all the decree-holders unless it is proved otherwise. This is based on a very sound principle, otherwise any one of the decree-holders on account of some malice with the other decree-holders or in collusion with the judgment debtors can make the decree un-executable. As a joint decree is a executable as such and the execution court cannot go behind the decree, a decree can be executed in part only where the share of the decree-holders are defined or can be predicted or where the share is not in dispute. In that case a separate execution for the respective shares of the decree-holders is permitted under the law, otherwise it is beyond the scope of the execution court to find out the shares of the decree-holders in the execution proceedings. A joint decree is not divisible and can be executed and is always executable as joint decree. The view of the execution court that as Smt. Rajni Singh has opposed the execution of the whole decree so it is not for the benefit of Thakur Shiv Raj Singh, is illegal and cannot be maintained in law."

11. I am in respectful agreement with the view expressed by this Court in the aforesaid case of Bansraj Singh supra). In the facts of the instant case at hand, the Supreme Court while dismissing the S.L.P. had observed that the transferees cannot claim any better right than those of the transferors and they may either choose to

> take benefit of the decree in question or to forego the same. It appears that the judgment debtor-revisionist has chosen to take the benefit of the decree by filing an execution case No. 14 of 1992 in the court of Civil Judge, Gorakhpur. The decree-holder-respondent has filed objection to the same and is contesting the said execution. Be that as it may and without expressing any final opinion on the status of the judgment-debtor-applicant, I am of the view that if the judgment-debtor is claiming the right of a decree-holder on the basis of the alleged sale deed in her favour, her objection under Section 47, C.P.C. will not be maintainable as held by this Court in the case of Bansraj Singh (supra) within the scope of Section 47 C.P.C. The first submission, therefore, made by the learned, counsel for the judgment-debtor-revisionist cannot be accepted.

28. Leaving everything aside, this court finds that entire documentary evidence available on record clearly suggests that the plaintiff is the exclusive owner of the property in question, but since possession over the some portion of Khasra No.705 of defendant has been found to be 15 years old, Courts while accepting plea of adverse possession raised by the defendant over aforesaid specific portion of land passed decree for possession in favour of the plaintiff after removal of super structure of any kind existing on the suit land, save and except construction on the portion of Khasra No.705 in the shape of Tin Posh Veranda, Tin Posh Cattle Shed, Slate Posh Shed, Slate Posh Pucca Construction as shown in site plan Ex.PW2/A. Even if plea of defendant is accepted that he has become one of the co-sharer on account of his having purchased the land from plaintiff Bidhi Chand, he can only be held co-owner alongwith other plaintiffs qua the share of Bidhi Chand, which otherwise does not come out to be more than 5 marlas, over which defendant has already raised construction and he has been held to be owner of the same by way of adverse possession.

29. Reliance placed upon the judgment passed by Hon'ble High Court of Orissa **in Bhismadev Taria and another versus Radhakishan Agarwalla** and others, AIR 1968 Orissa 230 (V 55 C 66) by learned Senior counsel representing the appellant-defendant has no application in the case at hand because in that case Hon'ble Court held that co-sharer's suit for possession must either be for benefit of entire body of co-sharers or for possession of the plaintiff's share. However, in the case at hand, it is not in dispute that at the time of filing of the suit, defendant was not a co-sharer, rather he after having suffered decree from trial court purchased share of one of the plaintiff. Since at the time of filing of the suit, defendant was not a co-sharer in the suit property, there was otherwise no occasion, if any, for the plaintiff to file suit for possession for the benefit of entire body of co-sharers, rather at that time plaintiff filed suit for possession on behalf of all the share holders in the suit property.

30. Having perused the material available on record, this Court is fully satisfied and convinced that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Substantial questions of law are answered accordingly.

31. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, wherein it has been held as under:

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground***

> ***for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***
>
> ***(p.269)***

32. Aforesaid exposition of law clearly suggests that High Court, while excising power under Section 100 CPC, cannot upset concurrent findings of fact unless the same are shown to be perverse. In the case at hand, this Court while examining the correctness and genuineness of submissions having been made by the parties, has carefully perused evidence led on record by the respective parties, perusal whereof certainly suggests that the Courts below have appreciated the evidence in its right perspective and there is no perversity, as such, in the impugned judgments and decrees passed by both the Courts below. Moreover, learned counsel representing the appellant-defendant was unable to point out perversity, if any, in the impugned judgments and decrees passed by both the Courts below and as such, same do not call for any interference.

33. Consequently, in view of the detailed discussion made hereinabove, the impugned judgments and decrees passed by the courts below are upheld and present appeal fails and same is accordingly dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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

Between: -

STATE OF HIMACHAL PRADESH

…APPELLANT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. RAJINDERDOGRA, SENIOR ADDITIONAL
ADVOCATE GENERAL, SH. SHIV PAL MANHANS,
ADDITIONAL ADVOCATE GENERAL AND
MR. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL)

AND

KULDEEP, SON OF SH. MOHAN LAL,
RESIDENT OF VILLAGE JAGHANA,
POST OFFICE, DOMEHAR, TEHSIL
AND POLICE STATION, ARKI,
DISTRICT SOLAN, H.P.

…. RESPONDENT.

(SH. V.S. CHAUHAN, SENIOR ADVOVATE

WITH SH. AVINASH SHARMA, ADVOCATE)

CRIMINAL APPEAL NO. 153 OF 2021
DECIDED ON: 22.09.2021

Indian Penal Code, 1860 - Section 376 read with Section 4 of the Protection of Children from Sexual Offences Act, 2012- Rape with minor girl - Age not proved- Acquittal – Entry of date of birth in school register is doubtful- The basis of date of birth not clear- Held, once the victim was not proved to be minor, no offence could be charged- Acquittal sustainable- Appeal dismissed.

This appeal coming on for admission this day, **Hon'ble Mr. Justice Satyen Vaidya**, delivered the following:

J U D G M E N T

2. By way of instant appeal, appellant has assailed the judgment of acquittal dated 28.11.2020 passed by learned Additional District & Sessions Judge, Fast Track Special Court, Solan, District Solan, H.P. in Sessions Trial No. 30-S/7 of 2020/2016

3. Respondent herein was charged and prosecuted for offences under Sections 363, 366 and 376 of the Indian Penal Code (for short 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

4. The prosecution of respondent was result of investigation carried out in pursuance to registration of FIR No.03 of 2016 dated 8.1.2016 at Police Station, Arki, District Solan, H.P.The above noted FIR was registered on the complaint of Ganga Ram S/o Sh. Pahal Singh. It was alleged by him that respondent herein used to meet his daughter (victim). Despite advice, respondent used to roamin or around his house. In the evening of 07.01.2016, at around 6.00 P.M. respondent had enticed the victim and had kidnapped her with intention to marry her.

5. During investigation, the victim was recovered on 17.01.2016 from the company of the respondent from village Haripur, Tehsil Chakrata, Vikasnagar, Dehradun. The victim denied having been enticed by respondent. The victim disclosed that she was maintaining relation with respondent voluntarily and was pregnant. She had accompanied respondent of her own free will.

6. On completion of investigation, report under Section 173 Cr.P.C. was submitted recommending trial of respondent. Learned trial Court charged

respondent for offences under Sections 363, 366 and 376 of IPC and Section 4 of the POCSO Act.

7. After completion of trial, the learned trial Court has recorded the finding of acquittal vide impugned judgment.

8. The appellant has assailed the impugned judgment mainly on the ground that the evidence has not been correctly appreciated by the learned trial Court. It has been contended that the findings of the learned trial Court to the effect that victim was major at the time of alleged offence is against the material proved on record. According to appellant, the statement of PW-2, father of victim has not been considered in right perspective. Documents Ex.PW-8/B and Ex.PW-8/C have wrongly been discarded. The precedence given to document Ext.-DX vis-à-vis documentsEx. PW-8/B and Ex.PW-8/C, is against the settled principles of law. It has also been submitted that the statement of victim under Section 164 Cr.P.C. Ex.PW-19/F, has not been appreciated correctly.

9. We have heard Mr. Rajinder Dogra, learned Senior Additional Advocate General for the appellant and Mr. V.S. Chauhan, Senior Advocate, assisted by Mr. Avinash Sharma, Advocate, for the respondent and have also gone through the records.

10. It is not disputed by either side that the respondent has married the victim and have two children from the wedlock. They are living happy married life.The factum of marriage having been solemnized between respondent and victim cannot be a legal ground to absolve the respondent from the criminal liability, if the alleged offence is otherwise proved against him. Thus, the material available on record needs independent assessment.

11. The controversy revolves around the prime issue regarding the age of victim at the time of alleged offences. The victim had accompanied the respondent on 17.01.2016. According to her version, she had conceived as a result of physical relation developed between her and the respondent on

2/3.11.2015. Thus, the fate of the case hinges upon the age of the victim on 2/3.11.2015 and thereafter on 07.01.2016.

12. The prosecution has examined the father of victim Sh. Ganga Ram as PW-2, who in his examination-in-chief narrated the age of victim to be 16 years in the year 2016. However, in cross-examination, he admitted to have executed an affidavit Ext.-DX before the Executive Magistrate, Arki regarding the date of birth of his daughter. He also admitted the fact that his daughter had solemnized marriage with respondent on 03.01.2016. He denied the suggestion that his daughter at the time of marriage was major.

13. Perusal of document Ext.-DX, reveals that the same was executed by PW-2 on 07.11.2015 before the Executive Magistrate, Arki, District Solan and had solemnly affirmed as under:

"1. That the date of birth of my daughter Meena is 10.5.1997 which is true and correct and the date of birth which was written in school certificate i.e. 10.5.1999 is wrong, which was written at that time due to mistake."

14. The date of execution of this document has not been challenged by the prosecution. Thus, it cannot be said that this document was created or manufactured after registration of the case to create evidence.

15. The prosecution has also examined PW-8 Sh. Shanta Kumar to prove the extract of admission and withdrawal register of Government Senior Secondary School, Baghal, Tehsil Kotkhai, District Shimla, Ex.PW-8/C and a copy of an affidavit executed by PW-2 Ganga Ram as Ex. PW-8/B.

16. Contents of affidavit Ex.PW-8/Bdisclose that the date of birth of victim mentioned therein is 10.5.1999. However, the document placed on record is not the original and does not even reveal the date of its execution or details of its attestation. Strangely, the execution of document Ex.PW-8/B has not been proved through its purported author i.e. PW-2. For the reasons best known to prosecution, the document Ex.PW-8/B was not shown to the witness, who is alleged to have executed the same.Evidently, the entries in

school register Ex.PW-8/C, are based upon the contents of this affidavit, therefore, such entry in respect of the date of birth of victim is not beyond shadow of doubt.

17. The cardinal principle of criminal jurisprudence is that the standard of proof required in criminal trials is beyond all reasonable doubts. The prosecution, in light of above discussion, has failed to discharge the burden in accordance with law. The fact that the victim was minor on the date of alleged offence was required to be proved by the prosecution by cogent and convincing evidence, but the evidence on record is found to be deficient in more than one way. The fact remains that execution of affidavit Ext.-DX remained un-rebutted. Prosecution omitted to re-examine the witness PW-2 on this material aspect. In light of the admission of PW-2 as to execution of document Ex. DX,his oral version regarding minority of victim at the time of alleged offence,looses significance.

18. The victim appeared as PW-1 and did not support the prosecution case. In cross-examination, she specifically denied her date of birth to be 11.05.1999. In her further cross-examination by the defence counsel, she categorically admitted her date of birth to be 10.05.1997.

19. PW-16 Shri Bhupinder Gupta was examined as a witness to prove the records of Govt. Senior Secondary School, Bhumti, Tehsil Arki, District Solan. This witness deposed that on the request of police, he had issued certificate Ex. PW-16/B and had also handed over a copy of School Leaving Certificate Ex.PW-16/C to the police during investigation. Though, these documents also mention the date of birth of victim as 10.05.1999, but again there is nothing on record to authenticate these entries. It is not clear as to on what basis the date of birth of the victim was recorded as 10.05.1999.

20. Ex.PW-16/C is the school leaving certificate, which shows that the victim was admitted in Govt. Senior Secondary School, Bhumti, Tehsil Arki, District Solan on 15.11.2011 and remained there till 27.02.2012. The

entry in Ex. PW-8/C against the name of victim at serial No. 567 of the register dates back to 11.03.2011. It appears that after leaving Govt. Senior Secondary School, Baghal, Tehsil Kotkhai, District Shimla, the victim was admitted in Govt. Senior Secondary School, Bhumti, Tehsil Arki, District Solan. Hence, the entry of 10.05.1999 as date of birth of victim in records of both the schools remained the same. The school at Govt. Senior Secondary School, Bhumti, Tehsil Arki must have admitted the victim on the basis of record of her previous schooling. When the entry in document Ex. PW-8/C with respect to the date of birth of victim has been held to be doubtful, the entry in documents Ex.PW-16/B and Ex.PW-16/C cannot have better credence.

21. The ossification test does not appear to have been conducted on victim to ascertain her age.

22. On the basis of the evidence on record, it is not established and proved that the victim was a minor at the time of alleged offence. To the contrary, the evidence is that she was born on 10.05.1997 and thus had attained majority on 10.05.2015. That being so the findings recorded by the learned trial Court cannot be faulted. Once the victim was not proved to be a minor, no offence could be said to have been committed by respondent for which he was charged. The victim has categorically stated that she had accompanied respondent of her own will more than once and had maintained relations with him voluntarily. None of the incidences when victim is alleged to have accompanied respondent relate to the period of her minority. The factum that the victim and respondent are happily married is a relevant fact only to evaluate the veracity of version given by the victim.

23. In light of the above discussion, we find no merit in the appeal and the same is dismissed, so also the pending application(s), if any.

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

Between:-

1. MOHINDER PAL SON OF LATE SH. KULDEEP SINGH AGED 37 YEARS R/O VILLAGE AND POST OFFICE LAMBLOO, TEHSIL AND DISTRICT HAMIRPUR, H.P.
2. SONU SON OF SH. ISHWAR DASS, R/O VILLAGE & POST OFFICE LAMBLOO, TEHSIL AND DISTRICT HAMIRPUR, H.P.
3. SUNIL DUTT, SON OF LATE SH. BIDHI CHAND, R/O VILLAGE AND POST OFFICE LAMBLOO, THESIL AND DISTRICT HAMIRPUR, H.P.

…….. PETITIONERS.

(BY SH. S.D GILL, ADVOCATE AND
SH. VIVEK ATTRI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH. THROUGH ITS SECRETARY HEALTH GOVERNMENT OF H.P. SHIMLA-2.
2. DIRECTOR (HEALTH & FAMILY WELFARE) DIRECTORATE OF HEALTH SHIMLA.
3. REGISTRAR, H.P PARA MEDICAL COUNCIL SHIMLA-1.

…..RESPONDENTS

(BY. MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL FOR RESPONDENTS NO.1 AND 2.
BY. MR. DALIP K SHARMA, ADVOCATE FOR RESPONDENT NO.3)

CIVIL WRIT PETITION NO. 3281 OF 2020

RESERVED ON: 17.8.2021
DECIDED ON: 27.8.2021

Constitution of India, 1950 - Article 226 - **H.P. Para-Medical Council Act, 2003** - Registration as para-medical practitioner having recognized qualification - Institute which conducted the relevant examination had no valid affiliation with the premier regulatory mechanism- Petition disposed of accordingly.

This petition coming on for Admission after notice this day, the Court passed the following:-

O R D E R

The writ petitioners had earlier approached this Court through theirs instituting CWP No. 968/2020. This Court, on 3.3.2020, had disposed of the afore writ petition, through its making the hereinafter extracted order:-

> "CMP No.2674 of 2020:
> Allowed and disposed of.
> CWP No.968 of 2020:
> 2. Notice only confined to respondents No.1, 2 & 4. Mr. Ajay Vaidya, Sr. Additional Advocate General, appears and waives service of notice on behalf of respondents No.1, 2 & 4.
> 3. Heard.
> 4. The grievance of the petitioners is that their names have not been registered by respondent No.4, i.e. Registrar, Para Medical Council of Himachal Pradesh as Multi Purpose Health Workers. However, the present writ petition is not supported by any documents/representation(s) in this regard having been made by the petitioners to respondent No.4 for their registration as such and rejection of such prayer by the respondents.
> Therefore, we deem it proper to dispose of the present writ petition being premature, reserving liberty to the petitioners to approach respondent No.4

> by submitting their representation(s) for their registration as Multi Purpose Health Workers, within a period of two weeks from today. In case such representation is made by them, the Competent Authority/ respondent No.4, i.e. Registrar, Para Medical Council of Himachal Pradesh, shall consider and take a conscious decision in the matter, in accordance with the law, within a period of two weeks thereafter. Liberty is also reserved to the petitioners to seek appropriate remedy in accordance with law, in case they feel aggrieved against the decision.
>
> Pending miscellaneous application(s), if any, shall also disposed of."

2. Since, the order extracted (supra) resulted in the respondent concerned declining to register the name(s) of the petitioners, as, Multi Purpose Health Workers (Male), consequently, the writ petitioners are constrained, to, cast a challenge, upon, Annexure P-3.

3. The petitioners, had successfully completed the MPHW course, as became conducted by Rajasthan Vidyapeeth University Udaipur (Rajasthan). However, they were enrolled as students in the afore university w.e.f 2002-2003. Further more, as disclosed in the writ petition, the petitioners undertook the afore course from the University (Supra) from August 2002 to December, 2003.

4. The State of Himachal Pradesh, has enacted Himachal Pradesh Paramedical Council Act, 2003 (for short "Act"). The afore legislative enactment, carries in Section 38 thereof, provisions whereof become extracted hereinafter, a statutory privilege, vis-à-vis, any aspirant concerned, to seek valid enlistment as a paramedical practitioner in the relevant register, only upon, the most important word, as, occurs therein unless he possesses a "recognized qualification" hence becoming satiated by the aspirant concerned. Thereupon, the afore statutory coinage, as, becomes carried therein, does mandatorily entail, upon the aspirant concerned, to, possess hence a "recognized qualification".

> 38. Registration renewal and State Register- (1) No person shall be registered on the State Register as paramedical practitioner unless he possesses a recognized qualification and has not paid such fee, as may be prescribed and different fee may be prescribed for different qualification but it shall not exceed one thousand rupees and the registration shall be valid for a period of three years.
> (2) The Council shall cause to be maintained a State Register of Paramedical practitioners in such form, as may be prescribed, by regulations.
> (3) The Register shall be deemed to be public document within the meaning of Indian Evidence Act, 1872 (1 of 1872).
> (4) Every registered paramedical practitioner registered under sub-section (1) shall renew his registration after every three years on payment of such fee as may be prescribed."

5. The meaning to be ascribed to the statutory coinage "recognized qualification", is but naturally one of the university or institution wherefrom the aspirant concerned obtains the apposite qualification, hence being a recognized institution by the regulatory authority concerned or it holding a valid affiliation from the premier regulatory mechanism concerned, or, its holding a certificate qua it being an authorized educational agency concerned. Necessarily, in the wake of the apposite "qualification", emanating rather from a university not holding any apposite order of affiliation, from the educational regulatory authority concerned, and, also upon it not being a recognized institution, hence by the validly constituted regulatory mechanism concerned, thereupon the qualification, as, becomes acquired by the aspirant concerned, from the institution(s) concerned, would not facilitate the aspirant concerned, to, obtain the aspired registration within the mandate of Section 38 of the Act.

6. In testing whether the aspirants concerned, had validly obtained, the desired qualification, from Lord Mahavira Paramedical Institute, through

an examination as become conducted by Rajasthan Vidyapeeth University, Udaipur (Rajasthan), it has to be discerned from the relevant records, whether the afore deemed University, did hold, the valid authorization, from the validly constituted regulatory mechanism, hence to conduct examination(s), and/or whether it, had been constituted as an educational authority/body rather through a valid order as made by the apex validly constituted regulatory authority. However a perusal of the record of the case, does not disclose, that the institution concerned, in as much, as, Lord Mahavira Paramedical Institute, in its hence conducting the relevant examination, through, the aegis of Rajasthan Vidyapeeth University (supra), Udaipur (supra), either held any valid affiliation from the University (supra), nor any evidence exists on record hence suggestive that, even the afore deemed university also holding any valid affiliation to the apex regulatory mechanism concerned. In absence of the afore material, existing on record, this Court concludes, that the declining to the writ petitioners by Annexure P-3 of their enlistment in the relevant register, as, maintained for the relevant purpose, is both valid and merit worthy.

7. However, the defects, if any, of the afore made conclusion, are though strived to be undone, by the learned counsel for the petitioners, through his making reliance(s) upon Annexure R-3/1, Annexure whereof encloses the minutes of the meeting of the executive committee concerned, as became convened on 12.7.2018. Moreover, in the afore drawn minutes, only recital occur, vis-à-vis, the apposite qualifications hence obtained from the Punjab State Board of Technical Education and Industrial Training, rather enabling the aspirant concerned to seek registration. Consequently, the afore factum cannot be depended upon, by, the writ petitioners herein, as, the afore institution, evidently is not the one wherefrom the petitioners obtained, the apposite qualification rather the institution wherefrom they obtained the apposite qualification is Lord Mahavir Paramedical Institute.

8. Be that as it may, the minutes carried in Annexure R-3/1, are, to be in tandem and in harmony, with Section 38 (supra) of the Act, and, in case there is any apparent inter-se dis-concurrence inter-se mandate (supra) with the provisions (supra) of Section 38 of the Act, thereupon the minutes or recitals carried in Annexure R-3/1, rather are to be declared per incuriam, vis-à-vis, Section 38 of the Act, and, hence are declared.

9. The learned counsel for the petitioners has submitted, that after the enactment of the relevant Statute hence on 6.9.2003, and, the petitioners obtaining the requisite qualifications, from the afore educational institution hence earlier thereto, thereupon, the mandate of the afore Act is not applicable to them. However, the afore submission also appears to be mis-founded, as, the writ petitioners, undertook the MPHW course from the Lord Mahavira Paramedical Institute, from August, 2002 to December 2003. Therefore, when the afore session concluded after coming into force of Act (supra), consequently, unless they obtained the apposite qualification from the institution (supra), only upon its holding a valid affiliation, from the premier regulatory mechanism, they would not become entitled to cause their registration in the relevant register, hence maintained by the respondent concerned.

10. Since as afore-stated, no material exists on record rather suggestive that Lord Mahavira Paramedical Institute, which conducted the relevant examination, under the aegis of Rajasthan Vidyapeeth University, Rajasthan, held any valid affiliation from the afore University, and, also when no material available on record, hence suggestive, that the deemed university (supra) held any valid affiliation from the premier regulatory mechanism. Therefore this Court concludes that the writ petitioners, are, completely disentitled to seek their enlistment or registration, in, the relevant register maintained by co-respondent No.3. Dehors the above, even if the afore material, does not exist on record, in the larger interest of justice, the writ

petitioners may furnish to co-respondent No.3, within two weeks hereafter, the material/documents rather suggestive that (a) Lord Mahavira Paramedical Institute, held a valid affiliation hence from Rajasthan Vidyapeeth University, Udaipur, and, shall also produce before co-respondent No.3, within two weeks hereafter, documents suggestive, that Rajasthan Vidyapeeth University (deemed University), had become validly affiliated to the premier regulatory mechanism concerned. Upon the afore material becoming placed, before co-respondent No.3, within two weeks hereafter, the latter after due authentication thereof, shall proceed to within two weeks thereafter, accordingly enlist or decline enlisting of the writ petitioners, in the relevant register, as, maintained for the aspired purpose.

In view of the above, the writ petition is disposed of alongwith all pending applications.

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

Between :-

PRAVEER KUMAR THAKUR,
S/O SH. BALBIR SINGH VERMA,
R/O HOUSE No. 235-B, 1st FLOOR,
SECTOR-3, NEW SHIMLA, H.P.
PRESENTLY WORKING AS
ADDL. SUPERINTENDENT OF POLICE,
(TEMPORARILY ATTACHED AT
POLICE H.Q. SHIMLA).

…PETITIONER

(BY MR. BIMAL GUPTA,
SENIOR ADVOCATE, WITH
MR. SATISH SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY
(HOME) GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA.

2. THE DIRECTOR GENERAL OF POLICE,
STATE OF H.P., POLICE H.Q.,
NIGAM VIHAR, SHIMLA.

3. THE CHAIRPERSON,
INTERNAL COMPLAINT COMMITTEE
ON SEXUAL HARASSMENT OF WOMEN
AT WORKPLACE POLICE H.Q., SHIMLA

4. MS. RANJANA CHAUHAN,
IPS (FATHER'S NAME NOT KNOWN TO

THE PETITIONER) SUPERINTENDENT
OF POLICE, (LR)-CUM-CHAIRPERSON OF
INTERNAL COMPLAINT COMMITTEE,
POLICE H.Q. SHIMLA ON SEXUAL
HARASSMENT OF WOMEN AT
WORKPLACE, PHQ, SHIMLA-2 (HP).

...RESPONDENTS

(MS. RITTA GOSWAMI,
ADDITIONAL ADVOCATE GENERAL
WITH MS. SEEMA SHARMA,
DEPUTY ADVOCATE GENERAL,
FOR THE STATE)

CIVIL WRIT PETITION No. 3318 of 2021
RESERVED ON : 31st AUGUST, 2021
DATE OF DECISION : 10th SEPTEMBER, 2021

Constitution of India, 1950- Article 226 - Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013- Rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965- Competence of the complaints committee to issue memorandum - Internal

Complaints Committee does not have the power to proceed with formal/regular inquiry on its own- The Internal Complaint Committee has no authority to issue the impugned memorandum- Petition allowed.

Cases referred:

Nisha Priya Bhatia Vs. Union of India and another, (2020) 13 SCC 56;
Vishaka and others Vs. State of Rajasthan and others, (1997) 6 SCC 241;

This petition coming on for pronouncement this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****, passed the following*

O R D E R

The Internal Complaints Committee on sexual harassment of women at workplace has issued a memorandum to the petitioner on 28.05.2021 under Rule 14 of CCS(CCA) Rules 1965. Competence of the complaints committee to issue this memorandum is the main contention raised in this petition.

2. Facts leading to filing of the writ petition :

2(i) Petitioner qualified H.P. State Administrative Services Combined examination in the year 2008 and was selected as Deputy Superintendent of Police (HPPS). He was thereafter promoted as an Additional Superintendent of Police in September, 2017.

2(ii) A complaint of sexual harassment at workplace was lodged against the petitioner on 11.05.2021. The Superintendent of Police Shimla sent the complaint to the Director General of Police, Himachal Pradesh-respondent No. 2. FIR No. 14 of 2021 was registered against the petitioner at Women Police Station Shimla on 13.05.2021 under Sections 354 and 354A(1)(ii) of the Indian Penal Code. Petitioner was granted anticipatory bail by the learned Sessions Judge Shimla on 03.06.2021.

2(iii) The complaint dated 11.05.2021 was also sent to the Internal Complaint Committee on Sexual Harassment of Women at Workplace-respondent No.3 (ICC). Respondent No. 3 issued a memo to the petitioner on

28.05.2021 under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules 1965 [in short the CCS(CCA) Rules 1965]. Petitioner was called upon to submit his reply to the memo within 10 days. Petitioner filed his reply on 04.06.2021, denying the charges and alleged violation of principles of natural justice. He stated that he had not been supplied copy of the complaint, copy of fact finding inquiry report, if any, etc.

2(iv) Respondent No. 3 sent a notice dated 08.06.2021, calling upon the petitioner to appear before it at Police Headquarter Shimla on 10.06.2021 for inquiry proceedings. Petitioner appeared before respondent No. 3 and came to know that statements of two witnesses had already been recorded. Petitioner was supposed to cross examine these witnesses, but he was under the impression that he had been called for personal hearing. Caught unaware, he requested for deferring the cross examination of these two witnesses. His request was accepted. Later in the day, another notice was served upon him for appearance before the ICC on 11.06.2021. Petitioner appeared and submitted a representation for staying the proceedings pointing out the legal requirements, shortcomings and procedural lapses on part of ICC in conduct of the inquiry. He also raised an issue of denial of fair opportunity of defence. According to the petitioner, his representation went unconsidered, rather ICC examined one more witness on 11.06.2021. Unprepared, petitioner again took an adjournment for cross examination of this witness as well. Further proceedings were fixed for 14.06.2021.

2(v) Aggrieved with mode and manner of conduct of inquiry by the ICC, petitioner preferred instant writ petition with following reliefs :-

> *"i) That Memorandum dated 28.05.2021 (Annexure P-3) issued by respondent No. 4 as Chairperson of respondent No. 3 may kindly be held wrong, patently illegal and contrary to the provisions of the CCS (CCA) Rules 1965 and, therefore, may kindly be set aside.*
> *ii) That the proceedings initiated by respondent No. 3 pursuant to issuance of Annexure P-3 may kindly be held wrong, illegal and violative of the*

procedure prescribed for initiation of inquiry in such cases and the same may kindly be quashed and set aside.
(iii) That in the alternative since the proceedings against the petitioner after issuance of Annexure P-3 are based upon same set of facts founded on complaint, allegations and is also a subject matter of FIR No. 14 of 2021, therefore, departmental proceedings initiated against the petitioner may kindly be kept in abeyance till the completion of the trial arising out of FIR No. 14 of 2021."

During hearing of the case, Mr. Bimal Gupta, learned Senior Counsel for the petitioner, submitted that he will not press relief No. (iii) at this stage in the instant petition and will raise it at an appropriate stage in appropriate proceedings. His submission is accepted.

3. Contentions:

Gist of the arguments advanced by Mr. Bimal Gupta, learned Senior Counsel for the petitioner is that the memorandum alongwith charges (Annexure P-3) dated 28.05.2021 has been issued by ICC-respondent No. 3 under Rule 14 of the CCS(CCA) Rules, whereas respondent No. 3 has no authority to issue the memorandum under Rule 14 of the CCS(CCA) Rules. In terms of Rule 14, the charge sheet can be issued to him in accordance with law by the disciplinary authority. Respondent No. 3 is neither his disciplinary authority nor the competent authority to issue the memorandum under Rule 14. Inquiry is not being conducted in accordance with mandatory provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (in short Act of 2013) and the Rules framed thereunder. Guidelines framed by Ministry of Personnel, Government of India in the Office Memorandum (in short O.M.) dated 16.07.2015 detailing the procedure for holding the inquiry in sexual harassment complaints are being violated. Circular dated 26.06.2019 issued in this regard by respondents-State is also being disregarded by the ICC. Inquiry is being conducted against the petitioner in a hot-haste manner and in violation of principles of natural justice. As per

provisions of Rule 14 of the CCS(CCA) Rules, memo of charge sheet is required to be served alongwith article of charges, imputation in support of charges, documents relied upon and list of witnesses to be examined etc. All these documents were not supplied to the petitioner. The petitioner had to make a specific request for the supply of these documents on 04.06.2021.

Ms. Seema Sharma, learned Deputy Advocate General, has defended the issuance of impugned memorandum dated 28.05.2021 by the ICC. The case of the respondents is that inquiry is being conducted as per Standard Operating Procedure No. 580 of 2017 (in short SOP), CCS(CA) Rules and the Act of 2013. While conducting the inquiry, O.M. dated 16.07.2015 and circular dated 26.06.2019 have also been followed. Respondent No.3, the Committee is competent to issue the memorandum dated 28.05.2021.

4. Legal History:

4(i) In **(1997) 6 SCC 241,** titled **Vishaka and others** Vs. **State of Rajasthan and others**, Hon'ble apex Court laid down various guidelines for protecting women from sexual harassment at workplace. Some of the guidelines pertained to taking disciplinary action against the accused employees. These were :-

"……..

5. Disciplinary Action:

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redressal of the complaint

made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

……."

The Complaints Committees were set-up for dealing with complaints of sexual harassment at workplace, pursuant to the judgment in **Vishaka and others** Vs. **State of Rajasthan and others (1997) 6 SCC 241**.

4(ii) The above guidelines were followed by an amendment to Rule 14 of the CCS(CCA) Rules, 1965 prescribing procedure for imposing penalties. On 10.07.2004, following proviso was inserted after Rule 14(2) :-

"Provided that where there is a complaint of sexual harassment within the meaning of Rule 3-C of the Central Civil Services (Conduct) Rules, 1964, the Complaints Committee established in each Ministry or Department or Office for inquiring into such complaints, shall be deemed

to be the inquiring authority appointed by the disciplinary authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into the complaints of sexual harassment, the inquiry as far as practicable in accordance with the procedure laid down in these rules."

As per proviso to Rule 14(2) of the CCS (CCA) Rules, in case of complaints of sexual harassment, the Complaints Committee set-up in each department for inquiring into sexual harassment complaints shall be deemed to be the inquiring authority appointed by the disciplinary authority for the purpose of CCS(CCA) rules. Unless a separate procedure has been prescribed, the Complaints Committee shall hold the inquiry as far as practicable in accordance with the procedure laid down in CCS(CCA) Rules.

4(iii) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force on 22.04.2013. Gist of some provisions of this Act relevant to the case in hand are as under :-

i) *An aggrieved woman may make in writing a complaint of sexual harassment at workplace to the internal/local committee, as the case may be, within three months from the date of the incident. For reasons to be recorded in writing, this time period can be extended by further three months on showing of sufficient cause. [Section 9].*

ii) *Inquiry into the complaint shall be conducted in accordance with service rules applicable to the respondent (if he is an employee), where no rules exist, then in such manner as may be prescribed. [Section 11(1)]*

iii) *For the purpose of inquiry, the committee shall have same powers as are vested in a civil Court under the Code of Civil Procedure when trying a suit in respect of summoning, enforcing the attendance of any person, examining him on oath, requiring the discovery and production of document and any other matter which may be prescribed. [Section 11(3)]*

iv) *The inquiry is to be completed within a period of 90 days. [Section 11(4)]*

v) *On completion of inquiry, the Complaints Committee is to provide a report of its findings to the employer within a period of ten days. The report is also to be made available to the concerned parties. [Section 13 (1)]*

vi) *If the Complaints Committee concludes that allegations leveled in the complaint are proved, then it shall recommend to the employer to take action against respondent for sexual harassment as a misconduct in accordance with applicable service rules or where no service rules have been made, in such manner as may be prescribed. [Section 13(3)]*

In the instant case, complaint dated 11.05.2021 relating to sexual harassment was forwarded to the ICC. The ICC was to enquire into a matter where allegations had been levelled against an employee (petitioner), who was a gazetted State Police Service Officer (HPPS) governed by the CCS(CCA) Rules 1965 for disciplinary purposes. Section 11 of the Act of 2013 provides that where the respondent is an employee, then the inquiry has to be conducted in accordance with Service Rules applicable to him.

5. The SOP No. 580 of 2017

The respondents' case is that in the police department, SOP No. 580 of 2017 has been framed, providing mechanism for redressal of complaints of sexual harassment at workplace. The SOP as per its para 13 was valid for a period of three years from the date of issue. According to the respondents, its validity has been retrospectively extended on 01.06.2021 w.e.f. 06.01.2021 to 06.01.2023.

5(i) As per para 4 of the SOP, under the H.P. Police Act, 2007, there are four categories of police personnel governed by separate disciplinary provisions. Petitioner falls in the category of Gazetted State Police Service Officer, who for disciplinary purpose is governed by CCS(CCA) Rules. The relevant part of para 4 reads as under :-

"*In Himachal Pradesh Police there are four categories of personnel as provided under Section 4 of Chapter-II of H.P. Police Act-2007-*

(i) Non-Gazetted Police Officers Grade-II, comprising of Constables and Head Constables ;

(ii) x x x x x x x x x x x x x x x x x x x x x x x x

(iii) Gazetted State Police Service Officer; and

(iv) x x x x x x x x x x x x x x x x x x x x x x x x

(a) x x x x x x x x x x x x x x x x x x x x x x x x

(b) Personnel under category (iii) are governed as per provisions of Rule-14 of Central Civil Services (Classification, Control & Appeal) Rules, 1965 as well as relevant provisions of H.P. Police Act-2007 & CCS (Conduct) Rules.

(c) x x x x x x x x x x x x x x x x x x x x x x x x x"

5(ii) Para 7(a) of the SOP gives the complaint mechanism. Clauses (x) and (xi) state that in the preliminary hearing, the committee should serve gist of the complaint to the alleged officer (in the form of articles of charge) and he should formally be asked whether he pleads guilty or otherwise. If the charges are denied, the complainant should be asked to produce her witnesses, if any, for recording their statements. These two clauses are extracted hereinbelow :-

> *"(x) In the preliminary hearing the Chairperson/Presiding Officer should serve gist of complaint to the alleged officer/official (in the form of articles of charge) and he should formally be asked whether he pleads guilty or otherwise.*
>
> *(xi) If the charges are denied, the complainant should be asked to produce her witnesses, if any, before the Internal Complaints Committee for recording their statements."*

Clause (xvii) of para 7(a) provides that after recording the defence and proceedings of cross examination of defence witnesses, the committee is to give its findings. A copy of the findings of the complaints committee is to be provided to the respondent to enable him to file reply to the disciplinary authority. The disciplinary authority will decide the matter as per procedure laid down in para 4. Clauses (xvii), (xviii) and (xix) of para 7(a) of the SOP are as under :-

""(xvii) the Committee to give the findings opinion after recording the defense and proceedings of cross examination of defense witnesses, documents etc., if any.
(xviii) On receipt of the finding from Internal Complaints Committee, copy of the same should be provided to the respondent for his reply to the Disciplinary Authority.
(xix) On receipt of representation, if any, submitted by the respondent, the case should be finally decided by the competent authority as per procedure laid in rules/provisions quoted under para-4."

5(iii) Para 4 of the SOP (part of which has already been extracted hereinabove) ends as under :-

"The enquiry conducted by the Complaints Committee shall be treated as DE for awarding any punishment by the disciplinary authority, as per above provisions."

6. O.M. dated 16.07.2015 :

Both the parties have not denied the applicability of office memorandum dated 16.07.2015 issued by Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training. This memorandum outlines steps for conducting inquiry in complaints of sexual harassment. **6(i)** This office memorandum says that keeping in view the proviso to Rule 14(2) of CCS(CCA) Rules, the ICC will be involved in two stages. First is at the stage of investigation and the second stage is where the ICC acts as an inquiring authority and conducts the inquiry as far as practicable as per Rule 14 of the CCS(CCA) Rules. Para 9 of the O.M. runs as follows :-

"In the light of the Proviso to the Rule 14(2) mentioned above, the Complaints Committee would normally be involved at two stages. The first stage is investigation already discussed in the preceding para. The second stage is when they act as Inquiring Authority. It is necessary that the two roles are clearly understood and the inquiry is conducted as far as practicable as per Rule 14 of CCS (CCA) Rules, 1965. Failure to observe the procedure may result in the inquiry getting vitiated."

6(ii) First Stage of Involvement of ICC :-

Preliminary/fact finding inquiry/investigation- ICC conducts investigation to try to ascertain truth of allegations. This is done by collecting documents as well as recording statements of witnesses, if any, including the complainant. The investigation report at this stage assumes significance as the disciplinary authority relies on this investigation report in case of issuance of charge sheet, for drafting the imputations as well as for evidence by which the charges are to be proved. Para 8 of the memorandum reads as under :-

> *As mentioned above, the complaints of sexual harassment are required to be handled by Complaints Committee. On receipt of a complaint, facts of the allegation are required to be verified. This is called preliminary enquiry/fact finding enquiry or investigation. The Complaints Committee conducts the investigation. They may then try to ascertain the truth of the allegations by collecting the documentary evidence as well as recording statements of any possible witnesses including the complainant. If it becomes necessary to issue a Charge Sheet, disciplinary authority relies on the investigation for drafting the imputations, as well as for evidence by which the charges are to be proved. Therefore, this is a very important part of the investigation."*

6(iii) Disciplinary Authority gets into picture after the First Stage :-

The investigation report submitted by ICC as contemplated in para 8 is then sent to the disciplinary authority. The disciplinary authority will examine the report as to whether a formal charge sheet needs to be issued to the respondent-official or not. As per Rule 14(3) of the CCS(CCA) Rules, charge sheet is to be drawn by or on behalf of the disciplinary authority. In case charge sheet is issued to the officer, then he is to be given an opportunity to reply to the charge sheet. As per Rule 14(5) of the CCS(CCA) Rules, a decision to conduct the inquiry has to be taken after consideration of reply of the charged officer. This, as contemplated in para 12 of the office memorandum, is as under :-

"On receipt of the Investigation Report, the Disciplinary Authority should examine the report with a view to see as to whether a formal Charge Sheet needs to be issued to the Charged Officer. As per Rule 14(3), Charge Sheet is to be drawn by or on behalf of the Disciplinary Authority. In case the Disciplinary Authority decides on that course, the Charged Officer should be given an opportunity of replying to the Charge sheet. As per Rule 14(5), a decision on conducting the inquiry has to be taken after consideration of the reply of the charged officer."

6(iv) Second Stage of involvement of ICC:-

In case the charged officer denies the charges and his reply is not considered convincing, then charge sheet issued to him under CCS(CCA) Rules alongwith his reply is sent to the ICC for conducting formal inquiry into the matter. As per Section 11(3) of Act of 2013, the ICC comes into picture once again at this stage for holding formal inquiry. The ICC gets all the powers of the Civil Court to summon, enforce the attendance of any person, examine him on oath, require discovery and production of documents etc. Relevant para 14 of the office memorandum is as under :-

"In case the Charged Officer denies the charges and his reply is not convincing, the Charge sheet alongwith his reply may be sent to the Complaints Committee for formal inquiry, and documents mentioned in Rule 14(6) will be forwarded to the Complainants Committee. As per Section 11(3) of the Act, for the purpose of making any inquiry, the Complaints Committee shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed.

The Section 11(4) of the Act requires that the inquiry shall be completed within a period of ninety days."

6(v) The disciplinary authority in terms of Rule 14(5) (c) of CCS (CCA) Rules shall appoint the Presenting Officer. Charged officer is also entitled to defence assistant. Para 15 of the office memorandum in this regard is as follows :-

> *"The Disciplinary Authority shall also in terms of Rule 14(5) (c) appoint a Government servant as a Presenting Officer to present evidence on behalf of prosecution before the Complaints Committee/Inquiring Authority. The listed documents are to be sent to the Presenting Officer. The Complaints Committee would, thereafter, summon the Presenting Officer and the Charged Officer. As a first step, the charged officer would be formally asked as to whether he admits the charges. As mentioned above, in case of any clear and unconditional admission of any Article of Charge, no inquiry would be held in respect of that Article and the admission of the Charged Officer would be taken on record. The inquiry would be held thereafter, in respect of those charges which have not been admitted by the Charged Officer. The Charged Officer is also entitled to engage a Defence Assistant. The provisions relating to Defence Assistant are given in Rule 14(8)."*

The other paras of O.M. give the subsequent procedure.

7. The Circular dated 29.06.2019 :

It will also be worth noticing a circular dated 26.06.2019 issued by the Department of Personnel Government of Himachal Pradesh. The circular was issued in sequel to the O.M. dated 16.07.2015 (referred to in para 6 above). The circular was issued to all the Heads of departments. The circular reiterates that ICC's role at first stage is to conduct a fact finding inquiry. If it is considered necessary to issue the charge sheet, then disciplinary authority shall issue the charge sheet under CCS(CCA) Rule 14(3) relying upon the fact finding report. After considering the reply of the charged officer to the charge-sheet, the disciplinary authority shall take a call upon holding of formal inquiry against the employee. For conducting the formal inquiry, the matter alongwith all relevant documents is again sent to ICC which is the inquiring authority in terms of Act of 2013. For holding the formal inquiry, presenting officer is to be appointed. Extracts from the circular are as follows :-

> *"(i) The internal Complaints Committee set up in each organization under the provisions of the Section 4(1) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has a dual role. In the first stage, upon receipt of a complaint, it can conduct a preliminary enquiry/fact finding enquiry or investigation to*

verify the facts by collecting the documentary evidence as well as recording statements of any possible witness including the complainant, Under Section 11(4) of the Act, the enquiry shall be conducted within ninety days.

(ii) If it is felt necessary to issue a charge-sheet, then disciplinary authority, under Rule 14 (3), relies upon the investigation/preliminary/fact finding enquiry for drafting the imputations as well as for evidence by which the charges are proposed to be sustained.

(iii) The Charged Officer should be given an opportunity of replying to the charge-sheet. As per the Rule 14(5), the disciplinary authority after considering the reply of the Charged Officer takes a decision whether a formal enquiry is to be conducted.

(iv) The Complaints Committee shall be deemed to the Inquiring Authority and enquiry into the charges framed shall be held, as far as practicable as per Rule 14 of the CCS (CCA) Rules, 1965.

(v) When allegations of bias are received against an Inquiring Authority, the enquiry/investigation shall be stayed till the disciplinary authority takes a decision on the allegations of bias.

(vi) Under Rule 14(5) (c), a Presenting Officer is appointed, the examination, cross-examination and re-examination of prosecution/defence witnesses is done. Under Rule 14(18), General Examination of the Charged Officer is conducted and he is required to submit his written brief. The Complaints Committee is empowered to make its recommendations on specific points.

In this regard, attention is invited to the provisions contained in Rule-14(1) of CCS (CCA) Rules, 1965 which specifically stipulates that no order of imposition of any of the penalties specified in clauses (v) to (ix) of Rule 11 shall be made unless an inquiry is held in the manner provided in Rule-14 and Rule-15 otherwise the entire process would be vitiated, might entail unnecessary litigation and may not be legally tenable."

8. Observations :

8(i) Coming back to the facts of the case, as per reply filed by the respondents, the inquiry is being conducted against the petitioner in consonance with the SOP, the O.M. dated 16.07.2015, the CCS (CCA) Rules and the Act of 2013. As per para 14 of the reply filed to the writ petition, a fact finding inquiry was conducted by the committee on receipt of complaint dated

11.05.2021. The ICC found substance in the allegations made. Thereafter, the committee decided to proceed with formal inquiry on denial of charges by the petitioner. Relevant extract of the reply is as under :-

> *"14. That in view of submissions made in preceding paras, the averments made in this para are wrong hence denied completely. It is, however, submitted that after brief fact finding enquiry done by ICC wherein ICC examined 08 police personnel. Based on statements of the Police personnel examined, the Committee found that prima facie there was substance in the allegations made, as such, Committee decided to give gist of allegations to the petitioner and same was served to the petitioner on 28.05.2021 and was afforded an opportunity to spell out his side of the alleged incident. Allegations were denied by the petitioner. Then Committee decided to go ahead with the formal enquiry. That the petitioner made 3 representations dated 11.06.2021, 14.06.2021 and 18.06.2021 to the Committee seeking stay of the proceedings based on different grounds in this representations. The Committee deliberated on the representations and did not find any merit in the petitioner's plea in the light of the provisions of CCS (CCA) Rules, 1965 and the provisions of the SOP issued for enquiry into complaints of sexual harassment at workplace. As such the committee decided to proceed further with the enquiry under the provisions of the SOP which as on date is valid. The Complainant was asked to furnish a list of witnesses and documents/evidence if any in support of allegations. On receipt of list of witnesses the Committee proceeded to record the statements of PWs in presence of petitioner. Further, petitioner prayed for some time to cross examine the witnesses and same was provided to the petitioner. Photocopies of statements of PWs as well as copy of complaint against him were also given to petitioner on 11.06.2021 to facilitate him to prepare defence. Hence the averments made in this para by the petitioner are devoid of any merits hence not tenable."*

9. Observations :

The reply states that :

a) On receipt of the complaint, a fact finding inquiry was conducted by the ICC. The Committee examined 8 police personnel.

b) The ICC found substance in the allegations made by the complainant.

c) The ICC decided to give gist of the allegations to the petitioner. The gist of the allegations was served upon the petitioner on 28.05.2021. On petitioner's denial of allegations, the ICC decided to go ahead with formal inquiry against the petitioner as per SOP.

d) During formal inquiry, the ICC recorded the statements of PWs in presence of petitioner on 10.06.2021. At request of the petitioner, inquiry proceeding was adjourned to enable him to cross examine the PWs.

e) The ICC provided photocopy of the complaint dated 11.05.2021 and the statements of PWs to the petitioner on 11.06.2021 to facilitate him to prepare the defence.

f) The SOP does not provide for engagement of either the Presenting Officer or the Defence Assistant. Therefore, defence assistant cannot be provided to the petitioner.

8(ii) In the instant case, after completing the fact finding inquiry, the ICC found substance in the allegations levelled against the petitioner. The ICC decided to proceed with the formal inquiry. The decision to hold a formal inquiry against the petitioner was taken by the ICC on its own. Investigation/fact finding inquiry was not referred by it to the disciplinary authority. The disciplinary authority never came into picture at any stage. After investigation, the ICC on its own considered it appropriate to issue memorandum to the petitioner. The memorandum was issued under Rule 14 of the CCS(CCA) Rules. Relevant averments made by the respondents in their reply in this regard are reproduced hereinafter :-

> "Moreover, the memorandum dated 28.05.2021 has been served to the petitioner in compliance of Rule 14 of CCS (CCA) Rules. Thus the contention that due procedure is being followed in the enquiry is not tenable and hence denied."

8(iii) The ICC has no authority to issue the impugned memorandum under Rule 14 of the CCS(CCA) Rules. It is the pleaded case of the respondents that what was intended to be conducted by issuing

memorandum dated 28.05.2021 was a formal inquiry. It will also be appropriate to extract hereinafter the impugned memorandum dated 28.05.2021 issued to the petitioner :-

"MEMORANDUM"

{Rule 14 of CCS (CCA) Rules }

"*The undersigned has received a complaint (in original) made by HC Richa Sharma, PS New Shimla, District Shimla addressed to SP/Shimla vide DGP office Letter No. DIV-I-(14)/2021-762 Dated 13.05.2021. The letter directs undersigned to enquire the matter and submit the report to the DGP/HP.*

2. As per the complaint against Sh. Praveer Kumar Thakur, HPS, Addl. SP Shimla, temporarily attached at PHQ Shimla-2, there are charges of Sexual Harassment at workplace and inappropriate undesirable behavior including physical contact and advances. As per the contents of the complaint and information and facts available therein, the gist of allegations are hereby served on Sh. Praveer Kumar Thakur, HPS, Addl. S.P. enclosed as Annexure-I to IV.

3. Sh. Praveer Kumar Thakur is directed to submit his reply to the allegations within 10 days of receipt of this memorandum in form of written statement of his defence and also with regard to his statement whether he admits or deny each allegation.

4. Sh. Praveer Kumar Thakur is further informed that if he does not submit his written statement of defence on or before the date specified in Para 3 above, or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of Rule 14 of the CCS (CCA) Rules, 1965 or the orders/directions issued in pursuance of the said rule, the inquiring Authority may hold the inquiry against him ex-parte.

5. Attention of Sh. Praveer Kumar Thakur is invited to Rule 20 of the Central Civil Service (Conduct) Rules, 1964 under which no government servant shall bring or attempt to bring any political or outside influence to bear upon any superior authority to further his interest in respect of matters pertaining to his service under the Government. If any representation is received on this behalf from another person in respect of any matter dealt with in these

proceedings, it will be presumed that Sh. Praveer Kumar Thakur is aware of such representation and that it has been made at his instance and action will be taken against him for violation of rule 20 of the CCS (Conduct) Rules, 1964.

The receipt of the memorandum may be acknowledged"

Four detailed Articles of charges are also part of the above memorandum.

8(iii) As per pleaded case of the respondents, the fact finding inquiry was conducted by the ICC on the complaint dated 11.05.2021. As per office memorandum dated 16.07.2015, issued by Government of India, which is also applicable to all the departments of the respondent-State as clarified by the respondent-State in the circular dated 26.06.2019, and also as per the provisions of Act of 2013, the committee, after completion of fact finding/ preliminary inquiry/investigation, if is of the opinion that the complaint has substance, then such investigation is to be sent to the disciplinary authority. In conducting the fact finding inquiry, the ICC recorded and examined statements of 8 police personnel. It, prima facie, found substance in the allegations levelled in the complaint. If that was so, then this would have been the end of first stage of the role of ICC. The ICC thereafter was required to send its fact finding report to the disciplinary authority. It was for the disciplinary authority to examine the fact finding report of the ICC and to decide whether to issue charge sheet to the petitioner under Rule 14 of the CCS(CA) Rules or not. In case the disciplinary authority decided to issue the charge sheet to the petitioner, then the same was to be issued as per Rule 14(3) of CCS (CCA) Rules. Reply was to be called from the petitioner. Upon consideration of petitioner's reply, disciplinary authority was to take the final decision whether to proceed with formal inquiry against the petitioner or not. In case the disciplinary authority decided to proceed with formal inquiry, then the matter was to be again sent to the ICC as the ICC is the Inquiring Authority in complaints of sexual harassment as per provisions of Act of 2013 and the O.M. dated 16.07.2015. It is at this stage that the ICC comes into

picture once again. This is the second stage mentioned in O.M. dated 16.07.2015. The provisions regarding appointment of Presenting Officer and the Defence Assistant also become applicable. This is the only interpretation possible on combined reading of the O.M. dated 16.07.2015, Act of 2013 and the CCS (CCA) Rules. The Internal Committee does not have the power to proceed with formal/regular inquiry on its own. It will be appropriate to refer to **(2020) 13 SCC 56**, titled **Nisha Priya Bhatia** Vs. **Union of India and another,** wherein following was observed in respect of fact finding inquiry by the ICC followed by conduct of regular inquiry :-

> *"95. Be that as it may, in our opinion, the petitioner seems to have confused two separate inquiries conducted under two separate dispensations as one cohesive process. The legal machinery to deal with the complaints of sexual harassment at workplace is well delineated by the enactment of The Sexual Harassment of Women at Workplace Act, 2013 (hereinafter "2013 Act") and the Rules framed thereunder. There can be no departure whatsoever from the procedure prescribed under the 2013 Act and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (for short, "the 2013 Rules"), either in matters of complaint or of inquiry thereunder. The sanctity of such procedure stands undisputed. The inquiry under the 2013 Act is a separate inquiry of a fact-finding nature. Post the conduct of a fact-finding inquiry under the 2013 Act, the matter goes before the department for a departmental inquiry under the relevant departmental rules [CCS (CCA) Rules in the present case] and accordingly, action follows. The said departmental inquiry is in the nature of an in-house mechanism wherein the participants are restricted and concerns of locus are strict and precise. The ambit of such inquiry is strictly confined between the delinquent employee and the concerned department having due regard to confidentiality of the procedure. The two inquiries cannot be mixed up with each other and similar procedural standards cannot be prescribed for both. In matters of departmental inquiries, prosecution, penalties, proceedings, action on inquiry report, appeals etc. in connection with the conduct of the government servants, the CCS (CCA) Rules operate as a self-contained code for any departmental action and unless an existing*

rule is challenged before this Court on permissible grounds, we think, it is unnecessary for this Court to dilate any further."

8(iv) The SOP cannot override either the CCS(CCA) Rules or the provisions of Act of 2013 or the Office Memorandum issued by Government of India on 16.05.2015, which is also applicable to the respondents in terms of Circular dated 26.06.2019. Under the Act, the inquiry by ICC is to be completed within a period of 90 days. Formal inquiry/regular inquiry can be conducted after the issuance of charge sheet by the disciplinary authority under Rule 14 of CCS (CCA) Rules. In case the procedure laid down in para 7(a) of the SOP is followed in terms of interpretation given by the respondents, then in case of State Gazetted Police Service Officer, the disciplinary authority will come into picture only after completion of formal inquiry by the ICC, which would be in absolute derogation to the provisions of not only the Act of 2013, but also CCS(CCA) Rules and the detailed guidelines dated 16.07.2015 issued by Government of India. It is not the case of the respondents that they can conduct the inquiry against the petitioner into the complaint dehors the provisions of CCS(CCA) Rules, Act of 2013, the Office Memorandum dated 16.07.2015 and the Circular dated 26.06.2019. It is not and even otherwise also cannot be the case of the respondents that after conclusion of the present formal inquiry being conducted against the petitioner by the ICC, the matter will go to the disciplinary authority and that the disciplinary authority will then direct issuance of charge sheet to the petitioner followed by another regular departmental inquiry. This is because as per para 7(a)(xix) and para 4 of SOP, after conclusion of inquiry by the ICC, the matter goes to disciplinary authority for awarding punishment. A conjoint and holistic reading of the Act of 2013, the CCS(CCA) Rules, 1965, the O.M. dated 16.07.2015 issued by Government of India, the Circular dated 26.06.2019 issued by respondent-State and the SOP leads to only one conclusion that the ICC has no authority to issue the impugned memorandum dated 28.05.2021 to the petitioner. In

case the ICC has not completed the fact finding inquiry, then it is entitled to complete the same but in accordance with law. However, in case the ICC has already concluded the fact finding inquiry against the petitioner, then it is required to send the fact finding inquiry report to the disciplinary authority. It is for the disciplinary authority to examine the fact finding report to decide whether to issue charge sheet to the petitioner or not. It is the disciplinary authority which can issue the charge sheet to the petitioner under Rule 14 of CCS(CCA) Rules. After examining the reply of the petitioner to the charge sheet, it is for the disciplinary authority to decide whether to proceed with formal inquiry against the petitioner. The ICC will come into picture once again only if disciplinary authority decides to hold formal inquiry against the petitioner. If that course is adopted by the disciplinary authority, then the matter will be once again referred to the ICC which is the inquiring authority in terms of Act of 2013, CCS(CCA) Rules and the O.M. dated 16.07.2015. The ICC at this second stage of coming into picture will hold the inquiry as per provisions of CCS (CCA) Rules as the petitioner is a Gazetted State Police Service Officer governed by CCS (CCA) Rules, 1965 for disciplinary purposes.

In view of above discussion, it is held that the Internal Complaints Committee had no authority to issue the memorandum dated 28.05.2021 to the petitioner. This writ petition is allowed. The impugned memorandum dated 28.05.2021 (Annexure P-3) is quashed and set aside. It will be open for the respondents to proceed against the petitioner in accordance with law, keeping in view the observations made above. Pending applications, if any, also stand disposed off.

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

Between:-

RAJESH KUMAR
SON OF DIGTI RAM

R/O VILLAGE SANEDE, P.O GARNOTA, TEHSIL SIHUNTA, DISTRICT CHAMBA, H.P.

…….. PETITIONER.

(BY SH. S.D GILL AND
SH. VIVEK ATTRI, ADVOCATES)

AND

4. STATE OF H.P.
THROUGH SECRETARY HEALTH GOVERNMENT OF H.P. SHIMLA-2

5. PARA MEDICAL COUNCIL THROUGH ITS REGISTRAR INDIRA GANDHI MEDICAL COLLEGE LAKKAR BAZAR SHIMLA.H.P (THROUGH ITS M.D).

6. VINAYAKA MISSION UNIVERSTY, THROUGH ITS REGISTRAR, SANKARI MAIN ROAD (NH-47) ARIYANOOR, SALEN-6636308, TAMILNADU, INDIA.

…..RESPONDENTS

(BY. MR. AJAY VAIDYA, SR. ADDITIONAL ADVOCATE GENERAL FOR RESPONDENT NO.1.

BY. MR. DALIP K SHARMA, ADVOCATE FOR RESPONDENT NO.2)

CIVIL WRIT PETITION NO. 4755 OF 2020
RESERVED ON : 17.8.2021
DECIDED ON: 27.8.2021.

Constitution of India, 1950 - Article 226 - Mandamus **- H.P. Para-Medical Council Act, 2003** – Held - If the Institute holds the requisite affiliation from the State Government concerned or from the UGC, it could impart valid trainings in the discipline concerned- The petitioner was invalidly denied registration, consequently, mandamus is pronounced.

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

O R D E R

Though the writ petitioner avers in paragraph 10 of the petition, that, the requisite qualification/course as has been obtained by him, from Vinayaka Mission University, has been approved by Distance Education Council, IGNOU, New Delhi, and, the Joint committee of "AICTE-UGC-DEC". However, the afore made submission only remains in the realm of pleadings, as, no evidence is brought on record to prove the same.

2. The learned counsel for respondent No.2 has contended, that Section 19 of the Himachal Pradesh Para Medical Council Act, 2003 (for short "the Act"), bars the imparting of relevant courses, by all educational institutions concerned, unless prior permission of the State Government rather is obtained. However the provisions of the Act (supra), as, carried in Section 19 of the Act, and, as become extracted hereinafter, only bars, establishment of paramedical institution(s), and, also bars the paramedical institution(s), to open a new course or training besides bars the institution(s) concerned to increase their admission capacity, rather beyond the prescribed limits, obviously unless prior permission of the State government is accorded. However, the afore mandate, if comes to be profoundly, and, deeply read, its application is limited only to establishments of paramedical institutions, within the State of Himachal Pradesh, and, cannot become extended to carry any meaning, that paramedical institutions rather established outside the territory of the State of Himachal Pradesh, and imparting valid relevant distant courses or correspondence courses, vis-à-vis, the relevant discipline, also, there being barred to validly impart education, in the apposite courses to students concerned, unless prior thereto they obtained the statutory permission, from the government of Himachal Pradesh. Therefore, no prior

permission of the Government of Himachal Pradesh is required, vis-à-vis, the afore valid modes of impartings of education by validly established institutions located outside the territory of the State of Himachal Pradesh.

> 19. Permission for establishment of new paramedical institution.-
>
> (1) Notwithstanding anything contained in this Act,-
>
> (a) no person shall establish a para-medical institution; and
>
> (b) no paramedical institution shall-
>
> (i) open a new or higher course of study or training which would enable a student of such course or training to qualify himself for the award of any recognized paramedical qualification; or
>
> (ii) increase its admission capacity in any course of study or training,
>
> except with the previous permission of the State Government obtained in accordance with the provisions of this section.
>
> Explanation.- For the purposes of this section, the expression " person" includes any University or a trust but does not include the State Government.
>
> (2) Every person or paramedical institution shall, for the purpose of obtaining permission under sub-section (1), submit to the Council a scheme in accordance with the provisions of sub-section (3).
>
> (3) The scheme referred to in sub-section (2) shall be in such form, contain such particulars, preferred in such manner and accompanied with such fee, as may be prescribed.

(4) On receipt of a scheme by the Council under sub-section (2), the Council may obtain such other particulars as may be considered necessary by it from the person or the paramedical institution concerned and thereafter, it may-

(a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or institution concerned for making a written representation it shall be open to such person or paramedical institution to rectify the defects, if any, specified by the Council; and

(b) consider the scheme, having regard to the factors referred to in sub-section (8), and submit the scheme together with its recommendations thereon to the State Government.

(5) The State Government may, after considering the scheme and the recommendations of the Council under sub-section (4) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or institution concerned, and having regard to the factor referred to in sub- section (1), either approve (with such conditions, if any, as it may consider necessary)or disapprove the scheme and any such approval shall be a permission under sub-section (1) :

Provided that no scheme shall be disapproved by the State Government except after giving the person or institution concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub-section shall prevent any person or paramedical institution whose scheme has not been approved by the State Government to submit a fresh scheme and the provisions of this section shall apply to such scheme as if such scheme has been submitted for the first time under sub-section (2).

(6) Where, within a period of one year from the date of submission of the scheme to the Council under sub-section (2), no order passed by the State Government has been communicated to the person or institution submitting the scheme, such scheme shall be deemed to have been approved by the State Government in the form in which it had been submitted to the Council and accordingly, the permission of the State Government required under sub- section (1) shall also be deemed to have been granted.

(7) In computing the time limit specified in sub-section (6), the time taken by the person or institution concerned submitting the scheme in furnishing any particulars called for by the Council, or State Government, shall be excluded.

(8) The Council, while making its recommendations under clause (b) of sub-section (4) and the State Government while passing an order, either approving or disapproving the scheme under sub-section (5), shall have due regard to the following factors, namely :-

(a) whether the proposed paramedical institution or the existing paramedical institution seeking to open a new or higher course of study or training, shall be in a position to offer the minimum standards of paramedical education as prescribed by the Council under section 26 of this Act;

(b) whether the person seeking to establish a paramedical institution or the existing paramedical institution seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, training and other facilities to ensure proper functioning of the paramedical institution or conducting the new course of study or training or accommodating the increased admission capacity have been provided or would be provided within the time limit specified in the scheme;

> (d) whether adequate hospital facilities, having regard to the number of students likely to attend such paramedical institution or course of study or training or as a result of the increased admission capacity, have been provided or shall be provided within the time-limit specified in the scheme;
>
> (e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such paramedical institution or course of study or training by persons having the recognized paramedical qualifications;
>
> (f) the requirement of manpower in the field of practice of medicine; and
>
> (g) any other factors as may be prescribed.
>
> (9) Where the State Government passes an order either approving or disapproving a scheme under this section a copy of the order shall be communicated to the persons or paramedical institution concerned.

3. The afore reasons, for making the afore interpretation to the mandate supra, as, carried in Section 19 of the Act, would bring it in concurrence with the mandate carried in Section 38 of the Act, relevant provisions whereof becomes extracted hereinafter, as, therein the statutory coinage appertaining, to the necessity of the aspirant concerned possessing the relevant recognized qualification(s), does extend, to the aspirant concerned, the apposite statutory privilege to seek the aspired registration, upon, his holding the apposite qualification, from any validly established educational institution, though not existing in the territory of Himachal Pradesh, (i) yet it being evidently affiliated to a valid educational institution, or its becoming recognized by the regulatory mechanism concerned. Consequently, when the clout of the coinage “recognized qualification”, is not

restricted to any recognized educational institution hence existing within Himachal Pradesh nor when the mandate (supra) occurring in Section 19 of the Act, does not, trammel the coinage "recognized qualification", as, occurring in Section 38 of the Act, to its emanating only hence from validly established institution within the State of Himachal Pradesh. Therefore a harmonious reading of the provisions (supra) paves way for an inference that any validly established institution rather outside Himachal Pradesh, hence purveying teachings to the students concerned, and, who thereafter become conferred with degree/diploma, thereupon concomitantly theirs bestowing a, recognized qualification to the students concerned, and, also empowering the aspirant concerned to seek his valid enlistment.

> "38. Registration renewal and State Register- (1) No person shall be registered on the State Register as paramedical practitioner unless he possesses a recognized qualification and has not paid such fee, as may be prescribed and different fee may be prescribed for different qualification but it shall not exceed one thousand rupees and the registration shall be valid for a period of three years.
> (2) The Council shall cause to be maintained a State Register of Paramedical practitioners in such form, as may be prescribed, by regulations.
> (3) The Register shall be deemed to be public document within the meaning of Indian Evidence Act, 1872 (1 of 1872).
> (4) Every registered paramedical practitioner registered under sub-section (1) shall renew his registration after every three years on payment of such fee as may be prescribed."

4. Since this Court, has to the statutory coinage "Recognized Qualification" borne in Section 38 of the Act, imparted the connotation, that it conveys, and, is suggestive, that the apposite qualification, upon, emanating

from any educational institution within the territory of India, hence holding the valid certificate of affiliation, from the premier regulatory mechanism, or, being validly recognized by the State Government concerned, necessarily purveying, to, the successful degree/diploma holders the privilege to seek their valid enlistment. Therefore, no contra therewith meaning can be ascribed to the afore relevant portion of Section 19 of the Act. Consequently the operation, and, sway of the ordained statutory necessity of a prior permission, from the State of Himachal Pradesh, for establishing a paramedical institution concerned, and, for therethroughs its validly operating its courses, is confined only to those educational institutions, which exist or are to be established within the territory of the State of Himachal Pradesh.

5. Reiteratedly, the mandate (supra) cannot apply to invalidate hence valid affiliations meted to educational institutions established outside the State of Himachal Pradesh, either from the UGC or the State Governments concerned, nor also any distant learning/teachings imparted in the relevant discipline, by the recognized institutions concerned, can be brought within the realm of mandate (supra). Therefore, this Court concludes that even if Vinayka Mission University, is not meted any apposite prior permission within the mandate of Section 19 (supra), yet if it holds the requisite affiliation from the State Government concerned or from the UGC, it could impart valid trainings in the discipline concerned.

6. Be that as it may, since material exists on record rather suggestive that the courses or learnings as become successfully completed by the writ petitioner from Vinayaka Mission University, being a sequel of the University, being validly affiliated to UGC, and, other premier educational regulatory mechanisms. Therefore, the petitioner, was invalidly denied registration in the relevant register by the respondent concerned. Consequently, a mandamus is pronounced, vis-à-vis, the respondent concerned, to, within four weeks enlist the petitioner, in the relevant register.

In view of the above, the present petition stands disposed of alongwith all pending applications.

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

Between:

CHUNI LAL KASHYAP, SON OF KOTHO RAM, RESIDENT OF SHIV SHAKTI BHAWAN, VILLAGE JARAI, POST OFFICE SOLAN BREWERY, TEHSIL AND DISTT. SOLAN, 173214, HIMACHAL PRADESH.

....PETITIONER.

(BY SHRI KULDEEP SINGH AND SHRI HIRDAYA RAM, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS CHIEF SECRETARY, SHIMLA, 171002, HIMACHAL PRADESH.

2. PRINCIPAL SECRETARY (FINANCE) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA, 171002.

3. SECRETARY (LANGUAGE AND CULTURE) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA, 171002.

4. DIRECTOR, DEPARTMENT OF LANGUAGE AND CULTURE, HIMACHAL PRADESH, SHIMLA, 171009.

….RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. ADARSH SHARMA, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR THE RESPONDENTS)

CIVIL WRIT PETITION No.477 of 2020
DECIDED ON: 10.09.2021

Constitution of India, 1950 - Article 226 - Non-speaking order - It is well settled law that even an administrative order which has civil consequences has to be a reasoned one - Consequently order dated 10.07.2017 vide which prayer of the petitioner for grant of fourth year pay structure denied is set aside with the direction to authorities to rehear the grievances of the petitioner and thereafter pass a reasoned and speaking order.

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

J U D G M E N T

Leaned counsel for the petitioner has drawn the attention of the Court to annexure P-1, i.e. communication dated 10.07.2017 and by referring to the same, he has submitted that the case of the petitioner stands rejected by way of a non-speaking order, as no reasons are contained in order dated 10.07.2017, as to what weighed with the Finance Department while rejecting the case of the petitioner.

2. Learned Additional Advocate General submits that the reasons are clearly borne out from the documents which are on record and as the post held by the petitioner was not at par with that of Assistant Engineer be it in the IPH Department or Himachal Pradesh Public Works Department, therefore, he was not entitled for the fourth year pay structure as is being claimed by the petitioner.

3. This Court is of the considered view that an administrative authority while passing an order on a representation of party, has to pass a

reasoned and speaking order. It is well settled law that even an administrative order which has civil consequences, has to be a reasoned one and herein because vide order dated 10.07.2017 the prayer of the petitioner for grant of fourth year pay structure stands denied, but obvious, it has civil consequences as far as the petitioner is concerned, therefore, reasons ought to have been assigned therein.

4. In these circumstances, without going into the merit of the respective contentions of the parties, this petition is disposed of by setting aside Annexure P-1, i.e. order dated 10.07.2017 on the ground of same being a non speaking order, with direction to the respondent-authorities to rehear the grievance of the petitioner and thereafter pass a reasoned and speaking order upon the same.

5. Principal Secretary (Language and Cultural Department) to the Government of Himachal Pradesh, is hereby directed to pass a speaking and reasoned order after giving personal hearing to the petitioner and the same be definitely passed within a period of six weeks from today.

6. The Court observes that the contentions raised by the petitioner be sympathetically considered by the said respondent and it goes without saying that in case the petitioner is still aggrieved by the order so passed, then he shall be at liberty to have such recourse against it as is permissible in law.

7. Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Neelam ....Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No.492 of 2021
Decided on: 23.06.2021

Constitution of India, 1950- Article 16- Reservations- There are two types of reservations, vertical and horizontal- In common parlance posts which are reserved for SC, ST and OBC etc., where the posts which are reserved under category of sports persons, ex-serviceman, persons with physical disabled etc., are said to be horizontally reserved- Any person belonging to SC or ST or OBC etc. can compete for the post of general category- Respondent not considering the petitioner for the post of sports person on the ground that petitioner belongs to SC category- Held- That in service jurisprudence there is no 'reservation of post for General Category'- A post which is not reserved is an open post- The candidate belonging to reserve category has a right to compete for an open category post and if selected on merit, has a right to exhaust an open category post and cannot be said to have exhausted the reserved post- Rejection is arbitrary- Direction issued to respondent to offer appointment to the petitioner- Petition allowed.

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate, with M/s Rajesh Kumar and Rakesh Chauhan, Advocates.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocates General, with Ms. Divya Sood, Deputy Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

CMP No.6516 of 2021

Notice. Learned Additional Advocate General, accepts notice on behalf of the non-applicants.

By way of this application, a prayer has been made to place on record the Matriculation Certificate of the petitioner, which stands appended with the petition as Annexure-X as well as abstract of the copy of the Advertisement dated 19.12.2018, which is annexed with the application as Annexure-Y.

Learned Senior Counsel for the applicant/ petitioner submits that in case the application is allowed and these documents are ordered to be taken on record, they will facilitate the adjudication of the case.

Learned Additional Advocate General submits that he has no objection in case the application is allowed and the documents appended therewith are ordered to be taken on record. Accordingly, this application is allowed and the documents appended with the same are ordered to be taken on record, which shall be treated as part of the pleadings.

CWP No.492 of 2021

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

According to the petitioner, she completed her graduation in the year 2018 and in the course of her college years, was selected to represent the State of Himachal Pradesh in the Inter- University Kabaddi Championship, which took place in New Delhi in the year 2017. The team, of which the petitioner was a part, won Bronze Medal in the said Inter-University Championship, as is evident from Annexure P-1, appended alongwith the petition. She was again selected to represent Himachal Pradesh University in the year 2018 and the team again won a Bronze Medal in All India Inter University Kabaddi Tournament held in M.D. Rohtak, as is evident from Annexure P-2. The petitioner was also selected for Himachal Pradesh State Kabaddi team and represented the State in the 66th Senior National Kabaddi Championship, held at Patliputra Sports Complex, Patna and the team won a Bronze Medal. Copy of the Certificate of merit awarded to the petitioner is evident from Annexure P-3. The

State of Himachal Pradesh has taken a policy decision to provide 3% reservation to distinguished sports persons in the post/services to be filled up by way of direct recruitment. This reservation is provided in the course of direct recruitment to Class-III and Class-IV categories in all the Government Departments, Boards, Corporation etc. The Department of Youth Services and Sports Himachal Pradesh has also framed Rules of employment cell for distinguished sports persons (Annexure P-5). These Rules were amended vide Annexure P-6 to some extent, as per notification, dated 10.02.2011. In terms of the Rules, the Department of Youth Services and Sports set up a sports person employment cell, which maintains a live register with respect to the eligibility of sports persons for the purpose of appointment. The Recruiting Department sends a requisition to the Department of Youth Services and Sports for sponsoring the names as per vacancies from the live register according to priority. Thereafter, the Requisitioning Department recruits the person whose name has been sponsored. The sport of Kabaddi finds mention at serial No.21 of Annexure-A of the Rules/Scheme framed by the department concerned and medal winners in recognized Senior National Championship (Women) fall in the Category-III of the same.

2. Further, as per the petitioner, respondent No.2 sent a requisition to respondent No.3 to sponsor the names of the distinguished sports persons (women) in the sport of Kabaddi, for the post of Sub-Inspector of Police on regular basis and in response thereto, the name of the petitioner was also sponsored by respondent No.3 for the post in issue vide communication, dated 07.10.2020, appended with the petition as Annexure P-7. In terms of the same, the name of the petitioner was sponsored in Category-III. After the recommendation, nothing was done by the Requisitioning Department for about two months. Thereafter, vide Annexure P-8, dated 10.12.2020, respondent No.2 wrote to respondent No.3 to sponsor the name of a General Category candidate for the post in issue on the plea that as the post of Sub-Inspector (Women) from

amongst sports persons quota was to be fulfilled from General Category candidates, whereas the petitioner belonged to Schedule Caste Category.

3. According to the petitioner, issuance of Annexure P-8 by respondent No.3 is arbitrary and not sustainable in law in view of the fact that the reservation provided for sports persons is Horizontal reservation and not-considering the name of the petitioner for the post in issue against the quota of sports persons simply on the ground that petitioner belongs to Schedule Caste Category, is not sustainable in law as the petitioner has a right to be appointed against the post in issue in her capacity as a sports person, if she fulfills the requisite eligibility criteria. It is in this background, that the petition has been filed by the petitioner, *inter alia*, praying for quashing of impugned communication, dated 07.10.2020 (Annexure P-7) and with further prayer for issuance of direction to the respondents to implement the recommendation made by respondent No.3, dated 07.10.2020 (Annexure P-7) and issuance of a writ of mandamus to the respondents to issue an appointment order in favour of the petitioner against the post of Sub-Inspector of Police.

4. Reply to the petition has been filed by respondents No.1 and 3, in which their stand is that as far as respondent No.3 is concerned, it has to sponsor the name of sports person to the Requisitioning Agency, which was done in the present case also and as and when requisition is received from any department, the name of eligible sports person is sponsored on the basis of sports merit and not category wise as no such record is maintained by the department.

5. A separate reply has been filed on behalf of respondent No.2, though it is reflected to be reply filed on behalf of respondents No.1 and 2. The stand of respondent No.2 in the reply, as is evident from the averments made in the preliminary submissions is that the requisition sent to respondent No.2 was with the request to sponsor the name from general category, because as per the roster, two posts falling in the share of sports persons were '**reserved for**

general category'. Yet the name of the petitioner was sponsored by respondent No.3, who was from Schedule Caste category. It is further the stand of said respondent that the petitioner had completed her Bachelor of Arts (BA-Honours) Degree Programme in June, 2018, whereas the eligibility was required to be fulfilled by the candidate concerned for the post of Sub-Inspector (Women) of Police as on 01.01.2018. It is on these grounds that the petition is opposed by respondent No.2.

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

7. Today, vide a miscellaneous application, the matriculation certificate of the petitioner as well as relevant extract of the Advertisement in issue have been ordered to be taken on record.

8. The post in issue was advertised by the Himachal Pradesh Staff Selection Commission, Hamirpur, District Hamirpur, H.P. vide Advertisement No.34-2/2018, dated 19.12.2018. As per the Advertisement, the opening date of submission of online recruitment application form was 23.12.2018. The closing date for submission of the same was 22.01.2019.

9. It was mentioned in the Advertisement that the date for determining eligibility of the candidates in respect of education qualification, experience, if any, shall be the '**prescribed closing date for submission of online recruitment applications form, i.e. 22.01.2019 till 11.59 p.m.**." Against the column of age, it was mentioned that for the post in issue, minimum and maximum age was between 21 to 26 years, which was to be reckoned as on 01.01.2018. The minimum qualification required for the post was graduation.

10. The code of the post in issue is 729 in terms of the Advertisement. In all, thirty three posts of Sub-Inspector of Police were advertised. The break of the post falling to the share of various category is mentioned as under:-

31. Police Sub Inspector	729	Gen (UR)-14, Gen. (BPL)-03, SC (UR)-06, SC (BPL)-01,

of Police (on regular basis) Rs.10300-34800+ 4600GP		SC (WFF)-01, ST (UR)-02, OBC (UR)-05, OBC (BPL)-01 **Age: 21 to 26 years**

11. There is no dispute that the date of birth of the petitioner is 20.06.1996, as is evident from her matriculation certificate. Thus, the petitioner was above 21 years and below 26 years in age as on 01.01.2018.

12. The stand of respondent No.2 that the petitioner was not eligible for appointment against the post in issue on the ground that the cut off date to assess the educational qualification eligibility of the candidate in terms of the Advertisement was 01.01.2018, is not at all sustainable. In fact, it is contrary to the terms of the Advertisement itself. In terms of the Advertisement, the date of determining the eligibility of all the candidates in respect of eligibility of educational qualification etc. was mentioned as the closing date of submission of online recruitment application form, i.e. 22.01.2019, till 11.59 p.m. That being the condition of the Advertisement, respondent No.2 could not have arbitrarily held the petitioner ineligible for the post in issue by taking the stand that the eligibility was to be seen as on 01.01.2018. This date i.e. 01.01.2018 was to determine the minimum and maximum age of the candidate and not to determine the eligibility in respect of essential qualification which obviously includes the educational qualification. It is not in dispute that the petitioner completed her Graduation-Honour Degree in June 2018. That being the case, by no stretch of imagination, it could be said that she was not fulfilling the eligibility criteria in respect of education qualification, because as per the Advertisement, this criteria was to be fulfilled as on 22.01.2019, at 11.59 p.m. and not 01.01.2018 as is the stand of respondent No.2.

13. In view of the findings returned hereinabove, the stand of respondent No.2 that the petitioner was not fulfilling the eligibility criteria in terms of the Advertisement, i.e. the last date prescribed therein, is rejected.

14. Now, coming to the stand of respondent No.2, that the name of the petitioner could not have been sponsored for the posts of sports person "**reserved for General Category candidates**" as the petitioner belongs to Schedule Caste Category, all that can be said is that this stand is nothing but deplorable. It is an admitted case of the parties that out of the total posts advertised for Sub-Inspector (Women) of Police, two were to be filled in from amongst the category of sports persons.

15. There are two kinds of reservations, Vertical and Horizontal. In common parlance posts which are reserved for Schedule Caste, Schedule Tribe and Other Backward Class etc., are termed as vertical reservations, whereas the posts which are reserved under the category of sports persons, ex-serviceman, persons with physical disability etc., are said to be horizontally reserved. This is for the reason that whereas the candidates belonging to open category cannot compete for a seat reserved for Schedule Caste or Schedule Tribe Category, however, any person belonging to any caste or tribe, can compete for the post which is horizontally reserved, provided he or she fulfills the eligibility criteria.

16. Incidently, the stand of respondent No.3 is also very clear that when the requisition is received from a department for sponsoring the name of eligible sports person, the name is sponsored by respondent No.3 in terms of the live register maintained by it from amongst the eligible sports persons and this register is maintained purely on the basis of sports merit and no category wise register is maintained.

17. As the post in issue i.e. a reserved post for a sports person, falls under the category of horizontal reservation, then the eligibility has to be assessed of that of a sports person, for the post in terms of his or her sports merit, and a candidate who is otherwise eligible for appointment against the post

in issue, cannot be held to be ineligible simply on the ground that as the posts were advertised for General Category, therefore, Schedule Caste Category candidate cannot be appointed against the same.

18. Incidently, it is not the case of respondent No.2 that though there were other more meritorious candidates than the petitioner belonging to the open category available for the post in issue, yet the name of the petitioner was sponsored, ignoring them. This means that for the two posts in issue, solely on the basis of sports merit, the petitioner was found eligible for appointment by respondent No.3 and therefore, her name was sponsored by respondent No.3 to the Requisitioning Department for appointment against the post in issue. Therefore, the act of respondent No.2 of overlooking the name of the petitioner for appointment against the post in issue simply on the ground that the post was 'reserved for Open Category', is arbitrary and not sustainable in law.

19. It is relevant to mention, at this stage, that in fact in service jurisprudence, there is no '**reservation of post for General Category'**. The posts advertised are either open or reserved. A post which is not reserved, is an open post. A candidate belonging to reserve category, may be Schedule Caste or Schedule Tribe, has a right to compete for an open category post and if selected on merit, has a right to exhaust an open category post and cannot be said to have exhausted the reserved post if he or she scores higher merit than the open category candidate. This principle of service jurisprudence has also been ignored by respondent No.2 by trying to carve out an artificial classification by terming open seats as '**posts reserved for General Category'**.

20. Thus, in view of the discussion held hereinabove, this writ petition is allowed. Annexure P-8, issued by respondent No.2, dated 10.12.2020, is quashed and set aside. It is held that rejection of the name of the petitioner by respondent No.2 for the appointment against the post of Sub-Inspector (Woman), reserved for sports person, is arbitrary and bad in law.

21. A mandamus is issued to respondent No.2 to offer appointment to the petitioner against the post of Sub-Inspector, reserved for sports person, from the same date and on the same terms of which the other incumbent namely Ms.Khila Devi was appointed. The seniority shall be granted to the petitioner as from the date of appointment of Ms. Khila Devi, but other benefits shall be notional as up to the date of passing of this judgment. It is clarified that *inter se* seniority of Ms. Khila Devi and the petitioner shall be in terms of their *inter se* merit as determined by the department.

22. The petition stands disposed of in the above terms, so also pending miscellaneous applications, if any. Interim Order, if any, stands vacated.

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

BETWEEN:

MANISH KUMAR, SON OF SHRI ASHOK KUMAR, AGED 26 YEARS, RESIDENT OF VILLAGE AND POST OFFICE CHATTARA, TEHSIL AND DISTRICT UNA, H.P.

....PETITIONER.

(BY SHRI Y.P. SOOD, ADVOCATE)

AND

1. INDIAN OIL CORPORATION LTD. BLOCK NO.21, COMMERCIAL COMPLEX, SDA KUSUMPTI, SHIMLA-171009 (HP), THROUGH ITS DIVISIONAL MANAGER.

2. DIVISIONAL SALES MANAGER,

INDIAN OIL CORPORATION LTD., BLOCK NO.21, COMMERCIAL COMPLEX, SDA KUSUMPTI, SHIMLA-171009 (HP).

RESPONDENTS.

(BY MR. K.D. SOOD, SENIOR ADVOCATE, WITH MR. MUKUL SOOD, ADVOCATE)

CIVIL WRIT PETITION No.1403 of 2019
RESERVED ON: 24.08.2021
DECIDED ON: 02.09.2021

Constitution of India, 1950- Article 226- Allotment of Retail Outlet Dealership- Petitioner being fully eligible for being allotted Retail Outlet Dealership has been wrongly held to be ineligible for the allotment of the same- Held-site offered by the petitioner was not in terms of the advertisement issued by the respondent, as such, there is no infirmity in the rejection of his candidature- Petition dismissed.

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

J U D G M E N T

The petitioner has filed this writ petition, praying for issuance of a direction to the respondent-Corporation to allot him a Retail Outlet Dealership, in the location "within 2 kilometers of village Thana Kalan on Una to Bangana Road (New NH-503A)". He has also prayed for quashing of Annexure P-10, dated 17.06.2019. The case of the petitioner is that vide advertisement dated 25.11.2008, applications were invited by the respondent-Corporation for allotment of Retail Outlet Dealership and one such dealership was advertised to be allotted "within 2 kilometers of village Thana Kalan on Una to Bangana Road

(New NH-503A)". This Retail Outlet Dealership was to be allotted in favour of a person belonging to Scheduled Caste Category. Petitioner being eligible for allotment of this dealership, submitted his application online, on 12.12.2008. At the relevant time, he was possessing land on lease, measuring 00-16-71 hectares (4 Kanal 7 Marlas), i.e. more than the requirement of respondent-Corporation. Respondents vide communication dated 25.01.2019 informed the petitioner that he had qualified for Draw of Lots for selection qua the allotment of Retail Outlet Dealership and was called upon to be present for the Draw of Lots.

2. In the Draw of Lots, the petitioner was declared as the successful candidate in terms of Annexure P-4, i.e. communication dated 06.02.2019. Petitioner complied with the formalities, he was called upon to meet with and was informed by the respondents vide communication dated 22.05.2019 (Annexure P-5) that the Land Evaluation Committee will visit the site on 31.05.2019.

3. This date was preponed to 23.05.2019 and on the said date, the Committee found the land offered by the petitioner to be in conformity with the requirements of the respondent-Corporation.

4. The grievance of the petitioner is that vide Anneuxre P-10, dated 17.06.2019, he was conveyed that the Land Evaluation Committee which visited the site on 23.05.2019, has found the site offered by the petitioner not as per the required norms, therefore, the petitioner was not found eligible for allotment of dealership.

5. According to the petitioner, Annexure P-10 does not contains any reason as to why his candidature was cancelled and otherwise also the arbitrary cancellation of the candidature of the petitioner is not sustainable in law. According to him, he being fully eligible for being allotted the Retail Outlet Dealership has been wrongly held to be ineligible for the allotment of the same. It

is in this background, he has approached the Court with the prayers already enumerated hereinabove.

6. The petition is resisted by the respondent-Corporation, *inter aila*, on the ground that the location offered by the petitioner falls on MDR-84, as was found during the land survey conducted by the Land Evaluation Committee, and the same was not in terms of the advertisement i.e. within 2 kilometers of village Thana Kalan on Una to Bangana Road (New NH-503A), district Una. According to respondent-Corporation, since the offered land by petitioner was not as per the terms of the advertisement and within the advertised stretch, therefore, his candidature was rightly rejected. It is also the stand of respondent-Corporation that the report of the Land Evaluation Committee was duly acknowledged by the applicant who has signed the same, Copy thereof stands appended with the reply as Annexure R1/1.

7. By way of rejoinder, the petitioner has reiterated his stand and in response to the contention of the respondent-Corporation that the land does not falls within the advertised stretch, the petitioner has stated that the land offered by him was within the parameters laid down by the respondents in village Thana Kalan on Una to Bangana Road.

8. I have heard learned counsel for the parties and have also gone through the pleadings minutely.

9. During the course of hearing of this writ petition, this Court had directed respondent-Corporation to produce the original record pertaining to the case including the advertisement in issue, which was duly produced before the Court by respondent-Corporation.

10. It is not in dispute that in terms of the advertisement, the location advertised was within 2 kilometers of village Thana Kalan on Una to Bangana Road (New NH-503A), district Una. Annexure P-2 is the copy of the application submitted by the petitioner. The location offered by the petitioner as mentioned in the application was within 2 kilometers of village Thana Kalan on Una to

Bangana Road (New NH-503A). Thus, it was categorically held out by the petitioner that the site being offered by him was within 2 kilometers of village Thana Kalan on Una to Bangana Road (New NH-503A) as was advertised by the Corporation. The specific stand of the respondent-Corporation in its reply is that the site offered by the petitioner does not falls on National Highway 503A, but falls on MDR-84. This is also borne out from Annexure R1/A, which is the report of the Land Evaluation Committee, in which it is mentioned that the proposed land offered by the petitioner does not fulfills the conditions of being situated on the National Highway.

11. During the course of arguments, learned counsel for the petitioner argued that the contention of respondent-Corporation that the site offered by petitioner was not inconsonance with the advertisement, was bad because there is no National Highway near village Thana Kalan and there was only one road near said village on which the petitioner was offering land. If the contention of learned counsel for the petitioner is to be believed, then the only conclusion which can be drawn is that the holding out which was made by the petitioner in the application submitted by him in response to the advertisement issued by respondent-Corporation was incorrect. Though, it has been contended before the Court on behalf of the petitioner that there is no National Highway near village Thana Kalan on Una to Bangana Road, yet in the application form submitted by the petitioner, he had categorically mentioned that the offered location was "within 2 kilometers of village Thana Kalan on Una to Bangana Road (New NH-503A)".

12. In this background, the petitioner cannot be permitted to blow hot and cold in the same breath because when he held out in the application form submitted by him that he was offering the land situated on ***New NH 503A***, now he cannot be permitted to take the plea that there is no National Highway near village Thana Kalan etc. The advertisement has also not been challenged on this ground.

13. Incidently, the report of the Land Evaluation Committee (Annexure R1/1) is duly signed by the petitioner and one does not finds any objection having been raised in the same by the petitioner that the reasons mentioned therein were incorrect with regard to the proposed land being situated on MDR-84 and not fulfilling the criteria of being situated on a National Highway.

14. In this view of the matter, as apparently, the site offered by the petitioner was not in terms of the advertisement issued by respondent No.2, this Court does not finds any infirmity in the rejection of his candidature by respondent-Corporation and the petition is accordingly, 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:

SIDHARTH, SON OF SHRI RAMESH CHAND, RESIDENT OF VILLAGE UPPER BAROL, POST OFFICE DARI, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.

....PETITIONER.

(BY SHRI SURINDER SAKLANI, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY (ARTS, LANGUAGE & CULTURE) TO THE GOVERNMENT OF HIMACHAL

PRADESH, SHIMLA171002.

2. THE DIRECTOR, ARTS, LANGUAGE & CULTURE, HIMACHAL PRADESH, SDA COMPLEX, KASUMPTI, SHIMLA-171009.
3. H.P. STAFF SELECTION COMMISSION, HAMIRPUR, DISTRICT HAMIRPUR, H.P., THROUGH ITS SECRETARY.
4. SHRI SANJAY KUMAR, SON OF (NOT KNOWN TO THE PETITIONER), C/O THE DIRECTOR ARTS, LANGUAGE & CULTURE, HIMACHAL PRADESH, SDA COMPLEX, KUSUMPTI, SHIMLA-171009.

....RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL AND MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO.1 AND 2.

MR. SANJEEV KUMAR MOTTA, ADVOCATE, FOR RESPONDENT NO.3.
MR. VIJAY ARORA, ADVOCATE, FOR RESPONDENT NO.4)

CIVIL WRIT PETITION No.2258 of 2019
DECIDED ON: 02.09.2021

Constitution of India, 1950- Article 226- Appointment of Personal Assistant challenged on the ground that due weightage was not given to the experience which the petitioner had and respondent No. 4 who had no experience was recommended for appointment by ignoring the legitimate candidature of the petitioner- Selection was to be made on the basis of sum total of evaluation

criteria and not just on the basis of experience- marks of respondent No. 4 were much more as compared to the petitioner- Held- appointment of respondent No. 4 is neither in violation of the provisions of the advertisement nor the R & P rules- Petition dismissed.

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

J U D G M E N T

Facts necessary for the adjudication of the present petition are as under:-

Vide Annexure P-1, respondent No.3 invited applications for appointment from eligible candidates to the posts detailed in the advertisement. This advertisement, i.e. advertisement No.33-2 of 2017, was uploaded on the Website in the month of September, 2017. In terms thereof, opening date for submission of online recruitment application form was 16.09.2017 and the closing date for submission of the application form was 15.10.2017.

2. The issue involved in this petition is with regard to the post of Preservation Assistant on contract basis in the department of Language and Culture, which post stood advertised against Post Code No.597. In terms of the advertisement, one post of Preservation Assistant was advertised which was reserved for Scheduled Caste (UR) category. The essential qualification prescribed in the advertisement for the post in issue was B.Sc. with Chemistry from a recognized university and desirable qualification was certificate in Cultural Preservation or one year experience in Cultural Preservation.

3. Petitioner and the private respondent being eligible for being considered for appointment against the post in issue applied for the same. Vide Annexure P-5, i.e. Press Note dated 07.08.2019, respondent No.3 declared the result of written objective type screening test for the recruitment

to the post in issue which was held on 26.03.2019. In terms of the Press Note, 83 applications were received for the post in issue, out of which 40 applications were provisionally admitted and in the written objective type screening test held on 26.03.2019, thirteen candidates appeared, out of whom, four candidates were reflected to be short listed for further selection process.

4. It is not in dispute that the private respondent was reflected at serial No.1 viz-a-viz the four candidates short listed and the petitioner was reflected at serial No.3. This reflection of the candidates was by way of depiction of their respective roll numbers allotted to them for participating in the process. Thereafter, vide Press Note, dated 03.09.2019, Annexure P-6, the private respondent was declared to be the selected candidate to the post in issue and feeling aggrieved by the selection of the said respondent, the petitioner has filed this writ petition.

5. Mr. Surinder Saklani, learned counsel for the petitioner has argued that the appointment of private respondent is not sustainable in the eyes of law as the respondent-Commission has erred in not appreciating that in terms of the advertisement for the post, it was only the petitioner who was having the requisite experience of having served against the post in issue, which extremely important aspect of the matter has been ignored by the Commission while offering appointment to the private respondent, who was not having any experience at all. On this short count, he has prayed for quashing of the selection of the private respondent. No other point was urged.

6. The petition has been resisted by the respondents. Respondents No.3 and 4 have filed their separate replies, whereas the State has adopted the reply filed by respondent No.3. In its reply, filed by respondent No.3, said respondent has mentioned that the post in issue was advertised by the Commission and it was mentioned in the advertisement that the selection process will be of 100 marks, consisting of 85 marks written examination and

15 marks of evaluation on prescribed parameters. These parameters were clearly defined and spelled out in advertisement Annexure P-3. Said respondent has further mentioned in the reply that respondent No.4 Sanjay Kumar scored 53.26 marks, i.e. 51 marks in written test and 2.26 marks in evaluation, whereas the petitioner scored total 48.83 marks, i.e. 44 marks in written test and 4.83 marks in evaluation. As per the mode of selection,15 marks of evaluation were earmarked by granting 2.5 marks to experience maximum upto five years by granting 0.5 marks for each completed year related to the post applied for in Government/Semi-Government Organization and one mark was earmarked for training related to the post. In terms thereof, the petitioner was awarded one mark for training and 2.5 marks for experience, whereas no marks for experience were granted to respondent No.4.

7. On the strength of said reply filed by respondent No.3, learned counsel appearing for the private respondent has also submitted that the selection of the private respondent has been done by respondent No.3 strictly in terms of the Recruitment and Promotion Rules and despite due weightage being given to the petitioner with regard to the experience possessed by him, he could not gain appointment as the private respondent had scored more marks than the petitioner in the written test.

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

9. It is not in dispute that both petitioner and the respondent were eligible for being considered against the post in issue. The grievance as raised by the petitioner through counsel with regard to selection of the private respondent is on the count that due weightage was not given by respondent No.3 to the experience which the petitioner had and respondent No.4 who was not having any experience at all was recommended for appointment by ignoring the legitimate candidature of the petitioner.

10. In the considered view of the Court, there is no merit in the said contention of the petitioner. Though, there is no dispute that the petitioner was possessing experience which was a desirable qualification in terms of the advertisement, but it also is a matter of record that the selection was to be made on the basis of sum total of evaluation criteria and not just on the basis of experience. It is borne out from the reply filed by respondent No.3 which has not been disputed, that in the written test, private respondent had out-scored the petitioner and thereafter, when the sum total of the marks allotted to the petitioner and the private respondent was done after taking into consideration the marks obtained by them in the objective test as well as marks obtained in evaluation, the marks of the selected candidate i.e. respondent No.4 were much more as compared to the petitioner. This is also borne out from Annexure R4/2, which is the roll number wise result of the candidates declared by respondent No.3 for the post of Preservation Assistant.

11. Thus, in view of the findings returned hereinabove, as this Court does not finds that the appointment of respondent No.4 is either in violation of the provisions of the advertisement or the Recruitment and Promotion Rules nor this Court is convinced that due weightage was not given to the experience which the petitioner was possessing and record demonstrates that despite due weightage being given to the petitioner with regard to the experience possessed by him, respondent No.4 outscored him on the basis of the marks scored by him in the objective type screening test, this petition being devoid of merit, is 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 SANDEEP SHARMA, J.

Between:
STATE BANK OF INDIA, PALAMPUR,
TEHSIL PALAMPUR, DISTRICT KANGRA,

HIMACHAL PRADESH
THROUGH ITS BRANCH MANAGER.

....PETITIONER

(BY SH. ARVIND SHARMA, ADVOCATE)

AND

1. DEBT RECOVERY APPELLATE TRIBUNAL, DELHI,
APARTMENT NO.318, 3RD FLOOR, HOTEL SAMRAT,
KAUTILYA CHANAKYAPURI NEW DELHI,
THROUGH ITS REGISTRAR.

2. SHIVANI RAINA WIFE OF SH. MIHIR KUMAR
SUKHUJA, RESIDENT OF OPPOSITE GURU
RAVI DASS MANDIR, CHOWKI, TEHSIL
PALAMPUR, DISTRICT KANGRA, H.P.

3. SH. MIHIR KUMAR SUKHUJA SON OF SH. V.K.
SAKHUJA, RESIDENT OF OPPOSITE GURU
RAVI DASS MANDIR, CHOWKI, TEHSIL
PALAMPUR, DISTRICT KANGRA, H.P.

RESPONDENTS NO.2 AND 3 PRESENTLY
RESIDING AT E-29, WARD 'A' MEHARAULI,
IDGAH ROAD, NEW DELHII 110030.

....RESPONDENTS

(BY SH. VIR BAHADUR VERMA, ADVOCATE, FOR R-1)

(BY. SH. NARESH SHARMA, ADVOCATE VICE SH.
ASHISH VERMA, ADVOCATE FOR R-2 & 3).

CIVIL WRIT PETITION No. 3000 of 2021
DECIDED ON: 01.09.2021

Constitution of India, 1950- Article 226- Petitioner challenged the order of Debts Recovery Appellate Tribunal, Delhi, being without jurisdiction- Held-

DRAT erroneously without there being any jurisdiction proceeded to decide the application under Section 17(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002- Order of DRAT quashed and set aside.

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

O R D E R

Instant petition filed under Article 226 of the Constitution of India, lays challenge to order dated 13.05.2021 ***(Annexure P-6)***, whereby Debts Recovery Appellate Tribunal, Delhi ***(for short 'DRAT'***) erroneously without there being any jurisdiction entertained the misc. Application No.15 of 2021, having been filed by respondents No.2 and 3 ***(Annexure P-3),*** praying therein for initiation of appropriate action against the erring bank officials on account of their having fraudulently credited the amount in the account of auction purchaser

2. On 18.05.2021, Division Bench of this Court while issuing notice to the respondents, returnable for 5th July, 2021, admitted the petition for hearing and stayed the proceedings before Debts Recovery Appellate Tribunal, Delhi in Misc. Application No.15 of 2021 ***(Annexure P-6).***

3. On 28.07.2021, Mr. Ashish Verma, Advocate put in appearance on behalf of respondent No.2 and stated that he has been appointed as legal aid counsel on behalf of respondent No.2, whereas despite service, respondent No.3 did not come present, but yet this Court with a view to afford due opportunity of being heard to respondents No.2 and 3, adjourned the matter for today's date, specifically requesting Mr. Ashish Verma, Advocate to ensure presence of respondents No.2 and 3 in the Court on the next date of hearing. However, fact remains that despite notice respondents No.2 and 3 have not come present. Mr. Ashish Verma, learned counsel representing respondents No.2 and 3 informs this Court that immediately after passing of order dated

9.8.2021, he informed both the respondents by way of a letter sent through speed post, but they have not responded and as such, this Court has no option, but to decide the case at hand on the basis of the material already available on record.

4. Precisely, the facts of the case as emerge from the record are that respondents No.2 and 3 approached this Court by way of CWP No.4424 of 2019, seeking therein direction to State Government to investigate the case FIR No.143 of 2017 against the petitioner-bank or its employees and file the challan after the investigation. Besides above, respondents No.2 and 3 also sought direction to petitioner-bank to accept the case of respondents No.2 and 3 under One Time Settlement (OTS) of the outstanding amount.

5. Aforesaid prayer made on behalf of respondents No.2 and 3 came to be resisted on behalf of petitioner-bank on the ground that matter with regard to same issue is pending before the Debts Recovery Appellate Tribunal. Petitioner-bank also informed Division Bench of this Court that as per notice dated 18.01.2021 demand was raised by the petitioner-Bank to pay Rs.10,38,100/-. Responding to aforesaid submissions made on behalf of the petitioner-bank, learned counsel representing respondent No.3 stated before the Division Bench of this Court that respondent No.3 is ready and willing to pay the entire amount within the stipulated period and to show his bona-fide he also handed over demand draft of Rs.1, 03, 810/-, which is 10% of the total amount as per notice dated 18.01.2021.

6. Order dated 7.4.2021 passed by Division Bench of this Court in CWP No.4424 of 2019, reveals that learned counsel representing the petitioner-bank submitted before the Division Bench that in case entire amount is deposited within a period of 10 days, notice issued in reference to the loan account shall be withdrawn. Learned counsel for respondent No.3 also submitted before the Division Bench of this Court that he has deposited Rs.5, 75,000/- in the account of one Ashwani Kumar, who according to him,

is a third party. Taking note of pleadings as well as submissions adduced on record by the respective parties, Division Bench of this Court disposed of the aforesaid petition, directing respondent No.3 to deposit entire loan amount on or before 24th April, 2021. Though, the 'OTS' scheme had ended on 31st March, 2021, but Division Bench of this Court directed the petitioner-bank to extend the scheme till 24th April, 2021, enabling respondent No.3 to avail benefit of scheme and ordered that on clearance of the entire amount on or before the 24th April, 2021, parties would make statements before the Debt Recovery Tribunal or Debts Recovery Appellate Tribunal with regard to clearance of entire loan amount, so that matter is settled amicably for all times to come. However, at this stage, grouse of the petitioner-bank is that though pursuant to order dated 7.4.2021, passed by Division Bench of this Court in CWP No.4424 of 2019, loan account of respondent No. 3 has been settled and in that regard 'NOC' already stands issued to him, but yet he has not withdrawn the cases filed by him in the Debts Recovery Appellate Tribunal. Second grouse, as has been raised on behalf of petitioner- bank is that order dated 13.5.2021 (Annexure P-6) having been passed by Debts Recovery Appellate Tribunal, Delhi, is without jurisdiction as such, same cannot be allowed to sustain.

7. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that there is no dispute interse parties that as of today entire loan amount stands settled and nothing is due from respondents No.2 and 3. Since despite there being undertaking given to the Division Bench at the time of passing of order dated 7.4.2021 that on clearance of entire amount on or before 24th April, 2021, submission shall be made before the Debts Recovery Appellate Tribunal or Debt Recovery Tribunal with regard to amicably settlement, enabling it to dispose of the pending petitions, till date respondents No.2 and 3 have not withdrawn the proceedings and Debts Recovery Appellate Tribunal without

any jurisdiction has entertained the misc. Application No.15 of 2021, having been filed by respondents No.2 and 3, petitioner-bank has approached this Court in the instant proceedings.

8. Having taken note of the fact that no proceedings of any kind were pending before the Debts Recovery Appellate Tribunal, New Delhi interse petitioner and respondents No.2 and 3 and for the first time misc. application No.15 of 2021 having been filed by respondents No.2 and 3 came to be instituted before the Debts Recovery Appellate Tribunal, Delhi, this Court finds force in the submissions made by learned counsel for the petitioner-bank that since no proceedings were pending before the Debts Recovery Appellate Tribunal, no misc. application could have been filed directly by respondents No.2 and 3 before the Debts Recovery Appellate Tribunal. Misc. Application No.15 of 2021 (***Annexure P-3)*** filed under Section 17(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 read with Section 151 CPC ***(for short 'Act')*** could be only filed before the Debts Recovery Appellate Tribunal at first instance. Aggrieved with the order, if any, passed on the aforesaid application by Debt Recovery Tribunal, Chandigarh, respondents No.2 and 3 could have filed appeal under Section 20 of the Recovery of debts due to banks and Financial Institutions Act, 1993 in Debts Recovery Appellate Tribunal. However, in the case at hand, respondents No.2 and 3 though initially prepared application (Annexure P-3) under Section 17(1) of the Act to be filed before the Debt Recovery Tribunal, Chandigarh, but it is not understood how it came to be listed before Debts Recovery Appellate Tribunal, New Delhi, who otherwise had no jurisdiction whatsoever, to entertain the aforesaid application. Interestingly, Debts Recovery Appellate Tribunal despite there being specific objections raised by the petitioner-bank, proceeded to issue notice on the aforesaid application. Perusal of aforesaid notice, dated 26.2.2021 ***(Annexure P-2***) reveals that Debts Recovery Appellate Tribunal, Delhi considering the

aforesaid application to be filed by respondent No.3 under Section 17-A of the Act, proceeded to decide the same using administrative powers under Section 17(A)of the Act, which was otherwise not permissible.

9. At this stage, it would be appropriate to take note of Section 17-A of the Act herein below:-

> ***"17A. Power of Chairperson of Appellate Tribunal****.-(1) The Chairperson of an Appellate Tribunal shall exercise general power of Superintendence and control over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officer.*
>
> *(2) The Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own motion after notice to the parties and after hearing them, transfer any case from one Tribunal for disposal to any other Tribunal."*

10. It is quite apparent from the aforesaid provision of law that Chairperson of an Appellate Tribunal has general power of Superintendence over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officer. However, in the instant case perusal of order dated 13.5.2021 (Annexure P-6), clearly reveals that Debts Recovery Appellate Tribunal erroneously without there being any jurisdiction proceeded to decide the application under Section 17(1) of the Act, while erroneously exercising power under Section 17(A) of the Act, which was otherwise not permissible and as such, order passed under this provision cannot be allowed to sustain.

11. Record reveals that petitioner-bank besides filing reply on merit to the application filed by respondents No.2 and 3, also filed separate application raising therein plea of jurisdiction, but interestingly, Debts

Recovery Appellate Tribunal straightaway dismissed the application filed by the petitioner with cost amounting to Rs.15000/-. If the aforesaid order dated 13.05.2021, is read in its entirety, it nowhere suggests that Debts Recovery Appellate Tribunal specifically dealt with the objections of jurisdiction raised by the petitioner-bank, rather Tribunal below merely swayed away with the allegations levelled by respondents No.2 and 3 against the officials of the bank and issued notice under Section 17(a) of the Act, calling upon petitioner-bank to put in appearance. Since no order, if any, ever came to be passed on the application filed by respondents No.2 and 3 under Section 17(1) of the Act by Debt Recovery Tribunal, Chandigarh, application could not have been entertained directly by Debts Recovery Appellate Tribunal, Delhi that too under Section 17(A)of the Act.

12. Hon'ble Apex Court in case titled **Standard Chartered Bank vs. Dharminder Bhohi and others, (2013) 15 SCC 341,** has categorically held that Debts Recovery Appellate Tribunal and Debt Recovery Tribunal are required to function within the statutory parameters and they do not enjoy any inherent power and it is limpid that Section 19(25) confers limited powers. The relevant para No.20 of the judgment is reproduced as under:-

> *"33. Section 19 of the RDB Act, occurring in Chapter IV of the Act, deals with procedure of tribunals. Sub-section (25) of Section 19 reads as follows:*
>
> *19. (25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."*
>
> *The aforesaid provision makes it quite clear that the tribunal has been given power under the statute to pass such other orders and give such directions to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Thus, the tribunal is required to function within the statutory parameters. The tribunal does not have any inherent powers and it is limpid that Section 19(25) confers limited powers.*

34. In this context, we may refer to a three-Judge Bench decision in Upper Doab Sugar Mills Ltd. v. Shahdara (Delhi) Saharanpur Light Rly. Co. Ltd.[AIR 1963 SC 217] wherein it has been held that when the tribunal has not been conferred with the jurisdiction to direct for refund, it cannot do so. The said principle has been followed in Union of India v. Orient Paper and Industries Limited [(2009)16 SCC 286].

35. In Union of India v. R. Gandhi, President, Madras Bar Association[(2010)11 SCC 1], the Constitution Bench, after referring to the opinion of Hidayatullah, J. in Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala[AIR 1961 SC 1669], the pronouncements in Jaswant Sugar Mills Ltd. v. Lakshmi Chand[AIR 1963 SC 677], Associated Cement Companies Ltd. v. P.N. Sharma[AIR 1965 SC 1595] and Kihoto Hollohan v. Zachillhu[1992 Supp(2) SCC 651], ruled thus: - (Madras Bar Assn. case {(2010) 11 SCC 1}.SCC P.35 para 45.

"45. Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well- recognized differences between courts and tribunals. They are:

i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a judicial member and a technical member who is an "expert" in the field to which the tribunal relates. Some highly specialised fact-finding tribunals may have only technical members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."

36. From the principles that have been culled out by the Constitution Bench, it is perceptible that a tribunal is established under a statute to adjudicate upon disputes arising under the said statute. The tribunal under the RDB Act has been established with a specific purpose and we have already focused on the same. Its duty is to see that the disputes are disposed of quickly regard being had to the larger public interest. It is also graphically clear that the role of the tribunal has not been fettered by technicalities. The tribunal is required to bestow attention and give priority to the real controversy before it arising out of the special legislations. As has been stated earlier, it is really free from the shackles of procedural law and only guided by fair play and principles of natural justice and the regulations formed by it. The procedure of tribunals has been elaborately stated in Section 19 of the RDB Act.

37. It is apt to note here that Section 34 of the SARFAESI Act bars the jurisdiction of the civil court. It reads as follows: -

> *"**34. Civil court not to have jurisdiction**. – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."*

*38. Section 34 of the RDB Act provides that the said Act would have overriding effect. We have referred to the aforesaid provisions to singularly highlight that the sacrosanct purpose with which the tribunals have been established is to put the controversy to rest between the banks and the borrowers and any third party who has acquired any interest. **They have been conferred jurisdiction by special legislations to exercise a particular power in a particular manner as provided under the Act. It cannot assume the role of a court of different nature which really can grant "liberty to initiate any action against the bank". It is only required to decide the lis that comes within its own domain**. If it does not fall within its sphere of jurisdiction it is required to say so. Taking note of a submission made at the behest of the auction purchaser and then proceed to say that he is at liberty to file any action against the bank for any*

> *omission committed by it has no sanction of law. The said observation is wholly bereft of jurisdiction, and indubitably is totally unwarranted in the obtaining factual matrix. Therefore, we have no hesitation in deleting the observation, namely, "liberty is also given to the auction purchaser to file action against the bank for any omission committed by it".*

13. It is quite apparent from the aforesaid provisions of law laid down by the Hon'ble Apex Court that the Tribunal/DRAT does not have any inherent power and even Section 19(25) confers limited powers. The power of the Tribunal/DRAT under Section 19(25) is limited to pass such other orders and give such directions to give effect to the orders or to prevent abuse of its process or to secure the ends of justice. Courts established by the State are entrusted with the State's inherent judicial power for administration of justice in general. The Tribunal/DRAT having been established under a Statute to adjudicate upon the disputes of a specialized nature by regulating the procedure, applying the provisions of CPC only where it is required. It has been categorically held in the aforesaid judgment that the Tribunal/DRAT are required to function within the statutory parameters and have been conferred jurisdiction by special statute to exercise a particular power in a particular manner as provided under the Act. Most importantly, in the aforesaid judgment, Hon'ble Apex Court held that the Tribunal/DRAT are required to decide the lis that come within their domain.

14. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, the present petition is allowed and Misc. Application No.15 of 2021, titled as Shivani Raina and another versus State Bank of India(Annexure P-3), order dated 13.5.2021 (Annexure P-6) as well as notice dated 26.02.2021 (Annexure P-2), are quashed and set-aside. Pending application(s), if any, also stands disposed of. Interim order is vacated.

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

Between:

MADAN LAL SHARMA SON OF SH. SHIV KUMAR SHARMA, R/O VILLAGE CHAPRUHI, P.O.PIR SULHI, TEHSIL RAKKAR, DISTRICT KANGRA, H.P.

....PETITIONER

(BY SH. BHUVNESH SHARMA, SH. RAMAKANT SHARMA AND SH. JAI RAM SHARMA, ADVOCATES).

AND

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

2. DIRECTOR ELEMENTARY EDUCATION, HIMACHAL PRADESH, SHIMLA (HP).

....RESPONDENTS

(BY SH.SUDHIR BHATNAGAR AND SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATES GENERAL WITH SH. R.P. SINGH, SH. KAMAL KISHORE AND SH. NARINDER THAKUR, DEPUTY ADVOCATES GENERAL)

CIVIL WRIT PETITION No.3341 of 2019
DECIDED ON: 04.09.2021

Constitution of India, 1950- Article 309- Services of petitioner were taken over as Shashtri w.e.f. 27.08.1990, he is entitled to pay scale of the post in question as prescribed in the R&P Rules- It is well settled law that statutory rules framed under Article 309 of Constitution of India cannot be superseded by issuance of administrative instructions- Petition allowed.

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

O R D E R

Petitioner herein was appointed as Shastri in a Privately Managed Indira Gandhi Memorial Middle School, Amlehar, Tehsil Nadaun, District Hamirpur, Himachal Pradesh on 06.06.1985. Petitioner continued to discharge his duties in the capacity of Shastri in the aforesaid school without there being any interruption till the year 1990 when aforesaid school was taken over by the State Government. Since services of the petitioner were not taken over by the Government despite there being assurance and completion of all the necessary formalities, he was compelled to file Original Application No.1195 of 1991 in the erstwhile H.P. Administrate Tribunal, which came to be disposed of with the direction to the respondents to treat the original application as representation to the Secretary (Education) to the Government of Himachal Pradesh with further direction to him to consider the same in the light of judgments passed by learned Tribunal below in TA No.876/86 *(Sushil Kumar Kaushal Vs. State),* TA No.875/86 *(Smt. Maya Devi vs. State*), OA No.175/88 *(Sarwan Kumar vs. State)* and OA No.160/90 *(Surinder Kumar Vs. State*) after affording an opportunity of being heard to the petitioner. Pursuant to aforesaid direction issued by learned Tribunal, respondent-Department treated the Original Application having been filed by the petitioner as representation and rejected the same by concluding in the order that as per the condition of the gift deed, Government was not bound to take over the services of the staff of the school. Respondents in order rejecting the representation observed that it was specifically mentioned in the gift deed that only the services of those staff will be considered for taking over by the State

Government, who are found eligible under the instructions circulated in the month of June, 1985.

2. Being aggrieved and dissatisfied with the aforesaid order rejecting representation, petitioner approached this Court by way of CWP(T) No.5 of 2012, praying therein for following reliefs:-

> "(***i*** ***That the respondents be directed to take over the services of the applicant.***
>
> ***(ii)*** ***That the respondent be directed to pay to the applicant all the consequential benefits, such as pay etc.***
>
> ***(iii)*** ***That the respondent be directed to pay the interest of 18% p.a."***

3. This Court vide judgment dated 12th October 2012 ***(Annexure P-1)*** allowed the writ petition and quashed order rejecting representation and directed the respondent-State to appoint the petitioner as Shastri w.e.f.27.8.1990 i.e. from the date when Indira Gandhi Memorial Middle School, Amlehar, District Hamirpur was taken over, with all consequential benefits.

4. Though, pursuant to aforesaid directions issued by this Court vide judgment dated 12th October, 2012, respondents appointed the petitioner as Shastri teacher on regular basis in the pay scale of Rs.1500-2700 w.e.f.27.8.90, 5000-8100 w.e.f.01.01.96 and 10300-34800 +3200 Grade Pay w.e.f.01.01.2006 w.e.f.27.08.1990, the date when Indira Gandhi Memorial Middle School Amlehar, District Hamirpur was taken over but since petitioner despite being his regular appointment made pursuant to order dated 21.9.2015 ***(Annexure P-2)*** was not given the pay scale as was given to the persons appointed on regular basis, he filed Original application bearing No.7779 of 2018, titled ***Madan Lal Sharma versus State of Himachal***

Pradesh and another, which came to be disposed of vide judgment dated 10.01.2019 (Annexure P-3). Aforesaid Original Application came to be disposed of with the direction to the respondents/competent authority to extend the benefit of the judgment passed by this Court in CWP (T) No.5759 of 2008, titled ***Subhash Chand and another versus State of Himachal Pradesh and others***, decided on 5.7.2010. Tribunal below while passing aforesaid judgment specifically ordered that in case petitioner is found to be similarly situate, he be given benefit to the aforesaid judgment within a period of two months.

5. Pursuant to aforesaid judgment, petitioner filed representation ***(Annexure P-4),*** praying therein that he be given pay scale of Rs.1640-2925 w.e.f.27.8.1990. However, aforesaid representation having been filed by him came to be rejected vide order dated 4.9.2019 ***(Annexure P-5),*** whereby Deputy Director Elementary Education, Kangra at Dharamshala ordered that from the perusal of record as well as service book of the petitioner, it is amply clear that the applicant is not similar situate to the petitioner in CWP (T) No.5759 of 2008 titled as ***Subhash Chand and another versus State of Himachal Pradesh and others,*** because petitioner was appointed/taken over after 23.03.1989. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein for following reliefs:-

> "(i). ***That the impugned rejection letter dated 04.09.2019 at Annexure P-5 may kindly be quashed and set-aside and petitioner may kindly be held entitled the grant the revised pay scale of Rs.5480-8100/- with all consequential benefits.***
>
> ***(ii). That the respondents further may very kindly be directed to grant of the pay scale of Rs.1640-2925 revised to Rs.5480-8925/- as is prescribed for the post of Shastri Teacher, instead of pay***

scale of Rs.1520-2700 revised to 5000-8100/- as granted to him on his initial appointment on 27.08.1990, with all consequential benefits and arrears may kindly be ordered to be paid with interest, in the interest of justice."

6. Having heard learned counsel representing the parties and perused material available on record, this Court finds that there is no dispute *interse* parties that prior to taking over of the school by Government of Himachal Pradesh in the year 1990, petitioner was serving as Shastri teacher in Indira Gandhi Memorial Middle School Amlehar, Tehsil Nadaun, District Hamirpur. It is also not in dispute that since services of the petitioner were not taken over, he was compelled to approach this Court by way of CWP (T) No.5 of 2012 and this Court vide judgment dated 12th October, 2012, issued direction to the respondents to appoint petitioner as Shastri w.e.f. 27.8.1990, the date when Indira Gandhi Memorial Middle School, Amlehar, District Hamirpur, Himachal Pradesh was taken over with all consequential benefits.

7. It is also not in dispute that aforesaid judgment was not laid challenge, rather respondent complying with the aforesaid directions contained in the aforesaid judgment taken over the services of the petitioner as Shastri teacher on regular basis in the pay scale of Rs. of Rs.1500-2700 w.e.f.27.8.90, Rs.5000-8100 w.e.f.01.01.96 and Rs.10300-34800 +3200 Grade Pay w.e.f.01.01.2006 w.e.f.27.08.1990, as is evident from office order, dated 21.9.2015 ***(Annexure P-2).*** Since services of the petitioner vide order, dated 21.9.2015 ***(Annexure P-2)*** were ordered to be taken over on regular basis w.e.f. 27.8.1990 i.e. the date when Indira Gandhi Memorial Middle School Amlehar, District Hamirpur was taken over, he claimed pay scale of Rs. 1640-2925, which at that time was being paid to the regularly appointed Shastries in the Department of education. However, such plea of him was rejected on the

ground that since services of the petitioner was taken over after 23.3.1989, pay scale implemented prior to the same vide Notification dated 7.11.1988 ***(Annexure PR-1)*** cannot be made applicable in the case of the petitioner. However, such plea taken by the respondent in case of other similarly situate person was not accepted by the competent court of law in CWP(T) No. 5759 of 2008 titled ***as Subhash Chand versus State of Himachal Pradesh and others*** and as such, Tribunal below while placing reliance upon the judgment rendered by this Court in aforesaid case of Subhash Chand, directed the respondent-department to consider and decide the case of petitioner in the light of observations/findings returned in the aforesaid judgment passed by this Court in Subhash Chand's case (supra). Competent authority again vide order dated 4.9.2019, rejected the prayer made on behalf of petitioner for grant of pay scale of Rs.1640-2925 on the ground that judgment passed by this Court in Subhash Chand's case (supra) cannot be made applicable in the case of the petitioner since he was appointed/taken over after 23.3.1989.

8. Order dated 4.9.2019 ***(Annexure P-5),*** passed by competent authority of law in purported compliance of order passed by learned Tribunal in Original Application No.7779 of 2018, decided on 10.01.2019 is not sustainable in the eye of law for the reason that same is not based upon proper appreciation of law laid down by this Court in Subhash Chand's case (supra), wherein it has been categorically held that administrative instructions, if any, issued cannot supersede rules framed under Article 309 of the Constitution of India. In Subhash Chand's case (supra), Co-ordinate Bench of this Court categorically ruled that if particular pay scale is prescribed for a particular post under R&P Rules, same cannot be superseded/ taken over by mere issuance of administrative instructions ***(Annexure P-6).***

9. Order dated 4.9.2019, passed by Deputy Director Elementary Education otherwise contains no reason for rejection of the case of the petitioner. Competent authority has simply stated that case of the petitioner is not similar to that of CWP(T) No.5759 of 2008 i.e. Subhash Chand and another. Had the competent authority bothered to go through the judgment passed by Co-ordinate Bench of this Court in its entirety, probably it would not have passed order dated 4.9.2019, which is impugned in the instant proceedings. Since there was specific direction to the competent authority to consider the case of the petitioner in the light of judgment passed by Co-ordinate Bench of this Court in CWP(T) No.5759 of 2018, it was under obligation to pass detailed order, specifically assigning therein reasons that why the case of the petitioner is not similar to that of Subhash Chand case (supra). Since Co-ordinate Bench of this Court in Subhash Chand case (supra) has already held that administrative instructions, if any, issued cannot supersede the rules framed under Article 309 of Constitution of India, respondent-department could not have denied the pay scale, to which petitioner is otherwise entitled in terms of R& P Rules qua the post in question.

10. In the case at hand, reply filed on behalf of respondents No.1 and 2, reveals that Government of Himachal Pradesh vide letter No.Shiksha-II-Kha(4)3/89, dated 17.12.1991 clarified that those Shastries/Language Teachers, who were working on regular basis up to 23.03.1989, would be granted pay scale of s.1640-2925 as a measure personal to the incumbents, but once aforesaid pay scale of Rs.1640-2925 has been specifically provided vide Notification dated 7.11.1988 ***(Annexure PR-1),*** issued in exercise of power conferred under Section 309 of the Constitution of India and proviso to sub rule (1) of Rule 10 of the Vidhan Sabha(Recruitment and condition of service) Rules 1972, it is not understood that how aforesaid pay scale could be denied to the petitioner as well as other similar situate persons on the basis

of clarification issued by the Government of Himachal Pradesh vide letter dated 17.12.1991, as has been taken note hereinabove. Perusal of aforesaid Notification dated 7.11.1988 ***(Annexure PR-1***), reveals that though pay scales of Rs. 1640-2925, Rs.1800-3200, senior scale after 8 years, Rs. 2000-3500 senior scale after 18 years shall be a measure personal to the present incumbents. i.e., persons already rendering services at the time of issuance of notification, but in future masters (TGT) shall be appointed as Language masters.

11. Respondents in their reply have stated that since the petitioner has not annexed any record regarding his qualification as Shiksha Shastri or Shastri with O.T(Sanskrit)/B.Ed or B.A B.Ed having Sanskrit as an elective subject in BA and B. Ed with Sanskrit thus the pay scale of Rs. 1500-2700/- as allowed to all other Shastries and Language teachers ***(Annexure R-1)*** cannot be allowed to him**.** However, this Court is of the view that aforesaid plea raised by the respondents cannot be allowed at this stage, especially when there is no dispute that services of the petitioner were taken over as Shastri w.e.f. 27.8.1990, may be pursuant to the directions issued by Co-ordinate Bench of this Court in Subhash Chand's case (supra). Since, it is not in dispute that services of only those teachers, who were fully qualified were to be taken over, plea of qualification as has been raised at this stage by way of reply otherwise cannot be allowed to be raised with a view to defeat the legible claim of the petitioner. Since, services of the petitioner stands regularized/taken over as Shastri, he is entitled to pay scale of the post in question, as prescribed in the R & P Rules. Aforesaid pay scale cannot be denied on the basis of the clarification issued by way of administrative instructions. It is well settled that statutory rules framed under Article 309 of Constitution of India cannot be superseded/ substituted by issuance of administrative instructions, as has been held by Co-ordinate Bench of this Court in Subhash Chand case (supra).

12. Consequently, in view of the detailed discussion made hereinabove, this Court finds merit in the present petition and accordingly same is allowed and order dated 4.9.2019 ***(Annexure P-5),*** passed by Deputy Director Elementary Education Kangra at Dharamshala, is quashed and set-aside and respondents are directed to grant pay scale of Rs. 1640 to 2925/- to the petitioner with further revised pay scale from the date of taking over his services w.e.f.27.8.1990. Needful in terms of aforesaid directions issued by this Court shall be done expeditiously, preferably within a period of six weeks. Pending applications, if any, also stands disposed of.

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

Between:

SUNIL KUMAR GROVER, SON OF SHRI JASWANT SINGH, RESIDENT OF MOHTLI, TEHSIL INDORA, DISTRICT KANGRA, H.P.

....PETITIONER.

(BY SHRI B.C. NEGI, SENIOR ADVOCATE, WITH MR. NITIN THAKUR, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (REVENUE) TO THE GOVERNMENT OF HIMACHAL PRADESH-2;

2. THE DISTRICT COLLECTOR KANGRA, DISTRICT

KANGRA AT DHARAMSHALA, HIMACHAL PRADESH;

3. ADDITIONAL DISTRICT MAGISTRATE, KANGRA, DISTRICT KANGRA AT DHARAMSHALA, HIMACHAL PRADESH;

4. TEHSILDAR-CUM-SUB REGISTRAR, NAGROTA BAGWAN, DISTRICT KANGRA, HIMACHAL PRADESH;

5. STATE BANK OF INDIA, THE MAIN BRANCH KALIBARI, THE MALL SHIMLA, H.P.

....RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENTS NO.1 TO 4.

MR. ARVIND SHARMA, ADVOCATE, FOR RESPONDENT NO.5)

CIVIL WRIT PETITION No.3447 of 2019
DECIDED ON: 06.09.2021

Constitution of India, 1950- Article 226- SARFAESI Act, 2002 - Indian Registration Act, 1908 - Registration of Sale Certificate qua the property in issues which the petitioner purchased through an auction held under the provisions of SARFAESI Act- Held- Petitioner is clearly protected by the

provisions of Section 17(2) (XII) of the Registration Act and the sale certificate does not require any registration- Petition allowed.

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 case of the petitioner is that he is a businessman and he participated in a bank auction conducted by respondent No.5 under the provisions of SARFAESI ACT 2002, in respect of land and building, details of which are given in para-1 of the petition. Respondent No.5 declared the account of one Shri Mohan Singh Guleria, operating in the name and style of M/S Silvermoon Motors Pvt. Ltd. as NPA and auctioned the above mentioned property under the SARFAESI ACT. The sale certificate was issued in favour of petitioner being the highest bidder in respect of the property auctioned in issue. The grievance of the petitioner enumerates from Annexure P-3, in terms whereof the petitioner has been called upon to register the sale certificate with the Registration Authority.

2. Learned Senior Counsel, appearing for the petitioner has drawn the attention of the Court to the judgment passed by Hon'ble Supreme Court of India, in *(2007) 5 Supreme Court Cases 745*, titled *B. Arvind Kumar* Versus *Govt. of India and Others*. He has referred to question number-2, as stands framed in para-8 of said judgment and answer thereto as stands contained in para-12 of the judgment and by placing reliance upon the same, he has argued that the Hon'ble Supreme Court has been pleased to settle the issue at hand by holding that now when an auction purchaser derives title on confirmation of sale in his favour and a sale certificate is issued evidencing such sale and title,

no further deed of transfer of the Court is contemplated or required. On the strength of this judgment of the Hon'ble Supreme Court, the petitioner submits that this writ petition be allowed and respondents be directed not to give effect to Annexure P-3 and to recognize the sale certificate, which has been issued in his favour by respondent No.5.

3. Learned Additional Advocate General, while referring to the response filed to the petition by the State, submits that inconsonance with the provisions of Section 17 of the Indian Registration Act, all non-testamentary documents which purport or operate to create any right, title or interest, whether vested or contingent, of the value of more than one hundred rupees, are to be compulsorily registered and it is in this view of the statutory provisions of the Registration Act that the petitioner is being called upon to do the needful.

4. Having heard learned counsel for the parties and having perused the pleadings as well as the judgment referred to by learned Senior Counsel for the petitioner, this Court is of the view that as the petitioner has purchased the property in issue through an auction which was held under the provisions of the SARFAESI ACT, his case is squarely covered by the judgment of Hon'ble Supreme Court in B. Arvind Kumar's case (supra) and he cannot be called upon to register the sale certificate.

5. Section 17 (1) of the Registration Act provides that the documents have to be registered, if the property to which they relate, is situated in a district in which the provisions of the Indian Registration Act are applicable. Sub-section (2) of the said Section, which starts with a non-obstetric clause, provides that nothing in Clause 'B' and 'C' of sub-section (1) shall, *inter alia*, apply to any certificate of sale granted to the purchaser of any property sold by a public auction by a Civil or Revenue Officer. This is specifically contained in sub-clause (xii) of sub-section (2) of Section 17 of the Act. Hon'ble Supreme Court in B. Arvind Kumar's case (supra) has taken into consideration the

statutory provisions of Section 17 (1) as also Section 17 (2) (xii) of the Registration Act,1908, while holding that when an auction purchaser derives title on confirmation of sale in his favour and as the sale certificate is issued, evidencing such sale and title, then no further deed of transfer from the Court is contemplated or required.

6. In this view of the matter, as the petitioner herein has purchased the property in auction held by respondent No.5, under the provisions of the SARFAESI ACT, he is clearly protected by the provisions of Section 17 (2) (xii) of the Registration Act and the sale certificate does not requires any registration. The act of the respondent/State vide Annexure P-3 (Colly) and calling upon the petitioner to have the sale certificate is illegal and contrary to the provisions of Section 17 (2) (xii) of the Registration Act and therefore, not sustainable in the eyes of law.

7. Accordingly, this writ petition is allowed, as prayed for and Annexure P-3 (Colly) are quashed and set aside and the respondent-authority is directed not to give effect in the same. The petition stands disposed of. Pending miscellaneous applications, if any, also stand disposed of. Interim order, if any, stands vacated.

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

Between:-

GRAM PANCHAYAT SIRINAGAR,
BLOCK KANDAGHAT,
OFFICE AT MAIN BAZAR,
KANDAGHAT, MOHAL SIRINAGAR,
TEHSIL KANDAGHAT, DISTICT SOLAN,
H.P. THROUGH ITS PRADHAN/PRESIDENT
SMT. RAJVINDER KAUR,
W/o SHRI GURVINDER SINGH R/o VILLAGE

DOLAG, TEHSIL KANGAGHAT, DISTRICT SOLAN, H.P.

……PETITIONER

(BY SH. P.S, GOVERDHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH THE CHIEF SECRETARY TO THE GOVERNMENT OF HIMAHCAL PRADESH.

2. THE PRINCIPAL SECRETARY (URBAN DEVELOPMENT) GOVERNMENT OF HIMACHAL PRADESH SHIMLA H.P.

3. THE SECRETARY RURAL DEVELOPMENT AND PANCHAYATI RAJ DEPARTMENT, GOVERNMENT OF H.P. SHIMLA.

4. THE DIRECTOR, URBAN DEVELOPMENT HIMACHAL PRADESH, SHIMLA.

5. THE DEPUTY COMMISSIONER SOLAN, DISTRICT SOLAN H.P.

6. THE NAGAR PANCHAYAT KANDAGHAT, MAIN BAZAR KANDAGHAT, TEHSIL KANGAGHAT, DISTRICT SOLAN H.P., THROUGH ITS SECRETARY.

…..RESPONDENTS

(SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJENDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, SH. VINOD THAKUR, SH. HEMANSHU MISRA, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS AND SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO.1 TO 5)

(BY SH. VINOD CHAUHAN, ADVOCATE, FOR RESPONDENT NO.6)

CIVIL WRIT PETITION No. 3450 OF 2021
RESERVED ON : 01.09.2021
DECIDED ON: 07.09.2021

H.P. Municipal Act, 1994- Sections 3 & 57- Property vested in municipality- Petitioner challenged the dispossession of office building- Held- Petitioner has a right to claim compensation or share in income from income generating assets, that too if found permissible and payable under law- Transfer of movable assets of Gram Panchayat to Nagar Panchayat held to be bad in law.

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

ORDER

The municipality of Nagar Panchayat Kandaghat came into being under Section 3 of the Himachal Pradesh Municipal Act 1994 (for short, "Municipal Act") on publication of Notification dated 28.10.2020. *Vide* same notification, the Government of Himachal Pradesh declared some parts of local areas of Gram Panchayat Sirinagar and Kawarag as municipal area of Nagar Panchayat Kandaghat under Section 4(6) of the Act *ibid*.

3. In sequel to Constitution of Nagar Panchayat Kandaghat and inclusion of local areas of Gram Panchayat Sirinagar in said municipality, Deputy Commissioner, Solan on 15.06.2021 ordered the transfer of all assets and liabilities of Rural Development and Panchayati Raj Department in favour of Urban Development Department, Himachal Pradesh, pertaining to such local area of Gram Panchayats Sirinagar and Kawarag which had been declared as municipal area of Nagar Panchayat Kandaghat.

4. Petitioner, by way of instant petition, has assailed the action of respondents whereby moveable and immovable assets earlier held by it have

been ordered to be transferred in the manner above mentioned and has prayed for following substantive reliefs:

> *"(i). To issue writ of certiorari thereby quashing and setting aside the impugned office letters dated 15.05.2021, 17.05.2021 and 04.06.2021,* ***Annexures P-6, P-7 P-8****, and the impugned office order dated 15.06.2021,* ***Annexure P-9****, being wrong arbitrary and legally not tenable.*
>
> *(ii) To issue appropriate writ, direction and order thereby restraining respondents No.1, 2 and 4 to 6 from dispossessing the petitioner from the office building (two storeyed) situated over abadi deh land comprising Khasra No.794 precisely denoted by Khasra No.794/1* ***(Annexure P-5),*** *situated in Mauja Sirinagar, Tehsil Kandaghat, District Solan, H.P. and other assets mentioned in the list annexed with* ***Annexure P-9*** *along with the vehicle bearing registration HP-13-3807, till the final disposal of the present writ petition".*

5. As per petitioner, the impugned communications and order are bad in law for want of prior consent of Government of Himachal Pradesh as required by Section 112 of the Himachal Pradesh Panchayati Raj Act (for short, "Panchayati Raj Act"). Petitioner has also contended that transfer of moveable assets was without jurisdiction and authority. Further, the action of respondents in transferring the assets of petitioner in favour of Nagar Panchayat Kandaghat have been assailed to be in violation of Section 57 of the Municipal Act.

6. In addition, petitioner has also taken exception to impugned action of respondents on the ground that petitioner had only suitable place for its office in building constructed on Khasra No. 794/1 in Kandaghat and after its transfer petitioner will not be left with any other suitable and convenient place for its office.

7. Respondents while contesting the claim of petitioner have averred that action of respondents in transferring of assets from Gram Panchayat Sirinagar to Nagar Panchayat Kandaghat was perfectly legal. Petitioner has been alleged to be guilty of suppression of true and immaterial

facts on the ground that it had already exhausted the remedy by filing CWP No.6044 of 2020 which was dismissed by this Court on 7.1.2021. It has been contended that funds amounting to Rs.54,23,727/- were provided by the Rural Development and Panchayati Raj Department in the year 2018-19 and the office building of petitioner on Khasra No.794/1 was constructed with this amount. The said asset now stands transferred to Urban Development Department on the strength of the decision of the Government in that behalf conveyed by Secretary Urban Development vide communication dated 15.05.2021. Ground of non-maintainability of petition has also been raised in view of availability of alternative remedy under section 143 of Panchayati Raj Act.

8. We have heard learned counsel for petitioner as well as learned Advocate General for the state and have also gone through the records.

9. This court has already upheld validity of the Notification dated 28.10.2020, whereby Nagar Panchayat Kandaghat came to be constituted and some parts of local area of Gram Panchayat Sirinagar were declared to be the Municipal Area. That being so, by implication of law, immovable assets earlier held by petitioner in the local area declared as municipal area, came to be vested in the Nagar Panchayat Kandaghat under Section 57 of the Municipal Act. The relevant extract of said provision reads as under:

> *"57.* ***Property vested in a municipality.***
>
> *(1) Subject to any special reservation made or to any special conditions imposed by the State Government, all property of the nature hereinafter in this section specified and situated within the municipal area, shall vest in and be under the control of the municipality and with all other property which has already vested, or may hereafter vest in the municipality shall be held and applied by it for the purpose of this Act, that is to say-*
>
> *(a) all public town-walls, gates markets, stalls, slaughter houses manure and night soil depots and public buildings of every description which have been constructed or are maintained out*

of the municipal fund;

(b) to (e) xxx xxx xxx

(f) All land or other property transferred to the municipality by the State Government or acquired by gift, purchase or otherwise for local public purposes.

(g) xxx xxx xxx

(2) Where any immovable property is transferred otherwise than by the sale by the State Government to a municipality for public purposes, it shall be deemed to be a condition of such transfer, unless specifically provided to the contrary that should the property be at any time resumed by the State Government, the compensation payable thereto, shall, in no case exceed the amount, if any, paid to the State Government, the compensation payable therefor shall, in no case exceed the amount, if any, paid to the State Government for the transfer, together with the cost or the present value which ever shall be less, of any together with the cost or the present value, of any buildings erected on other works executed on the land by the municipality.

(3) & (4). xxx xxx xxx

Provided that the mode and condition precedent to the transfer of immovable property, shall be governed by regulations or bye-laws made by the municipality."

10. Petitioner has failed to place any material on record to prove its title over the land comprised in Khasra No.794/1 or the building constructed thereon. On the other hand, the fact that the building was constructed in 2018-19 with the money provided by Rural Development and Panchayati Raj Department has remained un-rebutted. In the given facts, the office building in which Gram Panchayat Sirinagar was running its office can be stated to be the asset of the Government of Himachal Pradesh though vested in the Panchayat. As per Section 111(2) of the Panchayati Raj Act, Government is

entitled to resume the property so vested in the Panchayat subject to the conditions prescribed therein.

11. Section 111(2) of the Panchayat Raj Act, reads as under: -

"111. State Government may vest certain property in Panchayats:
(1) xxx xxx xxx

(2) The State Government may resume any property vested in the Panchayat under sub-section (1). No compensation other than the amount paid by the Panchayat for such transfer or the market value at the date of resumption of any building or works erected or executed on such property by the Panchayat shall be payable.

Provided that no compensation shall be payable in respect of building, structure or works constructed or erected in contravention of the terms and conditions of the vesting."

12. In above noted context, Rule 3 (2) of the Himachal Pradesh Panchayati Raj General Rules 1997 needs attention, which reads as under:

"3. Disposal of assets and liabilities of Gram Sabhas.-

(1) xxx xxx

"(2) If any village, sub-village or patti thereof, wherein immovable property is located is excluded from the Sabha area and included in the limits of municipality, the immovable property of the transferred area of that Gram Sabha may be transferred to the municipality and either the municipality or the Government shall pay to the Gram Panchayat concerned such compensation in lieu of immovable property, not lesser than the market values, as may be determined by the Government or the officer authorized by it, in this behalf. In case of income generating assets transferred to the municipality, the municipality shall continue to pay 50% of the net income accrued from such assets or more as may be determined by the Government, or the officer authorized by it to the Gram Panchayat".

13. Thus, in the given facts of the case, petitioner does

not have any right to challenge the transfer of immovable assets held by it in favour of Nagar Panchayat Kandaghat. Petitioner only has a right to claim compensation and/or share in income from income generating assets, that too if found permissible and payable under above noted provisions of law.

14. On plain reading of Section 112 of the Panchayati Raj Act it becomes clear that it deals with the situation where assets of Gram Panchayat are transferred as result of voluntary action of the Panchayat. It does not deal with the situation as has arisen in the present case whereby the erstwhile assets of Gram Panchayat Sirinagar have come to be vested in Nagar Panchayat Kandaghat by implication of law. Section 112 of the Panchayati Raj Act, reads as under: -

> **"112. *The transfer of immovable property:***
>
> *(1) No immovable property vested in or belonging to a Panchayat shall be transferred by sale, gift, mortgage or exchange or by lease or otherwise except with the sanction of the State Government or any officer authorized by it in this behalf.*
>
> *(2) The procedure of transfer of immovable property shall be such as may be prescribed."*

15. The claim of the petitioner in this regard otherwise also cannot be sustained due to the reason that the Principal Secretary Urban Development, Himachal Pradesh vide letter dated 15.05.2021 had already conveyed approval of Government for transfer of erstwhile assets of Panchayati Raj and Rural Development Department in favour of department of Urban development.

16. Petitioner also does not have right to run its office only from the building constructed on Khasra No. 794/1 as alleged by it. Petitioner has to maintain its office within the existing jurisdiction of Gram Panchayat Sirinagar. The petitioner in no manner can gainfully run the establishment of its office from a place which is outside the jurisdiction of its local area.

17. Under the constitutional scheme, the institution of Panchayats can find its origin in the concept of providing machinery for governance at grass root level. The Panchayati Raj institutions are extended wings of Government. The dispute raised by the petitioner in present proceedings runs counter to the purpose of creation of such institutions. The justiciability of such disputes is seriously questionable. Petitioner had alternative remedy under section 143 of the Panchayati Raj Act and its omission to avail such remedy provides reasons to doubt the bona fides of petitioner.

18. As regards the action of respondents in ordering the transfer of moveable assets of petitioner to Nagar Panchayat Kandaghat, it is held that no such power is vested in respondents. Law does not authorize such transfer and thus the action of respondents to that extent is held to be bad in law.

19. Thus, the petition is allowed to the limited extent only. Transfer of moveable assets of petitioner by respondents in favour of Nagar Panchayat Kandaghat are held to be bad in law and hence unsustainable. Remaining reliefs as prayed by the petitioner are rejected.

20. The petition is accordingly disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any, leaving the parties to bear their own costs.

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

Sumit Kumar ....Petitioner.

Versus

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

CWP No.3471 of 2021
Decided on: 28.07.2021

Constitution of India, 1950- Article 226- **H.P. Civil Services Contributory Pension Rules, 2006**- Petitioner has not complied with mandatory provisions

of Rule 4(1) of H.P. Civil Services Contributory Pension Rules, 2006, thereof the department cannot be faulted with the temporarily stopping release of salary in favour of the petitioner- Petition dismissed.

For the petitioner : Mr. Nishant Khidtta, Advocate, vice Mr. V.D. Khidtta, Advocate.

For the respondents : Mr.Adarsh Sharma, Mr. Sumesh Raj, Mr. Sanjeev Sood, Additional Advocates General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for respondents No.1 to 3.

Ms. Ranjana Parmar, Senior Advocate, with Mr. Karan Singh Parmar, Advocate, for respondent No.4.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

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

> "*(i) That the action of the respondents whereby they have stopped the salary of the petitioner may kindly be held illegal and violative of Article 21 of Constitution of India and may be quashed and set aside.*
> *(ii) That writ in the nature of mandamus may kindly be issued to the respondents to release the salary of the petitioner w.e.f. January 2021 till date with interest throughout.*"

2. The case of the petitioner is that he was initially engaged as a Clerk in 12th Circle of the H.P.P.W.D. Nahan, H.P., on contract basis, w.e.f. 30.06.2017. Thereafter, vide order dated 01.10.2020 (Annexure P-1), his

services were regularized as such with immediate effect. The grievance of the petitioner is that his salary from the month of January, 2021 has been stopped by the respondent-State and since then no salary has been released to him, which act of the respondent-State is completely arbitrary because there is no law which permits stoppage of the release of salary of an employee like petitioner by the respondent-department. According to the petitioner, it is in fact a malafide act on the part of the respondent/State that the salary of the petitioner has not being released despite his performing regular duties with the respondent/ department. As per him, he was communicated vide Annexure P-2, i.e. communication dated 21.01.2021, that he should submit the documents to generate his account in NPS/PRAN (National Pension Scheme/Permanent Retirement Account Number) and if he failed to do so, then his salary would be stopped without any notice. In terms of the averments made in paras 11 and 12 of the writ petition, the petitioner contends that his salary could not have been stopped under any circumstance even if he did not comply with the requirements in terms of Annexure P-2 etc. because there is no law which confers a right upon the respondent/State to stop the release of salary of the petitioner, in his favour. The petitioner contended that fundamental right to livelihood enshrined under Article 21 of the Constitution of India has been infringed as the respondents stopped the release of his salary from the month of January, 2021 without any prior intimation and without initiating any action/inquiry. Stoppage of salary of the petitioner according to him is without any justification and/or jurisdiction and it is in this background, present petition has been filed by the petitioner, praying for the reliefs already enumerated hereinabove.

3. Petition stands opposed by the respondent/State, *inter alia*, on the ground that salary of the petitioner has been stopped temporarily as despite reminders he has not submitted necessary forms or subscription to National Pension Scheme, introduced by the Government of Himachal Pradesh.

According to the State, all the employees recruited after 15.05.2013 are required to subscribe with National Pension Scheme and contribution from the salary of every employees recruited after 2003 is necessary under Himachal Pradesh Civil Service Contributory Pension Rules, 2006. A copy of said Notification is appended with the petition as Annexure R-1. It is further mentioned in the reply that the forms required for subscription to Contributory Pension Scheme are to be submitted within 15 days from the date of joining to the official by the D.D.O. and on failure, the D.D.O. is responsible for default of any penalty as per letter of the Finance Department, appended with the reply as Annexure P-2. The petitioner joined as a regular Clerk on 01.10.2020 and was accordingly called upon by the concerned D.D.O. to submit the forms for Contributory Pension Scheme (CPS). The petitioner did not submit requisite documents. He was issued reminders time and again to do the needful, but he has not adhered to the directions so issued to him and in these circumstances the respondents were left with no option, but to stop his salary till the time he submits the requisite documents. It is further the stand of the State that the provision for deduction towards National Pension Scheme is in the interest of the petitioner as the government has to make equal contribution towards the fund. The petitioner is acting contrary to his interest and willingly refusing to submit the documents for subscription to Contributory Pension Scheme. The respondents have no intent to stop the salary of the petitioner and the same shall be released immediately on submission of required documents by the petitioner.

4. Learned counsel for the petitioner has also argued that the salary of the petitioner could not have been stopped by the State on their whims and fancies without following the process of the law as has been done in the present case. He has further argued that the impugned act of the State infringes Article 21 of the Constitution of India.

5. On the other hand, learned Additional Advocate General has argued that it is not a case where the salary of the petitioner has been stopped literally as stated by the petitioner. According to him because it was mandatory for the petitioner, who has been regularly appointed as a Clerk w.e.f. 01.10.2020, to comply with the provisions of the Notification, dated 17.08.2007, therefore, on account of his failing to do so, the department had no option, but to temporarily stop his salary and immediately upon compliance of the provisions of the Notification, dated 17.08.2006, i.e. supply of the requisite documents by him, his salary shall be released immediately.

6. During the course of arguments, the Court had suggested to learned counsel for the petitioner that it will be in the interest of the petitioner to submit the documents being requisitioned by the respondent-department forth with and if the petitioner does so, then the Court shall facilitate the release of his salary immediately. However, learned counsel for the petitioner, on instructions, submitted that the same would be below the dignity of the petitioner and would frustrate the purpose of filing of the petition.

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

8. It is not in dispute that the services of the petitioner after his initially engagement on contract basis in the year 2017 have been regularized vide Annexure P-1, dated 01.10.2020, with immediate effect. It is also not in dispute that there is in force in the State of Himachal Pradesh, the Himachal Pradesh Civil Services Contributory Pension Rules, 2006, which stand issued vide Notification, dated 17.08.2006. This notification has been issued by the Financial Pension Department of the Government of Himachal Pradesh in exercise of powers conferred by the proviso to Article 309 of the Constitution of India. Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006, provides as under:-

> *" 4. Terms & Conditions:- (1) It shall be mandatory for all the new employees, who are recruited on or after 15-5-2003 to become members of the Scheme under these rules. Each employee shall be required to pay a monthly contribution which would be 10% of the Basic Pay, DA & NPA before 1-4-2004 and Basic Pay, Dearness Pay, DA & NPA w.e.f. 1-4-2004 to the Contributory Pension Scheme under these rules."*

9. Perusal of the provisions of Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006 demonstrates that it is mandatory for all the new employees, who are recruited on or after 15.05.2003 to become members of the Scheme under said Rules. Further, each employee is required to pay a monthly contribution which would be 10% of the Basic Pay, D.A. and National Pension Scheme to the Contribution Pension Scheme under Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006. This mandatory provision contained in Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006, which till date has not been complied with by the petitioner.

10. The contention of the petitioner that his salary has been arbitrarily stopped by the respondent-department is worth rejection. The temporary stoppage of release of the salary of the petitioner in his favour from the month of January, 2021 obviously is on account of the omission on the part of the petitioner to comply with Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006.

11. Record demonstrates that despite repeated reminders having been issued to the petitioner to generate his account in PRAN, failing which, his salary would be stopped, the petitioner has failed to do so. The Court fails to understand as to why the petitioner is so adamant in not generating his account in PRAN and thus, not complying with the mandatory provisions of Rule 4 (1) of the 2006 Rules. The adamancy of the petitioner is beyond the understanding of the Court. There is no question of non release of salary of the

petitioner being violative of Article 21 of the Constitution of India for the reason that the petitioner in his capacity as an employee of the department of Himachal Pradesh Public Works Department is bound by the terms and conditions which govern in his employment which also includes the provisions of 2006 Rules and only on this account his salary has been stopped as a result of his acts of omission.

12. As it is the petitioner who has not complied with the mandatory provisions of Rule 4 (1) thereof, the department cannot be faulted with for temporarily stopping release of salary in favour of the petitioner. The Court further fails to understand as to how it is below the dignity of the petitioner to submit the relevant documents/generate his account in National Pension Scheme, so as to comply with the mandatory provision of Rule 4 (1) of the Himachal Pradesh Civil Services Contributory Pension Rules, 2006, post which his salary, but natural has to be released by the department. In fact, what the Court has understood from the perusal of the pleadings as well as from the contentions raised on behalf of the petitioner by the learned counsel is that the petitioner happens to be an adamant kind of employee who rather than complying with the provisions, which are mandatory to be complied with by him in his capacity as an employee of the respondent-department is unnecessarily taking cudgels with the department. His conduct is unbecoming of a government official and that too at such a nascent stage of his service career when he is still under probation.

13. In view of the discussion hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed. No order as to costs. Pending miscellaneous applications, if any, stand disposed of.

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

Between:-

1. THE DEPUTY GENERAL MANAGER,
POWER GRID CORPORATION OF INDIA,
REHRU, P.O. AND TEHSIL NALAGARH,
DISTRICT SOLAN, H.P.

2. THE DEPUTY MANAGER,
POWER GRID CORPORATION OF INDIA,
B.B.M.B. COLONY, SUNDER NAGAR,
DISTRICT MANDI, H.P.
BOTH THROUGH AUTHORIZED SIGNATORY
OF POWER GRID CORPORATION OF INDIA
SHRI R.S. PATHANIA, CHIEF MANAGER,
POWER GRID CORPORATION OF INDIA,
NALAGARH, DISTRICT SOLAN, H.P.

……PETITIONERS

(BY SH. BIMAL GUPTA, SENIOR ADVOCATE
WITH SH. SATISH SHARMA, ADVOCATE)

AND

1. KRISHANU RAM
S/O LATE SHRI NIHALA,
R/O VILLAGE GASSAUR,
SUB TEHSIL NAMHOL,
DISTRICT BILASPUR, H.P.

…….RESPONDENT NO.1

2. UNION OF INDIA
THROUGH SECRETARY
POWER AND ENERGY,
GOVT. OF INDIA, NEW DELHI
3. THE PROJECT MANAGER,
JYOTI STRUCTURE LTD.,
NEAR GOVT. SENIOR
SECONDARY SCHOOL FOR
BOYS, ROURA SECTOR,

BILASPUR, H.P.

.....PROFORMA RESPONDENTS

(SH. PAWANISH KR. SHUKLA,
ADVOCATE, FOR R-1

SH. SHASHI SHIRSHOO, CENTRAL
GOVT. STANDING COUNSEL, FOR
PROFORMA R-2

PROFORMA R-3 STANDS DELETED)

CIVIL WRIT PETITION No. 5556 of 2014
DECIDED ON: 02.09.2021

Constitution of India, 1950 - Article 226 - **Indian Telegraph Act, 1885**- Section 16 (3)- **Indian Electricity Act**- Section 51- Compensation- Project proponent has challenged the order of Ld. District Judge, Bilaspur, under Section 16(3) of the Indian Telegraph Act, 1885 read with Section 51 of the Indian Electricity Act, to pay compensation of Rs.24,219/- alongwith 9% interest- Held- Suit land is joint and has not been partitioned as such, telegraph authority shall pay full compensation to all interested for any damage sustained by them- damage was caused to the suit land by erection of the transmission tower over the suit land- Applicant entitled for compensation therefore, there is no error in the finality reached by the Ld. District Judge, Bilaspur- Petition dismissed.

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

O R D E R

Learned District Judge, Bilaspur allowed a petition filed by respondent No.1 under Section 16(3) of the Indian Telegraph Act, 1885 read with Section 51 of the Indian Electricity Act and held him entitled to a compensation amount of Rs.24,219/- alongwith 9% interest. The Project Proponent has challenged this order in the instant writ petition.

2. Facts:-

2(i). Respondent No.1-Krishanu Ram moved an application under Section 16(3) of the Indian Telegraph Act (in short 'Act') read with Section 51 of the Indian Electricity Act before the learned District Judge, Bilaspur. He pleaded that he was joint owner in possession of the suit land to the extent of 1/4th share. Copy of the Jamabandi for the year 2002-03 in support of such assertion was appended alongwith the application. His case was that the project proponent had carried out the work of laying down the electricity transmission line from Kol Dam to Nalagarh and in that process, had erected Tower No.33 over the suit land. While constructing and erecting the tower, about 10 bighas of suit land alongwith crops and fruit bearing/non-fruit bearing trees/plants etc. standing over the same, were damaged. His grievance was that despite the fact that the damage to the extent of Rs.8 Lakhs was caused because of erection of tower on the suit land, the project proponent did not pay any compensation to the applicant. In all, a compensation of Rs.8 Lakhs for the damages caused over the suit land was prayed for by the applicant.

2(ii). The project proponent opposed the claim petition. Its stand was that it had assessed damages to the suit land at Rs.96,876/-. This compensation amount had been paid to the brothers of the applicant, who are joint owners of the suit land. The brothers of the applicant were in physical possession over the suit land as per their family arrangement and shares. The applicant had not objected to payment and disbursement of such compensation in favour of his brothers. The project proponent also took a preliminary objection with respect to the non-joinder of applicant's brothers as necessary parties to the petition.

2(iii). Parties led evidence in support of their respective pleadings.

2(iv). After considering the entire material on record, learned District Judge, Bilaspur, vide judgment dated 3.3.2014, allowed the claim petition. The claimant was held entitled to compensation amount of Rs.24,219/-

alongwith 9% interest from the date of filing of the application. This judgment has been assailed by the project proponent by filing the instant writ petition.

3. Contentions:-

I have heard learned counsel for the parties and gone through the record appended with the petition.

Learned Senior Counsel for the project proponent/writ petitioner contended that the compensation on account of damage caused to the suit land by erection of Tower No.33, had been paid by the project proponent (writ petitioners) to the brothers of the applicant. There was a family arrangement/partition amongst the brothers with respect to the suit land, pursuant to which the brothers of the applicant were in physical possession over the suit land. Accordingly, the compensation was paid to them. It was incumbent upon the applicant to have impleaded his brothers as parties to the application. Their non-impleadment is fatal to the petition. Learned counsel for respondent No.1 supported the findings returned in the impugned order and prayed for dismissal of the writ petition.

4. Observations:-

What comes out cumulatively from the reading of the pleadings, evidence and documents on record is that:-

4(i). As per the revenue documents (Jamabandifor the year 2002-03, Ext. PW-1/A), the applicant is recorded as joint owner in possession to the extent of 1/4th share over the suit land comprising Khata Khatoni No.79/87, Khasra Nos.749/487 and 784/489, measuring 18-16 Bighas, situated in Village Assa-Majari, Sub-Tehsil Namhol, District Bilaspur, H.P.

4(ii). As per the revenue record, the suit land is still joint and not partitioned amongst the applicant and his brothers.

4(iii). Sh. Jindu Ram, one of thebrothers of the applicant, stepped in the witness box as PW-2 and stated that the applicant was living in Village Gassaur for the last about 45 years, but that does not mean that he has no

right or interest over the suit land. Jindu Ram supported applicant's contentions.

4(iv). There is no evidence on record to prove that by way of any family partition/arrangement, the suit land was allotted to other co-owners to the exclusion of the applicant. The alleged family partition/arrangement was not proved on record.

4(v). According to the project proponent, Rs.96,876/- were assessed as damages on account of erection of tower over the suit land. The damage was assessed by the project proponent on its own. This amount was paid by it to the brothers of the applicant. It is not the stand of the project proponent that it paid the compensation amount or any part thereof to the applicant.

4(vi). It is not the case of project proponent that the applicant had authorized his brothers to accept the compensation amount falling to his share.

4(vii). The objection that the claim petition deserved dismissal for non-impleadment of brothers of the applicant is without any force. It is not the case of the project proponent that it had made any payment of compensation amount to the applicant. One of the brothers of the applicant had stepped into witness box as PW-2 and supported the case of the applicant.

4(viii). Once the applicant is proved to be the joint owner in possession over the suit land, then he has equal right, like other co-owners, to receive compensation on account of damages caused to the suit land due to erection of tower over the same. Admittedly, no compensation has been paid to the applicant.

4(ix). Section 10 of the Indian Telegraph Act, 1885, becomes relevant in this regard. It reads as under:-

> *"10. Power for telegraph authority to place and maintain telegraph lines and posts.– The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property:*

Provided that–

(a) the telegraph authority shall not exercise the powers conferred by this section except for the purposes of a telegraph established or maintained by the [Central Government], or to be so established or maintained;

(b) the [Central Government] shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and

(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and

(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers."

A perusal of Section 10(d) makes it evident that in case of damage to the property, the telegraph authority shall pay full compensation to 'all persons interested for any damage sustained by them by reason of the exercise of those powers'.

In the instant case, the project proponent (writ petitioners) erected tower No.33 over the suit land. Damage was caused to the suit land by erection of the transmission tower over the suit land. Damage has been assessed by the project proponent in terms of the Act to the extent of Rs.96,876/-. The assessed compensation amount on account of damage to the suit land was paid by the project proponent only to the brothers of the applicant and not to the applicant. The applicant was joint owner in possession over the suit land to the extent of 1/4th share. His name has been reflected as such in the revenue record, which carries presumption of truth. The project proponent failed to prove any partition/family arrangement with respect to the suit land. One of the brothers of the applicant stepped in the

witness box and supported the version of the applicant. In terms of provisions of Section 10(d) of the Act, the applicant is also entitled for compensation. It was incumbent upon the project proponent to ensure that assessed compensation amount is disbursed to all the interested persons in accordance with law. Therefore, there is no error in the finding recorded by the learned District Judge, Bilaspur, directing the writ petitioner/project proponent to pay 1/4th of the assessed compensation amount of Rs.96,876/-, i.e. Rs.24,219/-, alongwith 9% interest from the date of filing of the application, to the applicant (respondent No.1).

For all the aforesaid reasons, the instant petition lacks merit and is accordingly dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

1. D.A.V PUBLIC SCHOOL, PHASE-II,
SECTOR-IV BELOW B.C.S, NEW SHIMLA
THROUGH ITS PRINCIPAL.

2. D.A.V MANAGEMENT COMMITTEE
CHITRA GUPT ROAD, NEW DELHI,
THROUGH ITS PRESIDENT.

PETITIONERS 1 AND 2 THROUGH
SMT. ANURADHA SHARMA
W/O SH. SAMRATH RAJ SHARMA
PRINCIPAL DAV PUBLIC SCHOOL,
NEW SHIMLA, DISTRICT SHIMLA. H.P.

…….. PETITIONERS.

(BY MR. RAHUL MAHAJAN, ADVOCATE)

AND

SMT. KAMAL W/O SH. SUKH DEV, R/O SHOBHA RAM BUILDING, NEW SHIMLA, TEHSIL AND DISTRICT SHIMLA. H.P.

.....RESPONDENT

(BY. MR. SHANTI SWAROOP, ADVOCATE)

CIVIL WRIT PETITION NO. 52 OF 2017
RESERVED ON: 17.8.2021
DECIDED ON : 20.8.2021

Industrial Disputes Act, 1947 - Termination of workman- Referred to Industrial Tribunal-cum-Labour court, Shimla - Tribunal ordered for forthwith re-instatement in service along with seniority and continuity - Held - On proven misconduct, the penalty of termination of service is valid- Writ petition allowed.

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

O R D E R

The hereinafter extracted reference became transmitted by the appropriate government to the Labour Court-cum-Industrial Tribunal, Shimla.

> "Whether the action of the Principal DAV Public School Phase-II, Sector-IV, Below BCS, New Shimla-9 to terminate the services of Smt. Kamal W/o Shri Sukh Dev workman w.e.f 23.8.2005 on the basis of 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?"

2. The Industrial Tribunal-cum-Labour Court, Shimla, in the operative part of its verdict, as, becomes extracted hereinafter. ordered for forthwith re-instatement in service of the petitioner therein/respondent herein

alongwith seniority and continuity. However, the relief of back wages became declined to her.

> "As a sequel to my above discussion and findings on issues No. 1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records."

3. The Tribunal on issue No.1, as, becomes extracted hereinafter, had rendered findings in favour of the employer, and, against the workman. However, the employee has not challenged, the findings adversarial to her, as become returned upon the here-in-after extracted issue. Consequently, the findings as become returned on hereinafter extracted issue do acquire finality and conclusivity.

> "1. Whether the action of the respondent to terminate the services of the petitioner w.e.f 23.8.2005 on the basis of domestic enquiry and without complying with the provisions of Industrial Disputes Act, 1947 is improper and unjustified as alleged? OPP"

4. Therefore, the only res-controversea, which requires meteing of an adjudication, is whether the learned Tribunal concerned, on applying the principle of proportionality, inter-se, articles of charge, as, drawn against the respondent vis-à-vis the order for her termination from service, could validly conclude, that her termination from service, is grossly disproportionate, to the articles of charge, as, became framed against her.

5. At the outset, it is to be borne in mind, that the petitioner/employer, is an educational institution, and, the highest standards of discipline are to be maintained by all the employees of the educational institutions concerned. Therefore, bearing in mind the afore necessity, of

highest standards of discipline, being maintained amongst the entire staff concerned working in the educational institution concerned. Consequently, this Court has to test whether, given the articles of charge framed, against the workman/respondent, hence the penalty of termination from service, as become imposed upon her, was merit worthy, and or whether dehors application of the principle of proportionality inter-se the charge drawn against the respondent, and, the penalty of termination of service as become imposed upon her, rather it was at all necessary to become imposed, or becoming imposed, given the breach of discipline caused by the errant conduct of the workman, in the educational institution concerned where she was serving.

6. Further more, it is also to be adjudged whether the imposition of penalty of termination of service, hence upon the respondent, shocks the conscience of this Court, and, or hence that whether there is any disparaging caused to the principle of proportionality inter-se the misconduct of the workman, vis-à-vis, the penalty of termination of service, as, became imposed upon her.

7. In making a determination of the afore, it is relevant to bear in mind, a judgment of the Hon'ble Apex Court reported in (2013) 10 Supreme Court Cases 106, and, rendered in case titled as Deputy Commissioner, Kendriya Vidyalaya Sangthan and others versus J. Hussain, relevant paragraphs 7 to 14 whereof are extracted hereinafter:-

> 7. When the charge is proved, as happened in the instance case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of charge. The Disciplinary Authority is to decide a particular penalty specified in the relevant Rules. Host of factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past

conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist.

8. The order of the Appellate Authority while having a relook of the case would, obviously, examine as to whether the punishment imposed by the Disciplinary Authority is reasonable or not. If the Appellate Authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the Disciplinary Authority. Such a power which vests with the Appellate Authority departmentally is ordinarily not available to the Court or a Tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts.(See: Union Territory of Dadra & Nagar Haveli vs. Gulabhia M.Lad (2010) 5 SCC 775) In exercise of power of judicial review, however, the Court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the Court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.

9. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with doctrine of Wednesbury Rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the Court and the Court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by Lord Diplock in Council of Civil Service Unions vs. Minister for Civil Service in the following words:

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads of the grounds on which administrative

action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality."

10. Imprimatur to the aforesaid principle was accorded by this Court as well, in Ranjit Thakur vs. Union of India (1987) 4 SCC 611. Speaking for the Court, Justice Venkatachaliah (as he then was) emphasizing that "all powers have legal limits" invokes the aforesaid doctrine in the following words:

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

11. To be fair to the High Court, we may mention that it was conscious of the narrowed scope of the doctrine of proportionality as a tool of judicial review and has stated so while giving lucid description of this principle in the impugned judgment. However, we are of the view that it is the application of this principle on the facts of this case where the High Court has committed an error while holding that the punishment was shocking and arbitrary. Moreover, while interfering therewith, the High Court has itself prescribed the punishment which, according to it, "would meet the ends of justice", little realizing that the Court cannot act a disciplinary authority and impose a particular penalty. Even in those cases where it is found that the punishment is disproportionate to the nature of charge, the Court can only refer the matter back to the Disciplinary Authority to take appropriate view by imposing lesser

punishment, rather than directing itself the exact nature of penalty in a given case.

12. Here in the given case, we find that the High Court has totally downplayed the seriousness of misconduct. It was a case where the respondent employee had gone to the place of work in a fully drunken state. Going to the place of work under the influence of alcohol during working hours (it was 11.30 a.m.) would itself be a serious act of misconduct. What compounds the gravity of delinquency is that the place of work is not any commercial establishment but a school i.e. temple of learning. The High Court has glossed over and trivialized the aforesaid aspect by simply stating that the respondent was not a "habitual drunkard" and it is not the case of the management that he used to come to the school in a drunken state "regularly or quite often". Even a singular act of this nature would have serious implications.

13. There is another pertinent aspect also which cannot be lost sight of. The respondent had barged into the office of the Principal. As per the respondent's explanation, he had gone to the market and his friends offered him drinks which he consumed. It was a new experience for him. Therefore, he felt drowsiness immediately after consumption of alcohol and while returning home, he remembered that he had left some articles in the school premises and therefore he had gone to school premises to pick up those left out articles belonging to him. If the respondent was feeling drowsiness as claimed by him where was the occasion for him to go to the school in that condition? Moreover, if he had left some articles in the school premises and had visited the school only to pick up those articles, what prompted him to enter the office of the Principal? There is no explanation of this behavior on the part of the respondent in his reply. It would, obviously, be a case of forcible entry as it is no where pleaded that the Principal asked him to come to his room or he had gone to the room of the Principal with his permission or for any specific purpose.

14. Thus, in our view entering the school premises in working hours i.e. 11.30 a.m. in an inebriated condition and thereafter forcibly entering into the Principal's room would constitute a serious misconduct. Penalty of removal for such a misconduct cannot be treated as disproportionate. It does not seem to be

> unreasonable and does not shock the conscience of the Court. Though it does not appear to be excessive either, but even if it were to be so, merely because the Court feels that penalty should have been lighter than the one imposed, by itself is not a ground to interfere with the discretion of the disciplinary authorities. The penalty should not only be excessive but disproportionate as well, that too the extent that it shocks the conscience of the Court and the Court is forced to find it as totally unreasonable and arbitrary thereby offending the provision of Article 14 of the Constitution. It is stated at the cost of the repetition that discretion lies with the disciplinary/appellate authority to impose a particular penalty keeping in view the nature and gravity of charge. Once, it is found that the penalty is not shockingly disproportionate, merely because in the opinion of the Court lesser punishment could have been more justified, cannot be a reason to interfere with the said penalty."

8. The significance of the afore verdict becomes aroused from the factum, that this Court has concluded above, vis-à-vis, the necessity of maintenance of highest standards of discipline in the educational institution concerned, and, when in judgment (supra), though the delinquent act of the employee therein, became comprised in his coming to school under the influence of liquor, yet, the Hon'ble Apex Court concluded, that the imposition therein, of penalty of removal from service, was not disproportionate, vis-à-vis, the gravity of mis-conduct (supra), given the afore misconduct of the petitioner hence shocking the conscience of the Hon'ble Apex Court. Therefore, unless material on record occurs, and is suggestive, that the errant conduct of the workman, as becomes comprised, in hers provenly absenting herself from duties, and without hers making alternative arrangements for ensuring the cleanliness and hygiene, of the premises of the school concerned, as well as the hygiene, and, cleanliness of toilets, used by the staff and children, hence the application of the principle of proportionality inter-se the afore proven misconduct made by her, is, amenable for her services being terminated or hers being amenable for hers being re-instated in service with seniority and

continuity. The trite fulcrum obviously is comprised, in, trite inter-se drawings of parity inter-se the mis-conduct of the employee in verdict (supra), with the proven mis-conduct of the respondent herein.

9. The afore proven charges acquire conclusivity, as no challenge thereon, has been cast by the respondent. The judgment supra when hence proceeded to not apply the principle of proportionality vis-à-vis an educational institution, even with respect to proven misconduct therein, of the employee therein, arriving in the school concerned rather under the influence of liquor. Therefore, abstention of the respondent from duty without any leave from the school, and, hers not ensuring alternative arrangements being made, for ensuring the hygiene and cleanliness of the premises, of the school concerned, during the afore period, does also shock the conscience of this Court, as the misconduct of the employee in verdict (supra) did shock the conscience of the Hon'ble Apex Court. Therefore the Court concludes that the respondent/employee was not entitled to receive the benefits of any purported dis-proportionality inter-se proven misconduct (supra), vis-à-vis, the penalty of termination of service as became imposed by her by the disciplinary authority. Rather for ensuring that the highest standards of discipline are maintained in educational institutions, the penalty of termination of her service, is valid. Significantly since the afore ground of proven misconduct tantamounts to completest breaches of discipline in the school concerned, and, deserves not being condoned.

10. Consequently, the writ petition is allowed, and, the afore operative portion of the award as becomes impugned before this Court is quashed. All pending applications stand disposed of accordingly.

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

Between:-

M/s WIPRO ENTERPRISES PRIVATE LTD.,
PLOT No.87/A,EPIP, PHASE-I,
JHARMAJRI, P.O. BAROTIWALA,
TEHSIL BADDI, DISTT. SOLAN, H.P.

...PETITIONER

(BY SH. GULSHAN CHAWLA, SH. P.P. CHAUHAN
AND SH. R.L. VERMA, ADVOCATES)

AND

2. THE PRISIDING OFFICER,
INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT,
SHIMLA.

3. WIPRO KARAMCHARI SANGH UNION
/GROUP OF WORKERS, PLOT NO.87/A,
EPIP, PHASE-I, JHARMAJRI,
P.O. BAROTIWALA, TEHSIL BADDI,
DISTT: SOLAN, H.P THROUGH ITS
PRESIDENT/SECRETARY.

....RESPONDENTS.

(SH. V.D. KHIDTTA& SH.R.K.KHIDTTA, ADVOCATES, FOR RESPONDENT NO. 2).

CIVIL WRIT PETITION NO. 4970 OF 2021
RESERVED ON: 10.09.2021
DECIDED ON: 15.09. 2021

Industrial Disputes Act, 1947 – Section 33 - Dispute between the Union and the Company qua transfer of employees from one unit to the other- Jurisdiction of Labour Court to pass interim orders while dealing with a complaint under Section 33A of the Act- Held, Labour Court has jurisdiction to pass interim order and the same cannot be interfered with in exercise of jurisdiction under Article 226 of the Constitution of India- Petition dismissed.

Cases referred:

Automobile Products India Ltd vs. RukmajiBala, AIR 1955 SC 258;
Bidi, Bidi Leaves and Tobacco Merchants' Association Gondia and others vs. State of Bombay (now Maharashtra) and others, AIR 1962 SC 486;
Kumarhatty Co Ltd vs. UshnathPakrashi, AIR 1959 SC 1399;
M/s Lokmat Newspapers Pvt. Ltd. Vs.Shankarprasad, AIR 1999 SC 2423;

Management of Hotel Imperial, New Delhi and others vs. Hotel Workers Union, AIR 1959 SC 1342;
National Textile Corporation Ltd. and Ors. v/s State of Rajasthan and Anr., 1989 LabIC 1722;
Niemla Textile Finishing Mills Ltd., vs. 2nd Punjab Tribunal and others AIR 1957, SC 329;

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

O R D E R

2. By way of instant petition, petitioner has prayed for quashing of order dated 24.8.2021 passed by the Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla (for short 'The Labour Court') in application No. 50 of 2021, titled Wipro KaramchariSangh Union/Group of Workers vs. M/s Wipro Enterprises (P) Ltd.

3. Petitioner is a Company (for short 'The Company') incorporated and registered under the Companies Act, 1956. It has two manufacturing units situated at Plot No. 77 and plot No.87A in the vicinity of Industrial Area, EPIP Phase-I, Village Jharmajri, Tehsil Baddi, District Solan, H.P. Respondent No.2 is a Union of Workers of the Company (for short 'The Union').

4. An industrial dispute arose between the Union and the Company from the decision of the Company to transfer its employees from one unit to the other. The Union raised demand either to maintain status quo till the pendency of long term settlement dated 25.01.2018 or to enter into a fresh long term settlement. The settlement dated 25.01.2018 is valid till31.12.2021.

5. The Union issued demand notice upon the Company on 27.04.2021. Taking cognizance of such notice, the Conciliation Officer issued notice dated 29.04.2021 calling upon the Company to submit its response for

the purpose of conciliation under the Industrial Disputes Act, 1947 (for short 'The Act')

6. The conciliation proceedings were held on 18.6.2021, 13.7.2021 and 23.7.2021. The conciliation failed. On 03.08.2021, the Conciliation Officer submitted failure report under Section 12 (4) of the Act to the Labour Commissioner, Himachal Pradesh.

7. On 29.07.2021, the Company issued transfer order of 126 members of the Union from the Unit in plot No. 87A to plot No. 77 which were to take effect on 01.08.2021. Feeling aggrieved against the action of the Company, the Union filed a complaint under Section 33A of the Act before the Labour Court, Shimla.

8. Alongwith the above noticed complaint, the Union also filed an application under Section 10(4) of the Act seeking interim relief by way of stay on the transfer orders dated 29.7.2021/1.8.2021 issued by the Company, which came to be registered as Application No. 50 of 2021 before the learned LabourCourt. By impugned order, learned Labour Court stayed the operation of the transfer orders dated 29.7.2021/1.8.2021 till the disposal of the main petition.

9. The questions that needs to be answered by this Court, as raised in the instant petition, can be summed up as under:

(a) *Whether the learned Labour Court holds jurisdiction to entertain complaint under Section 33A when the violation of provisions of Section 33 of the Act had taken place during the pendency of the industrial dispute before the Conciliation Officer?*

(b) Whether the learned Labour Court holds jurisdiction to pass interim orders while dealing with a complaint under Section 33A of the Act?

10. The contention of the petitioner is that the transfer orders dated 29.7.2021 were to have effect on 1.8.2021. On either of these dates, the industrial dispute was not pending before any authority under the Act. As per petitioner, the proceedings of Conciliation Officer in respect of the industrial

dispute raised by the Union had come to an end on 23.7.2021, where-after no proceedings were held. The failure report was submitted by the Conciliation Officer on 3.8.2021 to the Labour Commissioner. Respondent No. 2 has contested this claim of the petitioner by referring to the provisions of Sections 12 and 20 of the Act, which reads as under:

"***12. Duties of conciliation officers.-***

(1) *Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall hold conciliation proceedings in the prescribed manner.*

(2) *The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.*

(3) *If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government [1] or an officer authorised in this behalf by the appropriate Government] together with a memorandum of the settlement signed by the parties to the dispute.*

(4) *If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.*

(5) *If, on a consideration of the report referred to in sub- section (4), the appropriate Government is satisfied that there is a case for reference to a Board*

[Labour Court, Tribunal or National Tribunal] it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

(6) *A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government:*

_____ [*Provided that, [subject to the approval of the conciliation officer,] the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.]"*

"***20. Commencement and conclusion of proceedings.***-

(1) *A conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike or lock- out under section 22 is received by the conciliation officer or on the date of the order referring the dispute to a Board, as the case may be.*

(2) *A conciliation proceeding shall be deemed to have concluded--*

(a) *where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute;*

(b) *where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate Government or when the report of the Board is published under section 17, as the case may be; or*

(c) *when a reference is made to a Court, [Labour Court, Tribunal or National Tribunal] under section 10 during the pendency of conciliation proceedings.*

(3) *Proceedings [before an arbitrator under section 10A or before a Labour Court, Tribunal or National Tribunal] shall be deemed to have commenced on the date of the [reference of the dispute for arbitration or adjudication, as the case may be] and such proceedings shall be deemed to have concluded [on the date on which the award becomes enforceable under section 17A]."*

11. The clear mandate of law is evident from the above noted provisions of the Act. The proceedings before the Conciliation Officer comes to an end in case of failed conciliation, when the failure report prepared by such authority under Section 12 (4) of the Act, is received by the Labour Commissioner.

Reference in this behalf can also be made to the judgment passed by the Hon'ble Supreme Court in **M/s Lokmat Newspapers Pvt. Ltd. Vs.Shankarprasad, AIR 1999 SC 2423**, in which it has been held as under:

"24. In order to answer these questions, it is necessary to note sub-section (4) of Section 12 of the I. D. Act which reads as under :

"(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.."

A mere look at this provision shows that if the Conciliation Officer finds during conciliation proceedings that no settlement is arrived at between the disputing parties, then after closing the investigation he has, as soon as practicable, to send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and has also to mention all other details as required to be mentioned in the report under Section 12 (4) of the I. D. Act.

25. The aforesaid statutory requirements leave no room for doubt that after closing the investigation and after having arrived at the conclusion that no settlement is possible between the parties, the Conciliation Officer has to spend some more time before submitting his detailed written report about failure of conciliation for information and necessary action by the State Government. In the very nature of things, therefore, such requirement will take at least a couple of days, if not more, for the conciliator after closing the investigation to enable him to send an appropriate report to the State Government. It is, therefore, obvious that on 22-6-1982 when by 4.35 p. m. the Conciliation Officer declared that settlement was not possible between the parties and he closed the investigation, neither his statutory function did not come to an end nor did he become functus officio. His jurisdiction had to continue till he submitted his report as per S. 12 (4) to the appropriate Government. Even such preparation of the report and sending of the same from his end to the appropriate Government would obviously have taken at least a few days after 22-6-1982. It must, therefore, be held that the conciliator remained in charge of the conciliation proceedings at least for a couple of days after 22-6-1982. It is, therefore, difficult to appreciate how within half an hour after the closing of investigation by the

conciliator and before his getting even a breathing time to prepare his detailed written report about failure of conciliation to be sent to the Government as per Section 12 (4) , the appellant could persuade itself to presume that conciliation proceedings had ended and, therefore, it was not required to follow the procedure of S. 33 (1) and straightway could pass the impugned order of retrenchment within 25 minutes of the closing of investigation by the conciliator on the very same day. It is difficult to appreciate the reasoning of the Labour Court that after the closer of investigation the conciliator became functus officio and the management could not have approached him for express written permission to pass the impugned order. It is easy to visualise that even on the same day i. e. on 22-6-1982 or even on the next day, before the conciliator had time even to start writing his report, such an express permission could have been asked for by the appellant as the conciliator by then could not be said to have washed his hand off the conciliation proceedings. He remained very much seized of these proceedings till at least the time the report left his end apart from the further question whether conciliation proceedings could be said to have continued till the report reached the State Government. Thus, on the express language of S. 12 (4) the conclusion is inevitable that closer of investigation by 4.35 p. m. on 22-6-1982 did not amount to termination of conciliation proceedings by that very time. The argument of learned counsel for the appellant was that closer of investigation automatically amounted to termination of conciliation proceedings. This argument proceeds on a wrong premise that closer of investigation by the conciliator is the same as closer of conciliation proceedings. The legislature while enacting S. 12 (4) has deliberately not used the words 'closer of conciliation' but, on the contrary, provided that after closer of investigation something more was required to be done by the conciliator as laid down under S. 12 (4) before he can be said to have done away with conciliation proceedings earlier initiated by him. On this conclusion alone the decision rendered by the Division Bench of the High Court that the impugned order of termination dated 22-6-1982 was issued by the appellant without following the procedure of S. 33 (1) of the I. D. Act has to be sustained."

12. Section 33 of the Act, reads as under:

"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings. –

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to themimmediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute[or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman] –
(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b)for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute--

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to himimmediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

***Explanation**.--For the purposes of this sub-section, a "protected workman", in relation to an establishment, means a workman who, being [a member of theexecutive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.*

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per cent. of the total number of workmen employed thereinsubject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, an arbitrator, a labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:]

[Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit: Provided further that no

proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.]"

13. Section 33A of the Act, reads as under:

***"33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings.**- Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal], any employee aggrieved by such contravention may, make acomplaint in writing[in the prescribed manner,--*

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and
(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.]

14. Section 33A isdesigned to provide an instant remedy to the workers aggrieved by the contravention of Section 33 of the Act. The complaint of such contravention can be made not only to the adjudicatory authorities, but to the conciliatory authorities also. Where the complaint is to a conciliatory authority, it will take into account such complaint in the course of mediating or promoting the settlement of the dispute. But where the complaint is made to an adjudicatory authority i.e. to an arbitrator, labour court, tribunal or national tribunal, it will adjudicate upon the dispute as if it is a dispute referred to or pending before it.

15. The plain reading of Section 33A suggests that in case of violation of Section 33 of the Act and during the proceedings before the Conciliation Officer, the complaint will be filed before such authority and in case of

violation during the pendency of industrial dispute before any adjudicatory authority, the complaint shall lie to such authority. This interpretation, however, renders the mandate of Section 33A otiose. If we take the example of the facts involved in the present case, the failure report was submitted by the Conciliation Officer on 3.8.2021, whereas the last proceedings held by him were on 23.7.2021. Once the conciliation had failed, no proceedings were pending before him after the failure report was received by the Labour Commissioner. Now, if the "Union" is asked to file its complaint under Section 33A of the Act before the Conciliation Officer, it shall be meaningless. Conciliation has already failed and as per Section 33A, Conciliation Officer can foster only mediation or conciliation. The workman in such event shall be rendered remedy less.

16. The use of the word 'such' in Section 33A of the Act thus does not imply that at the time when the complaint is preferred by the aggrieved workman, the main dispute must be pending before the authority to which the complaint is preferred; it clearly refers to the dispute which was referred to its adjudication and it has no reference to the pendency of the main dispute.In other words, it is sufficient that at the time of the contravention of Section 33, the main dispute was pending before the authority under the Act and it is not necessary that the dispute must continue to be pending at the time of making the complaint.

17. The first question is accordingly answered, the learned Labour Court, Shimla has rightly exercised the jurisdiction to entertain the complaint under Section 33A of the Act in the facts of the instant case.

18. As regards, the second question, it will be gainful to observe that the rationale behind Section 33 and Section 33A of the Act is to provide immediate protection to the workman. On receipt of complaint under Section 33A, the adjudicatory authority under the Act decides the complaint in the same manner as reference made to it under Section 10 of the Act. The workman is

saved from procedural prolongation under the Act for making reference to appropriate Government, which very often than not takes considerable long period. The connotation of the term 'shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act' clearly indicate the jurisdiction of the authority under Section 33A is the same as the jurisdiction of the authorities under the Act relating to the adjudication of an industrial dispute on a reference being made to them under Section 10 of the Act read with Section 11A.

19. In other words an adjudicator acting under this section would be dealing with the matter as if the question has been referred to it under the Act, and will thus have a very wide jurisdiction and it can deal with all aspects and modulate the reliefs that can be granted under Sec. 11A.

20. In ***Automobile Products India Ltd vs. RukmajiBala, AIR 1955 SC 258***,the Hon'ble Apex Court has observed that the Scheme of the Section lays down the authority, to which the complaint is to be made in respect of issues arising due to contravention of Section 33 and the merits of the Act or order of the employer. Simply put the jurisdiction of the authority is not only to merely adjudicate upon the matter and decree the relief but to also to indulge into the merits of the case.

21. In the case of ***Kumarhatty Co Ltd vs. UshnathPakrashi, AIR 1959 SC 1399***, the Hon'ble Supreme Court has observed that the complaint under Section 33A of the Act is to be placed on an equal threshold as compared to a complaint made under Section 10 of the Act and the adjudicatory body has every right vested in it to deal with the complaint under Section 33A by following the similar procedure as it would have done had the complaint been filed under Section 10 of the Act. Therefore, it can be safely assumed that the adjudicatory body is vested with the power to decree the relief as may be permissible in the light of Section 11A.

22. The words *"and the provisions of this Act shall apply accordingly'* as mentioned in Section 33A signify that the adjudicating body has to submit its award to the appropriate *government*. The awards after being published under Section 17A will have the same effect and force as awards made on a reference under Section 10 of the Act. Thus, it is abundantly clear that the nature and scope of the proceedings in complaint under Section 33A of the Act are not in any manner inferior to the proceedings initiated under Section 10 of the Act.

23. In ***Management of Hotel Imperial, New Delhi and others vs. Hotel Workers Union, AIR 1959 SC 1342***, a three Judges Bench of the Hon'ble Supreme Court has held as under:

"20. This, however, does not conclude the matter so far as the grant of interim relief in these cases is concerned. Even though there may be an implied term giving power to the employer to suspend a workman in the circumstances mentioned above, it would not affect the power of the tribunal to grant interim relief for such a power of suspension in the employer would not, on the principles already referred to above, take away the power of the tribunal to grant interim relief if such power exists under the Act. The existence of such an implied term cannot bar the tribunal from granting interim relief if it has the power to do so under the Act. This brings us to the second point, which has been canvassed in these appeals.

21. After a dispute is referred to the tribunal under s. 10 *of the Act, it is enjoined on it by* s. 15 *to bold its proceeding expeditiously and on the conclusion thereof submit its award to the appropriate government. An "award" is defined in S.*2(b) *of the Act as meaning "an interim or final determination by an Industrial Tribunal of any industrial dispute or of any question relating thereto." Where an order referring an industrial dispute has been made specifying the points of dispute for adjudication, the tribunal has to confine its adjudication to those points and matters incidental thereto; (s. 10(4)). It is urged on behalf of the appellants that the tribunal in these cases had to confine itself to adjudicating on the points referred and that as the question of interim relief was not referred to it, it could not adjudicate upon that. We are of opinion that there is no force in this argument, in view of the words "incidental thereto" appearing in* s. 10(4). *There can be no doubt that if, for example, question of reinstatement and/or compensation is referred to a tribunal for adjudication, the question of granting interim relief till the decision of the tribunal with respect to the same matter would be a matter incidental thereto under* s. 10(4) *and need not be specifically*

referred in terms to the tribunal. Thus interim relief where it is admissible can be granted as a matter incidental to the main question referred to the tribunal without being itself referred in express terms."

24. Though the dispute in the case of ***Imperial Hotel*** was referred for adjudication under Section 10 of the Act, but the principle laid down in the said judgment can be gainfully employed in the facts of the present case in the light of the discussion as the powers of adjudicatory authorities to deal with the complaints under Section 33A are analogous to the powers of such authorities to deal with reference under Section 10 of the Act.

25. In ***Bidi, Bidi Leaves and Tobacco Merchants' Association Gondia and others vs. State of Bombay (now Maharashtra) and others, AIR 1962 SC 486***, the Constitutional Bench of the Hon'ble Supreme Court has held as under:

"15. It is well settled that industrial adjudication under the provisions of the Industrial Disputes Act*, 1947 is given wide powers and jurisdiction to make appropriate awards in determining in industrial disputes brought before it. An award made in an industrial adjudication may impose new obligations on the employer in the interest of social justice and with a view to secure peace and harmony between the employer and his workmen and full co-operation between them. Such an award may even alter the terms of employment if it is thought fit and necessary to do so. In deciding industrial disputes the jurisdiction of the tribunal is not confined to the administration of justice in accordance with the law of contract. Mukherjee, J., as he then was, has observed in* The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi *the tribunal "can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or given effect to the contractual rights and obligations between them which it considers essential for keeping industrial peace." since the decision of the Federal Court in* Western India Automobile Association v. Industrial Tribunal, Bombay*, it has been repeatedly held that the jurisdiction of industrial tribunals if much wider and can be reasonably exercised in deciding industrial disputes with the object of keeping industrial peace and progress (Vide:* Rohtas Industries, Ltd., v. Brijnandan Pandey*;* The Patna Electric Supply Co. Ltd., Patna v. The Patna Electric Supply Workers Union*. Indeed, during the last ten years and more industrial adjudication in this country has made so much progress in determining industrial disputes arising between industrial of different kind and their employee that the jurisdiction and*

authority of industrial tribunals to deal with such disputes with the object of ensuring social justice is no longer seriously disputed."

26. In ***Niemla Textile Finishing Mills Ltd., vs. 2nd Punjab Tribunal and others AIR 1957, SC 329***, the Constitutional Bench of the Hon'ble Supreme Court has held as under:

"23. So far as delegated legislation is concerned, abstract definitions of the difference between the judicial and the legislative functions have been offered (See the distinction drawn by Mr. Justice Field in the SinkingFund case, but they are of little use when applied to a situation of complicated facts. The function of a Court is to decide cases and leading jurists recognize that in the decision of many cases a Court must fill interstices in legislation. A legislator cannot anticipate every possible legal problem; neither can he do justice in cases after they had arisen. This inherent limitation in the legislative process makes it essential that there must be some elasticity in the judicial process. Even the ordinary courts of law apply the principles of justice, equity and good conscience in many cases; e. g., cages in tort and other cases where the law is not codified or does not in terms cover the problem under consideration. The Industrial Courts are to adjudicate on the disputes between employers and their workmen etc., and in the course of such adjudication they must determine the "rights" and "wrongs" of the claim,% made, and in so doing they are undoubtedly free to apply the principles of justice, equity and good conscience, keeping in view the further principle that their jurisdiction is invoked not for the enforcement of mere contractual rights but for preventing labour practices regarded as unfair and for restoring industrial peace on the basis of collective bargaining. The process does not cease to be judicial by reason of that elasticity or by reason of the application of the principles of justice, equity and good conscience."

27. Reference can be made to a Division Bench judgment passed by the High Court of Rajasthan at Jodhpur in ***National Textile Corporation Ltd. and Ors. v/s State of Rajasthan and Anr., 1989 LabIC 1722***, in which it has been held as under:

"24. *Thus we have come to the conclusion that an Industrial Tribunal is competent to grant interim relief Under* Section 10(4) *of the Act, with respect to matters incidental to the points of dispute for adjudication. And that the Tribunal is competent to grant ad hoc increase in matter of industrial dispute with regard to demand for increase in wages, for the adjudication of which reference has been made to it by the State Government. The next question is under what circumstances an interim relief may be granted, it may be stated that granting of an interim relief is purely within the discretion of the Tribunal*

and this discretion is to be exercised with reason and sound judicial principles. We may adopt the same principles which govern the exercise of discretion by the Civil Court while granting temporary injunction. The principles may be stated as under:

Firstly, that there is prima-facie case, meaning there by that there is serious question to be tried and an existence of right;

Secondly, that the Tribunal's interference is necessary to protect the party from that species of injury which is regarded by the Courts irreparable and;

Thirdly, the balance of convenience that is the Tribunal should weigh the amount of substantial mischief that is likely to be done to the party claiming interim relief, if the same is refused and compare it with that which is likely to be caused to the other side if the interim relief is granted."

28. From the above noticed exposition of law, it is clear that there cannot be an absolute embargo on the power of the adjudicatory authorities under the Act to pass interim order in appropriate cases while dealing with the complaint under Section 33A of the Act. It goes without saying that the relief which is finally claimed in complaint under Section 33A cannot be granted by way of interim order. However, in order to maintain equities and to protect the interest of justice, the adjudicatory authorities can pass such interim orders as may be deemed necessary to maintain the balance.

29. In the instant case, the complaint preferred by the Union before the learned Labour Court refers to its grievance with respect to contemplated changes in conditions of service of workmen by the Company under the garb of the transfer of workmen from one unit to another, that too, before the expiry of long term settlement dated 21.1.2018. It has been alleged therein that the purpose of transfer of the workmen by the Company is to victimize them and to frustrate their rightful claims. The transfer of 126 workers by the Company vide orders dated 29.7.2021 effective from 1.8.2021 from Unit No.II (plot No. 87A) to unitNo.I (plot No.77), during the pendency of the dispute before the Labour Officer-cum-Conciliation Officer has been assailed with the prayer to allow such workmen to work at the same places where they were working

before issuance of impugned orders of transfer. A further prayer has been made seeking direction to the Company to pay all service benefits including full salary w.e.f. 1.8.2021.

30. By the nature of dispute brought before the learned Labour Court by way of above noticed complaint under Section 33A, it requires determination not only on the legality of transfer orders, but also on the merits of the claims of the Union. As noticed above, the basic dispute raised by the Union is with respect to the legality of the action of the Company, whereby the conditions of service of the workmen were alleged to be changed for ulterior purposes.

31. In the context of the nature of issues required to be decided by the learned Labour Court in complaint under Section 33A of the Act, it cannot be said that the impugned interim orders staying the transfer of workmen during pendency of complaint, suffers from any illegality or perversity. Since the learned Labour Court had jurisdiction to pass interim order, the same cannot be interfered with in exercise of jurisdiction under Article 226 of the Constitution of India. The second question is answered accordingly and the power of learned Labour Court to pass interim order in appropriate case is upheld.

32. Petitioner has further raised contention with respect to the merits of the dispute pending before the learned Labour Court. We are of the considered view that in exercise of jurisdiction under Article 226 of the Constitution of India, this Court will not deal with the questions of facts which are seriously disputed by the parties and especially at such stage where the learned Labour Court is still seized of the matter and has to decide the same on merits in accordance with law.

33. Before parting, we may observe that in the given facts and circumstances of the case and also on the basis of the material available before the learned Labour Court, the complaint under Section 33A of the Act could have been decided finally on merits instead of passing an interim orders.

Be that as it may, we don't intend to interfere with the impugned order dated 24.8.2021 passed by the learned Labour Court, Shimla in Application No. 50 of 2021 for the reasons detailed above.

34. In the light of above discussion, we do not find any merit in the instant petition and the same is dismissed, so also the pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, A.C.J. AND HON'BLE MR. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

1. PRASAR BHARTI BROADCASTING
CORPORATION OF INDIA THROUGH
THE CHIEF MANAGING DIRECTOR,
DOORDARSHAN BHAWAN SANSAD
MARG, NEW DELHI

2. THE DIRECTOR GENERAL,
BROADCASTING CORPORATION
OF INDIA, DOORDARSHAN KENDRA,
NEW DELHI

3. THE CHIEF ENGINEER, NORTH ZONE,
AKASHVANI AND DOORDARSHAN,
JAMNANAGAR HOUSE,
SHAHJAHAN ROAD,
NEW DELHI-110011

4. STATION DIRECTOR, PRASAR BHARTI,
BROADCASTING CORPORATION
OF INDIA, DOORDARSHAN KENDRA,
SHIMLA

……PETITIONERS

(BY SH. BALRAM SHARMA, ASSISTANT

SOLICITOR GENERAL OF INDIA)

AND

JIWAN KUMAR (SENIOR TECHNICIAN)
S/O SHRI GURDEV RAJ,
R/O HOUSE NO.157/1,
SUS NAGAR, JALANDHAR

……RESPONDENT

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

2. CIVIL WRIT PETITION No. 2768 of 2015

Between:-

JIWAN KUMAR (SENIOR TECHNICIAN)
S/O SHRI GURDEV RAJ,
R/O HOUSE NO.157/1,
SUS NAGAR, JALANDHAR, PB

……PETITIONER

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

AND

1. PRASAR BHARTI BROADCASTING
CORPORATION OF INDIA THROUGH
CHIEF MANAGING DIRECTOR,
DOORDARSHAN BHAWAN, SANSAR
MARG, NEW DELHI

2. THE DIRECTOR GENERAL,
BROADCASTING CORPORATION
OF INDIA, DOORDARSHAN KENDRA,
NEW DELHI

3. THE CHIEF ENGINEER, NORTH ZONE,
AKASHWANI AND DOORDARSHAN,
JAMNANAGAR HOUSE,
SHAHJAHAN ROAD,
NEW DELHI

4. STATION DIRECTOR, PRASAR BHARTI,
BROADCASTING CORPORATION OF
INDIA, DOORDARSHAN KENDRA,
SHIMLA

.....RESPONDENTS

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

CIVIL WRIT PETITION No. 1006 of 2015 ALONGWITH
CIVIL WRIT PETITION No. 2768 of 2015
RESERVED ON: 25.08.2021
DELIVERED ON : 09.09.2021

Constitution of India, 1950 - Article 226 - Writ petitions out of the judgment passed by the Ld. Central Administrative Tribunal, Chandigarh Bench- CCS (Pension) Rules, 1972- Resignation- Forfeiture of past service- The applicant remained absent from duty for eight years before tendering resignation- Whether resignation amounted to forfeiture of his past service- Held- Neither any pension nor pro-rata pension can be granted to the applicant.

Cases referred:

Asger Ibrahim Amin Versus Life Insurance Corporation of India, (2016) 13 SCC 797;
BSES Yamuna Power Limited Versus Ghanshyam Chand Sharma and another, (2020) 3 SCC 346;
LIC v. Shree Lal Meena, (2019) 4 SCC 479;
Sheelkumar Jain Versus New India Assurance Company Limited and others, (2011) 12 SCC 197;

These petitions coming on for hearing this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *delivered the following:*

O R D E R

Both these writ petitions arise out of judgment dated 14.8.2014, passed by the learned Central Administrative Tribunal, Chandigarh Bench in OA No.904/PB/2013, titled Jiwan Kumar Versus Prasar Bharti Broadcasting Corporation of India and others. Being interconnected, these are taken up together for decision.

CWP No.1006 of 2015

Whether learned Tribunal was justified in not considering the impact of Rule 26 of the CCS (Pension) Rules, 1972 to the facts of the case and whether learned Tribunal erred in law in granting benefit of past service for releasing pro-rata pension in favour of the original applicant, are the points falling for consideration in the instant petition.

2. Facts:-

2(i). The applicant was appointed as Technician in the year 1986 in Doordarshan Relay Centre, Pathankot. He was promoted as Senior Technician on 12.01.1990.

2(ii). The applicant proceeded on leave in September, 1999 and sought extension of the same from time to time. He never joined his duties thereafter and remained unauthorizedly absent from duties.

2(iii). On 27.03.2008, the applicant submitted his resignation to the respondents. His resignation letter reads as under:-

> *"Subject: Three month's notice to resign from the post of Sr. Technician.*
> *Sir,*
> *Respectfully, it is submitted to your kind notice that I have made up my mind to resign from government service due to the following compelling domestic grounds.*

1. That I originally belong to Jalandhar District (Punjab).
2. That due to some homely circumstances, my domestic life has been badly disturbed and due to this reason, I was away from my official duties and could not join my duties. This has badly affected my financial position and mental peace.

In view of the circumstances stated above, it is requested that this application may kindly be treated as my "NOTICE PERIOD OF THREE MONTHS" w.e.f. dated 1.4.08 to 1.7.08 be accepted and I may be relieved of my duties at D.DK. Shimla, accordingly.
3. Through this, I thank you and all my seniors for all the co-operation and encouragement extended to me during the short span of my service in the Department.

Thanking you,

Yours faithfully

Dated March 27, 2008

Sd/-
(JIWAN KUMAR)
SR. TECH
DDK, SHIMLA"

2(iv). The respondents accepted applicant's resignation on 31.10.2008. The office order accepting his resignation, reads as under:-

"The resignation of Sh. Jiwan Kumar, Sr. Technician, Doordarshan Kendra, Shimla is accepted on his request w.e.f. 14/10/2008."

As per endorsement on it, a copy of the communication was sent to the applicant. Vide another office order issued on 31.10.2008, applicant's unauthorized absence from duties for the period 01.07.2000 to 14.10.2008 was ordered to be treated as 'Dies-non'. The absence period was not to be counted as duty for any purpose. The office order is extracted hereinafter:-

"Sh. Jiwan Kumar, Sr. Technician on his transfer from Doordarshan Kendra, Jalandhar to Doordarshan Kendra, Shimla remained unauthorisedly absent from duty till 14.10.2008 after relieving from Doordarshan Kendra Jalandhar on 30.06.2000 (AN). His absence from 01.07.2000 to 14.10.2008 was treated as "Dies-non". The absence period as shown above will not be counted as duty for any purpose."

2(v). On 09.07.2012, the applicant issued a legal notice to the respondents that he had resigned on 27.03.2008 due to domestic compulsions and now wanted to continue in service by withdrawing the resignation. The respondents responded to the legal notice on 17.09.2012. It was stated that applicant's resignation was accepted on 14.10.2008. Intimation regarding this had been sent to him. Therefore, applicant's prayer cannot be accepted.

2(vi). The applicant thereafter filed original application before the learned Central Administrative Tribunal (in short 'Tribunal'), seeking quashing of order dated 31.10.2008 with an alternative prayer that even if his case was to be taken as that of resignation, then also the resignation will not entail forfeiture of applicant's past service.

2(vii). Learned Tribunal allowed the original application with a direction to the respondents to grant pro-rata pension to the applicant under Rule 49(2)(b) of CCS (Pension) Rules, 1972. The operative part of the judgment reads as under:-

> *"10. Having perused the material on record, we observe that the applicant had been away from his duty during the period 1.7.2000 to 14.10.2008. In fact, he was absent from the very date when he was relieved from the Doordarshan, Jalandhar, on account of being posted out from there. Respondents appear to have taken a very lenient view in the matter as no action was taken regarding the absence of employee till he submitted his request for voluntary resignation on 27.3.2008. Be that as it may, the fact remains that the applicant had served for over 14 years till he absented from duty w.e.f. 1.7.2000 to 14.10.2008 which period has been treated as "Dies-non" as per order dated 31.10.2008 (Annexure A-5). Hence, keeping in view judicial pronouncements referred above, the applicant may be treated as having voluntarily retired from service. The applicant is thereby entitled to pro-rata pension as per Rule 49(2)(b) of CCS (Pension) Rules, 1972 and the same may be released to him within a period of three months from the date of receipt of a certified copy of this order."*

Aggrieved against the above judgment passed by the learned Tribunal, instant writ petition has been preferred by the original respondents (employer).

3. Contentions:-

Learned Assistant Solicitor General of India for the original respondents (employer) and present petitioners contends that once an employee resigns from a post, then Rule 26 of CCS (Pension) Rules, 1972 (in short 'Rules') gets attracted. Under Rule 26(1) of the Rules, in case of resignation from a service, unless it is allowed to be withdrawn in public interest by the Appointing Authority, the past service gets forfeited.

Learned ASGI further submitted that the applicant had resigned on 27.03.2008. His resignation was accepted on 31.10.2008. Rule 26(1) of the Rules comes into play. In terms of this Rule, past service of the applicant is liable to be forfeited. The judgment passed by the learned Tribunal, allowing the benefit of past service to the applicant for the purpose of granting him pro-rata pension is, therefore, not in consonance with the Rules.

Learned Senior Counsel for the applicant (respondent herein) argued that the applicant cannot be treated to have resigned on 27.03.2008 as the acceptance of his resignation was never conveyed to him. Placing reliance upon certain judgments, it was also contended that past service of the applicant cannot be forfeited. Learned Senior Counsel argued that the applicant was entitled to pro-rata pension on the basis of 14 years of his past service.

4. Observations:-

We have considered the rival submissions of learned counsel for the parties and gone through the case file.

4(i). There is no dispute that the applicant remained unauthorizedly absent from duties w.e.f. 01.07.2000 to 14.10.2008. It is very astonishing that no

action, whatsoever, was taken by his employer (present petitioners) for eight years for such a derelict and indisciplined act of the applicant.

4(ii). After remaining on blissful unauthorized absence from duties for a long period of eight years, the applicant resurfaced in the year 2008. On 27.03.2008, he submitted his resignation from service. This resignation was accepted on 31.10.2008. The acceptance of resignation, as per the endorsement in the communication, was conveyed to him. In light of these facts, there is no escape from the conclusion that Rule 26(1) of the CCS (Pension) Rules had come into play. The rule reads as under:-

> *"(1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the Appointing Authority, entails forfeiture of past service."*

The past service of the applicant is, therefore, liable to be forfeited. Neither any pension nor pro-rata pension can be granted to the applicant in these facts. Mandatory provision of Rule 26(1) of the Rules cannot be given a go bye. In the impugned judgment passed by learned Tribunal, there is no reference to Rule 26 of the CCS (Pension) Rules.

4(iii). The contention raised by learned Senior Counsel for the applicant that the acceptance of resignation was not conveyed to the applicant by the Department is misplaced. The office order dated 31.10.2008, accepting applicant's resignation, as per the endorsement on it, was also sent to the applicant. It is not the case of the applicant that he did not remain on unauthorized absence from duties w.e.f. 01.07.2000 to 14.10.2008. It is admitted case of the applicant that he never joined his duties after September, 1999. It is not the case of the applicant that he did not tender resignation to his employer on 27.03.2008. It is also not the case of the applicant that he desired to resign from the services on expiry of three months from 27.03.2008. It cannot be believed that acceptance of applicant's resignation by the Department on 31.10.2008 had not been conveyed to him. It is also the

pleaded case of the applicant that in the year 2012, he had prayed for withdrawal of his resignation. It is thus established on record that the applicant had resigned on 27.03.2008 and was conveyed acceptance of his resignation by the Department on 31.10.2008.

4(iv)(a). Learned Senior Counsel for the applicant in support of his prayer for counting the benefit of applicant's past service in order to release pro-rata pension to him, also placed reliance upon the judgment of Hon'ble Apex Court in ***Sheelkumar Jain Versus New India Assurance Company Limited and others, (2011) 12 SCC 197.*** The question for consideration before the Hon'ble Apex Court as formulated in paragraph 16 of the judgment was:-

"In these two decisions, Sanwar Mal [(2004) 4 SCC 412] and Cecil Dennis Solomon [(2004) 9 SCC 461], the Courts were not called upon to decide whether the termination of services of the employee was by way of resignation or voluntary retirement. In this case, on the other hand, we are called upon to decide the issue whether the termination of the services of the appellant in 1991 amounted to resignation or voluntary retirement."

In the instant case, we are not called upon to decide as to whether the communication dated 27.03.2008, sent by the applicant, was his resignation or voluntary retirement. Undeniably, it was a case of resignation. In terms of his letter dated 27.03.2008, the applicant wanted to resign from service and accordingly submitted his resignation. His resignation was accepted on 31.10.2008. The period of his unauthorized absence from duties w.e.f. 01.07.2000 to 14.10.2008 was ordered to be treated as 'Dies-non'. This period was not to be counted as duty for any purpose. The applicant was well aware that he had resigned from service on 27.03.2008. In the year 2012, he had requested the employer to permit him to withdraw his resignation. Thus, to contend that the applicant had voluntarily retired and not resigned, is a plea de-hors the pleaded case of the applicant. This plea even otherwise does not

reconcile to the factual position of the case and the orders passed by the employer. The judgment cited by learned Senior Counsel is not applicable to the facts of the case.

4(iv)(b). Second judgment relied upon by learned Senior Counsel, rendered in ***Asger Ibrahim Amin Versus Life Insurance Corporation of India, (2016) 13 SCC 797***, also does not advance the applicant's case. Learned counsel has referred to following para of the judgment:-

> *"17. The Appellant ought not to be deprived of pension benefits merely because he styled his termination of services as "resignation" or because there was no provision to retire voluntarily at that time. The commendable objective of the Pension Rules is to extend benefits to a class of people to tide over the crisis and vicissitudes of old age, and if there are some inconsistencies between the statutory provisions and the avowed objective of the statute so as to discriminate between the beneficiaries within the class, the end of justice obligates us to palliate the differences between the two and reconcile them as far as possible. We would be failing in our duty, if we go by the letter and not by the laudatory spirit of statutory provisions and the fundamental rights guaranteed under Article 14 of the Constitution of India."*

The judgment was rendered in the facts of the case, where the Hon'ble Apex Court held that the appellant (therein) ought not to be deprived of pensionary benefits merely because he styled his termination of services as resignation or because there was no provision to retire voluntarily at that time. The facts in the instant case are different. The applicant had remained on unauthorized absence from duties w.e.f. the year 2000 onwards. Unfortunately, the Department did not take any action for his indiscipline. After about eight years, i.e. on 27.03.2008, the applicant chose to resign from service. We have already held earlier that it was a case of resignation and not that of voluntary retirement. The applicant was also all along aware that he had resigned from service and not voluntarily retired. It is not the case of the

applicant that he was eligible for voluntary retirement or that he had applied for voluntary retirement or he was allowed to retire voluntarily from service.

It is also pertinent to notice that the decision in Asger Ibrahim Amin's case (supra), relied upon by learned Senior Counsel, was questioned in ***LIC v. Shree Lal Meena, (2019) 4 SCC 479***. In Shree Lal Meena's case, larger bench of the Hon'ble Apex Court was called upon to determine whether respondent's resignation amounted to forfeiture of his past service, disentitling him from pension or was in fact voluntary retirement. While referring the matter to larger bench, the Hon'ble Apex Court in LIC v. Shree Lal Meena, (2015) 17 SCC 43, observed that the decision in Asger Ibrahim Amin Versus LIC obliterated the distinction between resignation and retirement. The Court noted that there is a "real difference between resignation and retirement". They cannot be used interchangeably, and the court cannot substitute one for the other merely because the employee has completed the requisite number of years to qualify for voluntary retirement.

The larger bench of the Hon'ble Apex Court in ***LIC v. Shree Lal Meena, (2019) 4 SCC 479***, elucidated the distinction between resignation and voluntary retirement in following manner:-

> *"22. … [quoting RBI v. Cecil Dennis Solomon, SCC pp. 467-68, para 10]*
>
> > *'10. In service jurisprudence, the expressions "superannuation", "voluntary retirement", "compulsory retirement" and "resignation" convey different connotations. Voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service. Though both involve voluntary acts, they operate differently. One of the basic distinctions is that in case of resignation it can be tendered at any time, but in the case of voluntary retirement, it can only be sought for after rendering the prescribed period of qualifying service. Another fundamental distinction is that in case of the former, normally retiral benefits are denied but in case of the latter, the same is not denied. In case of the former, permission*

or notice is not mandated, while in the case of the latter, permission of the employer concerned is a requisite condition. Though resignation is a bilateral concept, and becomes effective on acceptance by the competent authority, yet the general rule can be displaced by express provisions to the contrary."

The above observations highlighted the material distinction between the concept of resignation and voluntary retirement. The Court also observed that while pension schemes do form beneficial legislation in a delegated form, a beneficial construction cannot run contrary to the express terms of the provisions:

"26. There are some observations on the principles of public sectors being model employers and provisions of pension being beneficial legislations. We may, however, note that as per what we have opined aforesaid, the issue cannot be dealt with on a charity principle. When the legislature, in its wisdom, brings forth certain beneficial provisions in the form of Pension Regulations from a particular date and on particular terms and conditions, aspects which are excluded cannot be included in it by implication."

All the above judgments were noticed by the Hon'ble Apex Court in ***BSES Yamuna Power Limited Versus Ghanshyam Chand Sharma and another, (2020) 3 SCC 346,*** wherein it was observed that the decision to resign is materially distinct from a decision to seek voluntary retirement. The decision to resign results in the legal consequences that flow from a resignation under the applicable provisions. These consequences are distinct from the consequences flowing from voluntary retirement and the two may not be substituted for each other based on the length of an employee's tenure. Rule 26 states that upon resignation, an employee forfeits past service. Relevant paragraphs of the judgment read as under:-

"13. The view in Asger Ibrahim Amin was disapproved and the court held that the provisions providing for voluntary retirement would not apply retrospectively by implication. In this view, where an employee has resigned from service, there arises no question of whether he has in fact "voluntarily retired" or "resigned". The decision

to resign is materially distinct from a decision to seek voluntary retirement. The decision to resign results in the legal consequences that flow from a resignation under the applicable provisions. These consequences are distinct from the consequences flowing from voluntary retirement and the two may not be substituted for each other based on the length of an employee's tenure.

14. In the present case, the first respondent resigned on 7-7-1990 with effect from 10-7-1990. By resigning, the first respondent submitted himself to the legal consequences that flow from a resignation under the provisions applicable to his service. Rule 26 of the Central Civil Service Pension Rules 1972 (the CCS Pension Rules) states that:

> *"26. Forfeiture of service on resignation (1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the Appointing Authority, entails a forfeiture of past service."*

Rule 26 states that upon resignation, an employee forfeits past service. We have noted above that the approach adopted by the court in Asger Ibrahim Amin has been held to be erroneous since it removes the important distinction between resignation and voluntary retirement. Irrespective of whether the first respondent had completed the requisite years of service to apply for voluntary retirement, his was a decision to resign and not a decision to seek voluntary retirement. If this court were to re-classify his resignation as a case of voluntary retirement, this would obfuscate the distinction between the concepts of resignation and CCS Pension Rules voluntary retirement and render the operation of Rule 26 nugatory. Such an approach cannot be adopted. Accordingly, the finding of the Single Judge that the first respondent "voluntarily retired" is set aside."

5. In view of the above discussion, we hold that after remaining unauthorizedly absent from duties w.e.f. 01.07.2000 to 14.10.2008, the applicant had sent a communication to the respondents for resigning from service on 27.03.2008. His resignation was accepted on 31.10.2008. The applicant was made aware of acceptance of his resignation. The period of his unauthorized absence w.e.f. 01.07.2000 to 14.10.2008 was ordered to be treated as 'Dies-non'. It was not to be counted as duty for any purpose. In view of these facts, Rule 26(1) of CCS (Pension) Rules, 1972, gets attracted.

The Rule entails forfeiture of applicant's past service. Learned Tribunal erred in granting the benefit of past service for releasing pro-rata pension in favour of the applicant. Instant petition is, therefore, allowed. The impugned judgment dated 14.8.2014, passed by the learned Central Administrative Tribunal, Chandigarh Bench in OA No.904/PB/2013, titled Jiwan Kumar Versus Prasar Bharti Broadcasting Corporation of India and others, is set aside. The original application filed by the present respondent is dismissed.

CWP No.2768 of 2015

In view of the order passed in CWP No.1006 of 2015, the prayer made in this petition filed by the original applicant has become redundant. The writ petition is accordingly dismissed.

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

Between:-

UPANSHU SHARMA S/OSH. MANMOHAN SHARMA,
RESIDENT OF VILLAGE THALI, P.O. SUNNI,
TEHSIL KARSOG, DISTRICT MANDI, H.P.

...PETITIONER

(BY SH. SANDEEP SHARMA, ADVOCATE)

AND

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

2. HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR, THROUGH ITS SECRETARY. ....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH SH. R.S. DOGRA, SR. ADDL. ADVOCATE GENERAL,
SH. VINOD THAKUR, SH. HEMANSHU MSRA,

SH. SHIV PAL MANHANS, ADDITIONAL
ADVOCATE GENERALS AND SH. BHUPINDER THAKKUR,
DEPUTY ADVOCATE GENERAL, FOR R-1.

MR. ANGREZ KAPOOR, ADVOCATE, FOR R-2)

CWP No. 5027 of 2021

Between:-

VIKAS CHAUDHARY, S/O SH. TILAK RAJ,
RESIDENT OF VILLAGE DUMAL,
TEHSIL NURPUR, DISTRICT KANGRA, H.P.

...PETITIONER

(BY SH. DALEEP SINGH KAITH, ADVOCATE)

AND

HIMACHAL PRADESH STAFF SELECTION
COMMISSION, HAMIRPUR,
DISTRICT HAMIRPUR, H.P. THROUGH ITS
SECRETARY. ....RESPONDENT.

CIVIL WRIT PETITION NOs.4999 & 5027 OF 2021
DECIDED ON: 07.09.2021

Constitution of India, 1950- Article 226- Post of J.E. (Civil), HPSEB Ltd.- Objections to Answer Key- Re-assess the objections of petitioners on the ground that these have not been rightly considered- Held- The objections of the petitioners have already been considered by a panel of experts as such reliefs claimed by the petitioners are not permissible- Petition dismissed.

Cases referred:

Central Board of Secondary Education through Secretary, All India Pre-Medical/Pre-Dental Entrance Examination and others vs.KhushbooShrivastava and others (2014) 14 SCC 523;

Himachal Pradesh Public Service Commission vs.Mukesh Thakur and another (2010) 6 SCC 759;

Maharashtra State Board of Secondary and Higher Secondary Education and another vs.ParitoshBhupeshkumarSheth and others (1984) 4 SCC 27;

Rustam Garg and others vs. Himachal Pradesh Public Service Commission, ILR 2016 Vol. (2), 591;
Tata Cellular vs. Union of India 1994 (6) SCC 651;

These petitions coming on for admission this day, ***Hon'ble Mr. Justice Satyen Vaidya****, passed the following:*

O R D E R

Common questions of facts and law are involved in these petitions, hence both the petitions have been heard and are being decided together by a common judgment.

2. Respondent–Himachal Pradesh Staff Selection Commission (for short 'HPSSC') issued advertisement No.36-3/2020 inviting online applications for direct recruitment of various categories of posts mentioned therein, which included the posts of Junior Engineer (Civil) against Post Code 826 for Himachal Pradesh State Electricity Board Ltd.

3. Petitioners in both the petitions applied for the above noted posts and appeared in the written objective test held on 11.4.2021. The HPSSC circulated provisional answer key after the conduct of written objective test, calling upon the candidates to submit their objections on or before 23.4.2021.

4. Petitioners herein allege that they submitted their respective objections, to the provisional answer key, circulated by the HPSSC, but their objections have not been rightly considered and consequently they have not found place in the list of 119 selected candidates whose names have been declared vide notification dated 25.8.2021.

5. Petitioners have prayed for directions to HPSSC to re-assess their objections and to grant them marks by correcting the answer key accordingly. Quashing of notification dated 25.8.2021 has also been sought.

6. The counselling for final selection of candidates for 39 posts of Junior Engineer (Civil) in Himachal Pradesh State Electricity Board Ltd. (for

short 'HPSEBL') has been scheduled to be held on 8.9.2021. Keeping in view the urgency in the matter, on 02.09.2021 and 03.09.2021, this Court passed the orders in respective petitions of petitioners directing the HPSSC to file reply/instructions on 07.09.2021.

7. Today, the HPSSC has submitted written instructions. Specific stand taken by it is that in response to the objections invited to the provisional answer key, the petitioner Upanshu Sharma in CWP No. 4999 of 2021 did not submit his objections within prescribed seven days, whereas, the objections of petitioner Vikas Chaudhary in CWP No. 5027 of 2021 were received within time. Besides petitioners, many other candidates had submitted their objections. All such objections were referred to a panel of experts in accordance with condition No.14 (iii) of the advertisement. After evaluation by the expert panel, certain answers were corrected and the final answer key was published.

8. Condition No.14 (iii) of the advertisement reads as under:

"14.(iii). The provisional answer key of each Written Screening Test (Objective Type) will be uploaded on the official website after the freezing of the answer sheets of the candidates for calling objections from the candidates. Seven day's time shall be given for inviting objections in the answer key, if any. The objections will be got vetted through an expert panel and the result will be finalized as per the revised answer key."

9. We have heard learned counsel for the parties and have also gone through the records.

10. Petitioner in CWP No. 4999 of 2021 had objected to nine answers in the provisional answer key and as per the instructions submitted by the HPSSC, six answers were corrected after evaluation by expert panel. Petitioner in CWP No. 5027 of 2021 had also raised nine objections, out of which, four were upheld. Despite the corrections in the answer key, as noted above, petitioners have remained unsuccessful.

11. Once, the objections submitted by petitioners to the provisional answer key have been considered by a panel of experts, this Court in exercise

of its jurisdiction under Article 226 of the Constitution of India, will not venture to impose its own opinion.

12. The powers of this Court to have opinion different to that of the experts, in the matter of evaluation of answers in competitive examination, is well defined. In this context, reference can be made to the judgment passed by the Hon'ble Supreme Court in **Maharashtra State Board of Secondary and Higher Secondary Education and another** vs.**ParitoshBhupeshkumarSheth and others (1984) 4 SCC 27**, wherein it has held as under:

*"**29**. Far from advancing public interest and fair play to the other candidates in general, any such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."*

13. In **Himachal Pradesh Public Service Commission** vs.**Mukesh Thakur and another (2010) 6 SCC 759**, the Hon'ble Supreme Court has held as under:

*"**20**. In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter-se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent No.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like Physics, Chemistry and Mathematics, we are unable to understand as to whether such a course could*

have been adopted by the High Court. Therefore, we are of the considered opinion that such a course was not permissible to the High Court."

14. In **Central Board of Secondary Education through Secretary, All India Pre-Medical/Pre-Dental Entrance Examination and others** vs.**KhushbooShrivastava and others (2014) 14 SCC 523**, the Hon'ble Supreme Court while noticing the judgment in **Maharashtra State Board of Secondary and Higher Secondary Education** case(supra) has held as under:

"11. In our considered opinion, neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to Respondent 1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters……."

15. A Division Bench of this Court in **Rustam Garg and others** vs**. Himachal Pradesh Public Service Commission, ILR 2016 Vol. (2), 591**, while dealing with an identical proposition has held as under:

"17. In view of the aforesaid exposition of law, we have no doubt in our mind that even when the revised key answers are impugned with respect to questions relating to the subject of law, it is not permissible for this Court to examine the question papers and answer sheets itself, particularly when the Commission has assessed the inter se merit of the candidates. It is not for the Court to take upon itself the task of the statutory authorities and substitute its own opinion for that of the experts."

16. The power of judicial review vested in this Court is otherwise circumscribed and can be exercised only to examine the legality of decision making process as held by the Hon'ble Supreme Court in **Tata Cellular vs. Union of India 1994 (6) SCC 651.** No challenge has been laid in present proceedings to the decision making process, therefore, this Court will not venture into the merits of the decision taken by the competent authority.

17. Keeping in view the above noted exposition of law, the reliefs claimed by petitioners are not permissible.The objections of petitioners have already been considered by a panel of experts. Petitioners have not been able to show any

provision in the rules, governing the process of selection, from which they may derive a right to seek such a relief.

18. The claim of the petitioner in CWP No. 4999 of 2021 otherwise will not be maintainable as he had failed to submit his objections within the prescribed period of seven days. The factual position in this regard has not been denied by the learned counsel representing petitioner in the above noticed petition.

19. Accordingly, we do not find any merit in these petitions and the same are dismissed, so also the pending miscellaneous applications, if any, leaving the parties to bear their own costs.

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

Between:

GURDAS RAM SON OF SH. GUJJAR RAM, RESIDENT OF VILLAGE RAJALI BANYALA, P.O. LATHIANI, TEHSIL BANGANA, DISTRICT UNA, H.P., PRESENTLY WORKING AS CHOWKIDAR AT PATWAR CIRCLE RAJALI BANYALA, TEHSIL BANGANA, DISTRICT UNA, H.P.

....PETITIONER

(BY SH. VIJAY BHATIA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (REVENUE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. DEPUTY COMMISSIONER, UNA, DISTRICT UNA, H.P.

3. SUB DIVISIONAL OFFICER, BANGANA,
DISTRICT UNA, H.P.

....RESPONDENTS

BY SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL FOR R-1 TO 3)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 7778 of 2019
DECIDED ON: 17.08.2021

Constitution of India, 1950- D.C., Una, while regularizing the services of petitioner as Revenue Chowkidar reflected the date of retirement as 30.06.2016- As per copies of Pariwar Register and affidavit executed by the petitioner there is no force in the claim of the petitioner that his date of birth was 1964- Petition dismissed.

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

O R D E R

Being aggrieved with the issuance of communication, dated 20.4.2016 (Annexure A-1), issued under the signatures of Deputy Commissioner, Una, District Una, Himachal Pradesh, whereby respondents while regularizing the services of the petitioner as Revenue Chowkidar in Patwar Circle, Rajali Banyala, reflected his date of retirement as 30.6.2016, petitioner approached the erstwhile H.P. Administrate Tribunal by way of Original Application No.3078 of 2016, which now stands transferred to this Court after abolishment of erstwhile H.P. Administrate Tribunal and stands registered as CWPOA No.7778 of 2019, praying therein following reliefs:-

> "(i). That the impugned office order dated 20.04.2016(Annexure A-1) may kindly be quashed and set-aside and the respondents may kindly be restrained from retiring the applicant from the services on 30.06.2016.
> (ii). That the respondents may kindly be directed to allow the applicant to continue in service till

> he attains the age of superannuation i.e.30.06.2022.
> (iii). That the respondents may further be directed to regularize the services of the applicant w.e.f. 01.04.2012 with all consequential benefits like arrears etc."

2. Certain undisputed facts as emerge from the record are that the petitioner was initially appointed as Chowkidar at Patwar Circle, Rajali Banyala on part time basis in the year 1990. Since, despite petitioner having rendered ten years services on part time basis, respondents failed to convert his part time services into the contract as per the policy, dated 27.2.2004 formulated by the Government of Himachal Pradesh, he filed CWP No.9451 of 2011, titled as **Gurdas Ram Vs. State of H.P. & another**, seeking therein direction to the respondents to convert his part time services into contract in terms of the policy framed by the Government of Himachal Pradesh. Aforesaid writ petition having been filed by the petitioner came to be decided on 4.11.2011, whereby direction was issued to the second respondent/competent authority to look into the matter and take appropriate action in the case of the petitioner, on verification of facts, in the light of the policy, within a period of four months from the date of production of copy of the judgment.

3. On the basis of aforesaid judgment, petitioner represented to the competent authority for conversion of his services from part time to daily waged Chowkidar, but fact remains that no action, if any, ever came to be taken at the behest of the respondents for good five years after passing of aforesaid judgment by Division Bench of this Court in CWP No.9451 of 2011.

4. Vide order dated 20.4.2016 (Annexure A-1), Deputy Commissioner, Una, District Una, H.P., regularized the services of the petitioner as Revenue Chowkidar in the pay Band of Rs.4900-10680 +1300/- Grade Pay with effect from the date joining was accepted, but since in the

aforesaid communication date of retirement of the petitioner was shown to be 30.6.2016, he approached court of law in the instant petition, praying therein to restrain the respondents from retiring him from the service on 30.6.2016. Petitioner claimed in the petition that his date of birth has been shown wrongly as 01.07.1958, whereas he was born in the year 1964. Learned Tribunal below while issuing notice to the respondent-State vide order dated 30.06.2016, restrained the respondents from superannuating the petitioner from the service till further orders and since then on the strength of the afore order passed by learned Tribunal, petitioner is continuing to serve the Department.

5. Since, there was a dispute interse petitioner and the respondents qua Date of Birth of the petitioner, allegedly, respondents No.2 and 3, asked the petitioner to get opinion from the Medical Board with regard to his age. Medical Board comprising of Chief Medical Officer, Una and two more doctors opined that age of the petitioner is 44 to 46 years (Annexure A-2) and as such, petitioner claimed before the authorities that he be allowed to continue in service till 2022.

6. Aforesaid claim of the petitioner has been refuted by the respondents by way of detailed reply, wherein it has been categorically stated that there was no occasion, if any, for the authorities to call for the report of Medical Board, especially when petitioner himself at the time of his joining in the department had furnished copy of Pariwar Register, wherein his Date of Birth has been shown to be 1958. Besides above, on 26.04.2016, petitioner himself executed an affidavit, stating therein his age to be 57 years, as is evident from Annexure A-V annexed with the reply filed by respondents No.1 to 3. If the Date of Birth of the petitioner was not 57 years in the year, 2016, it is not understood that why petitioner in his affidavit executed in the year 2016 mentioned his date of birth as 57 years. Aforesaid affidavit placed on record by the respondents has been not disputed by the petitioner and as

such, there is reason to presume and believe that on 26.04.2016, age of the petitioner was 57 years and as such, date of birth has been rightly recorded as 1958 in the service record.

7. Though, learned counsel representing the petitioner placed heavy reliance upon the opinion rendered by Medical Board (Annexure A-2), but that cannot override the entry made in the Pariwar Register, copy whereof is placed on record by the respondents as Annexure R-2/I. Once, date of birth of petitioner stands recorded as 1958 in the Pariwar Register, otherwise there was no occasion for the authorities to call for the opinion of the Medical Board. Since, specific date and month has been not mentioned in the Pariwar Register containing date of birth of the petitioner, respondents rightly placed reliance upon the Industrial employment (Standing Orders) Central Rules, 1946 and considered the date of birth of the petitioner as 1.7.1958 (Annexure R/2-3) annexed with the reply filed by respondents No. 1 to 3.

8. Having carefully perused the documents placed on record, especially copies of Pariwar Register and affidavit executed by the petitioner, this Court finds no force in the claim of the petitioner that his Date of Birth was 1964.

9. Consequently, in view of the detailed discussion made hereinabove, this Court finds no merit in the present petition and accordingly same is dismissed. Since, it is not in dispute that pursuant to order dated 30.6.2016, passed by learned Tribunal below, petitioner is still continuing to serve the department in the capacity of Revenue Chowkidar, he is entitled to be given basic pay of the post in question. Ordered accordingly. Pending application(s), if any, also stands disposed of.

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

Between:-

DUNI CHAND

SON OF LATE SH. KANSHI RAM,
R/O VILLAGE SHAKOHER,
P.O ROHANDA,
TEHSIL AND DISTRICT MANDI, HP.

PRESENTLY SERVING AS A CLASS IV
EMPLOYEE UNDER DEPUTY DIRECTOR
OF HORTICULTURE (INFORMATION),
DIRECTORATE OF HORTICULTURE NAV
VAHAR, SHIMLA-2.

…….. PETITIONER.

(BY SH. A.K GUPTA, ADVOCATE)

AND

1. STATE OF H.P THROUGH PRINCIPAL SECRETARY (HORTICULTURE) WITH HEADQUARTERS AT SHIMLA-2, H.P.

2. THE DIRECTOR, HORTICULTURE WITH HEADQUARTERS AT NAV VAHAR, SHIMLA-2.

3. SH. AMAR DUTT BHARDWAJ, ASSISTANT CONTROLLER (FINANCE), DIRECTORATE OF HORTICULTURE SHIMLA-2.

4. THE SENIOR DEPUTY ACCOUNTANT GENERAL, H.P. SHIMLA-3

.....RESPONDENTS

(BY. SH. ASHWANI SHARMA & SH. HEMANT VAID, ADDL. A.GS WITH MR. VIKRANT CHANDEL & MR. GAURAV SHARMA, DY.A.GS FOR RESPONDENTS NO. 1 TO 3.)

(SH. BALRAM SHARMA, ASGI FOR RESPONDENT NO.4).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6294 of 2019
RESERVED ON: 12.8.2021
DECIDED ON : 20.8.2021

Constitution of India, 1950- **CCS (Pension) Rules, 1972**- Writ of Mandamus- Contribution towards GPF- Petitioner was allotted GPF number but later on was asked to switch over to Contributory Pension Scheme as per rules of 2006, on the ground that his regular appointment took place after May, 2003- Held- As per notification dated 17.02.2006 all appointments made by the Government of Himachal Pradesh on or after 15.05.2003 bar the appointees concerned from drawing the benefits of CCS (Pension) Rules, 1972- Regular appointment of the petitioner took place after May, 2003 as such, not entitled for the benefit of CCS (Pension) Rules- Petition dismissed.

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

O R D E R

The writ petitioner became conferred the aspired work charge status in the year 2002. The afore factum finds reflection in Annexure P-1. He became allotted General Provident Fund (for short "GPF") number by the Senior Deputy Accountant General, H.P. However, through Annexure P-2, the

writ petitioner was asked to switch over to Contributory Pension Scheme (for short "CPF"), as per rules of 2006, on the ground that his regular appointment took place after May, 2003. Consequently, the writ petitioner becomes aggrieved by the making of Annexure P-2, and, through the institution of the instant writ petition before this Court, he has sought the quashing of Annexure P-2. Moreover, he has also prayed for a mandamus being issued upon the respondent concerned, to, permit him to contribute to GPF.

2. Respondents No.1 and 2, in their reply meted to the writ petition, strived to validate Annexure P-2 through Annexure R-1 as becomes appended with the reply. A perusal of Annexure R-1 appended to their reply, Annexure whereof is a notification issued on 17.8.2006, though does enclose, that vis-à-vis, all appointments made by the Government of Himachal Pradesh on or after 15.5.2003, rather barring the appointees concerned, from drawing the benefits of Central Civil Services (Pension) Rules, 1972. Moreover, it is also spelt therein, that the appointees concerned whose appointments occur after 15.5.2003, would draw pension co-equivalent, to their contribution to the apposite pension fund.

3. However, a reading of Annexure R-1, though prima-facie does not sustain, the reply filed on affidavit filed by respondents No.1 and 2, that vis-à-vis, appointments made after 15.5.2003, the apposite appointees being barred to subscribe to GPF, and, rather all the post retiral benefits becoming governed by Annexure R-1. However, even if assumingly on a deep reading of Annexure R-1, the afore submission is prima-facie incorrect.

4. Nonetheless, a reading of Rule 4 of General Provident Fund (CS) Rules (for short "GPF Rules"), Rule whereof stands extracted hereinafter, makes abundant and clear echoings, that all temporary government servants after a continuous, service of one year, shall become eligible to subscribe to the funds concerned. Moreover, NOTE-3 appended there-under also made bespeakings, that the temporary government servants, who have been

appointed against regular vacancies, and, who are likely to complete more than a period of one year, may subscribe to GPF any time before completion of one year service.

"4. Conditions of eligibility

All temporary Government servants after a continuous service of one year, all re-employed pensioners (other than those eligible for admission to the Contributory Provident Fund) and all permanent Government Servants shall subscribe to the Fund:

Provided that no such servant as has been required or permitted to subscribe to contributory Provident Fund shall be eligible to join or continue as a subscriber to the Fund, while he retains his right to sub-scribe to such a Fund:

Provided further that a temporary Government servant, who is borne on an establishment or factory to which the provisions of Employees' Provident Funds Scheme, 1952, framed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) would apply or would have applied but for the exemption granted under section 17 of the said Act, shall subscribe to the General Provident Fund if he has completed six months' continuous service or has actually worked for not less than 120 days during a period of six months or less in such establishment or factor or in any other establishment or factory to which the said Act applies, under the same employer or partly in one and partly in the other.

[provided also that nothing contained in these rules shall apply to Government servant appointed on or after the 1st day of January, 2004]

EXPLANATION- For the purposes of this rule "continuous service" shall have the same meaning assigned to it in the Employees' Provident Funds Scheme, 1952, and the period of work for 120 days shall be computed in the manner specified in the said scheme and shall be certified by the employer.

NOTE-1 -Apprentices and Probationers shall be treated as temporary Government servants for the purpose of this rule.

NOTE-2 A temporary Government servant who completes one year of continuous service during the middle of a month shall subscribe to the Fund from the subsequent month.

NOTE-3 -Temporary Government servants (including Apprentices and Probationers) who have been appointed against regular vacancies and are likely to continue for more than a year may subscribe to the General Provident Fund any time before completion of one year's service."

5. From a reading of Rule 4 of GPF Rules, and, wherethrough temporary government servants rendering continuous service, for a period of one year, and, who are appointed against regular vacancies, become declared to be eligible, to, seek application qua them of the provisions cast in GPF Rules, and, also become permitted to make subscription to GPF, though hence prima-facie the writ claim would become vindicated. However, yet it has to be gauged whether the apposite work charge status, as became conferred upon the writ petitioner, in the year 2002, makes him eligible, to, continue to make subscriptions to the GPF, and, also whether Annexure P-2 can either come to be validated or invalidated.

6. The appointment of the government servant, even though on a temporary basis, is mandated in NOTE-3 occurring underneath, Rule 4 of GPF Rules, to be hence against a regular vacancy. However, upon the workman being conferred with a work charge status, he would, not be rendering services against a regular vacancy, and rather would serve against a regular substantive vacancy, only when his services become regularized against the substantive vacancy concerned. Consequently, since the conferment of work charge status, upon the workman, occurred in the year 2002, and, when at the afore stage, he was rendering services not against a regular vacancy, and, rather only upon his regularization in service, he occupied a substantive vacancy. Therefore, the mere conferment of a work charge status, vis-à-vis, the petitioner in the year 2002, and, it surviving upto his regularization in service

after 15.5.2003, would not make the afore post, to be co- equivalent to a substantive post, as during the afore spell, his salary became drawn from sub head "works", and, not from the head appertaining to "salary", as, rather becomes disbursable therefrom, only to an incumbent working against a regular vacancy, nor, obviously he would become entitled to claim the benefits of eligibility (supra) as occurs in Rule 4 of GPF Rules. As a sequel, also the withdrawal of GPF subscription rather through Annexure P-2, though earlier made, becomes valid and legally worthy.

7. However, the learned counsel for the petitioner also contended, on anvil of definition of "Temporary Post" occurring in Fundamental Rules 9 (30), definition whereof stands extracted hereinafter, that since the pay drawn by the writ petitioner, carries a definite rate of pay sanctioned for a limited period of time, thereupon, the working of the writ petitioner, on a work charge establishment, under the respondents, does make him fall hence within the definition of "Temporary Post", as occurs, in Fundamental Rules 9 (30).

> "(30) *Temporary post* means a post carrying a definite rate of pay sanctioned for a limited time."

8. However, even the afore submission cannot be accepted, by this Court, as the word "Post" as occurs in Fundamental Rules 9 (30), cannot carry any signification other than it being relatable to a substantive vacancy. Any other interpretation to the word "Post" as occurs in Fundamental Rules 9 (30), would be completely antithetical to the signification (supra), as becomes ascribed to the relevant NOTE-3 occurring underneath Rule 4 of GPF Rules, and, wherein a prescription occurs, that a government servant though temporarily employed, becomes entitled to draw the benefits of GPF Rules, only upon, his temporary employment being against a regular vacancy. Therefore, the word "post" occurring in Fundamental Rules 9 (30) becomes amenable to be meted a signification, qua its appertaining to a substantive post or a substantive vacancy. Consequently, the afore rendered work on a

work charge establishment, is not, for reasons (supra) rather amenable to be treated co-equal with work performed against any substantive post or against any substantive vacancy.

9. The learned counsel for the petitioner, though has not claimed in the writ petition, hence for pension qua the petitioner being determinable, on anvil of conferment upon him, of a work charge status, yet he has argued that application of Rule 2 of Central Civil Services (Pension) Rules, 1972 (For short CCS (Pension) Rules), be made qua the petitioner. In making the afore submission, he makes dependence, upon, Rule 2 of CCS (Pension) Rules, Rule whereof stands extracted hereinafter:-

> ”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 affairs of the Union which are borne on pensionable establishments, but shall not apply to-
> (a) Railway servants’
> (b) Persons in casual and daily-rated employment;
> (c) Persons paid from contingencies;
> (d) Persons entitled to the benefit of a Contributory Provident Fund;
> (e) Members of All India Services;
> (f) Persons locally recruited for service in diplomatic, consular or other Indian establishments in foreign countries;
> (g) Persons employed on contract except when the contract provides otherwise; and
> (h) Persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force”

10. While making the afore submission, the learned counsel for the petitioner, has depended upon the specific exclusion of categories of employees as borne therein, and, submits that since the apposite exclusion, as, appertaining to inapplicability of CCS (Pension) Rules, rather is exhaustive, and ad nauseam, and, when the workmen/employees concerned, who work against a work charge establishment, do not, occur therein. Therefore, for want of exclusion of work charge employees, in Rule 2 of CCS (Pension) Rules, hence makes them amenable to be valid recipients of pension, as the prior thereto application clause, is rather workable, vis-à-vis, them. However, even the afore made submission, cannot be accepted, as the mere non-occurrence of a work charge workman, in the relevant exclusion clause, vis-à-vis, the apposite application clause, rather per-se would not render work done on a work charge establishment, hence by a work charge workmen, to fall within the realm of the relevant application clause, as, carried in Rule 2 (supra). The imperative necessity for availments of benefits thereof, by the work charge employees, is comprised in their substantively working against regular posts. Since, as afore-stated the writ petitioner rendered work not against any substantive post concerned, rather during the period of his working as a work charge employee in the apposite work charge establishment, given his drawing wages from the sub head "works", hence imperatively contradistinct to the head wherefrom the salaries of incumbents working against substantive post rather become drawn, and, disbursed. Therefore, he is not entitled to avail the benefits of rule 2 (supra). Moreover, since the notification carried in Annexure R-1, communicates that all appointments made on or after 15.5.2003 hence against every post in the State of Himachal Pradesh, rendering the apposite appointees, for, not becoming valid recipients of CCS (pension) Rules. Therefore, the petitioner becomes rather entitled to all post retiral benefits being purveyed to them in the mode enshrined in Annexure R-1. Consequently, he is entitled to all post retiral benefits from the funds

wheretowhich he makes subscriptions. Therefore, this Court finds no merit in the petition, and, the same is accordingly dismissed. All pending application stand disposed of accordingly.

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

Between:-

PARSHOTAM SINGH, S/O
SH. OM PRAKASH VERMA,
R/O VILLAGE KULWARI,
POST OFFICE NALTI,
TEHSIL GHUMARWIN,
DISTRICT BILASPUR,
HIMACHAL PRADESH. ……APPLICANT

(BY SH. Y.P.S. DHAULTA, ADVOCATE)

AND

1. HIMACHAL PRADESH SUBORDINATE SERVICE SELECTION BOARD, HAMIRPUR, THROUGH ITS CHAIRMAN.

2. HIMACHAL PRADESH SUBORDINATE SERVICE SELECTION BOARD, HAMIRPUR, THROUGH ITS SECRETARY.

3. THE STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (HPPWD), SHIMLA-2, H.P. ……RESPONDENTS

(MS. ARUNA SHARMA, ADVOCATE,
FOR RESPONDENTS-1 & 2)

(SH.ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. RAJINDER DOGRA,
SENIOR ADDITIONAL ADVOCATE GENERAL,
SH. VINOD THAKUR, SH. SHIV PAL MANHANS,
SH. HEMANSHU MISRA, ADDITIONAL
ADVOCATE GENERALS AND
SH. BHUPINDER THAKUR,
DEPUTY ADVOCATE GENERAL,
FOR RESPONDENT-3)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6912 OF 2019
DECIDED ON: 22.09.2021

Constitution of India, 1950 - Article 226 - Judicial Review- Petitioner fell short of only one mark in the selection - Petitioner registered objections with the Subordinate Service Selection Board qua some questions- The Board in turn, got these questions vetted by the experts panel – Held - The objections of the petitioner have already been considered by a panel of experts as such, relief claimed by the petitioner is not permissible. Petition dismissed.

Cases referred:

Bhupinder Singh vs. State of Himachal Pradesh and another 2021 (1) Him. L.R. (DB) 6;

Central Board of Secondary Education through Secretary, All India Pre-Medical/Pre-Dental Entrance Examination and others vs. Khushboo Shrivastava and others (2014) 14 SCC 523;

Himachal Pradesh Public Service Commission vs. Mukesh Thakur and another (2010) 6 SCC 759;

Maharashtra State Board of Secondary and Higher Secondary Education and another vs. Paritosh Bhupeshkumar Sheth and others (1984) 4 SCC 27;

Rustam Garg and others vs. Himachal Pradesh Public Service Commission, ILR 2016 Vol. (2), 591;

Vikesh Kumar Gupta and another vs. State of Rajasthan and others (2021) 2 SCC 3;

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

O R D E R

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

> *"(i) That the applicant be awarded one marks each in question no.64, 90 and 104 respectively.*
> *(ii) That in the alternative the applicant be considered for the post of Junior Draftsman (Civil).*
> *(iii) That the entire process for selections of Junior Draftsman (Civil) may kindly be set-aside."*

2. The Himachal Pradesh Subordinate Service Selection Board, Hamirpur, (for short 'Board') invited applications for the post of Junior Draughtsman (Civil) for which examination was held on 5th July, 2015. The petitioner obtained 143 marks whereas the last selected candidate obtained 144 marks. Meaning thereby, the petitioner fell short of only one mark in the selection. After declaration of the result, the petitioner registered his objections with the Board relating to Question Nos. 10, 32, 64, 90, 104 and 159. The Board, in turn, got these questions vetted by the Expert Panel and the same was made available to the petitioner.

3. Now, the grievance of the petitioner is that some of the questions, more particularly, question numbers 64,90 and 104, as answered by the Experts, are still incorrect, hence, this petition.

4. What would be the scope of judicial review in the given facts and circumstances of the case has recently been considered by this Bench in ***CWP No. 4999 of 2021,*** titled ***Upanshu Sharma*** *vs.* ***State of Himachal Pradesh and another*** and connected matter, wherein it was observed as under:-

> *"12. The powers of this Court to have opinion different to that of the experts, in the matter of evaluation of answers in competitive examination, is well defined. In this context, reference can be*

made to the judgment passed by the Hon'ble Supreme Court in ***Maharashtra State Board of Secondary and Higher Secondary Education and another*** *vs.* ***Paritosh Bhupeshkumar Sheth and others (1984) 4 SCC 27****, wherein it has held as under:*

> *"**29**. Far from advancing public interest and fair play to the other candidates in general, any such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."*

13. In ***Himachal Pradesh Public Service Commission*** *vs.* ***Mukesh Thakur and another (2010) 6 SCC 759****, the Hon'ble Supreme Court has held as under:*

> *"**20**. In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had*

assessed the inter-se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent No.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like Physics, Chemistry and Mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court. Therefore, we are of the considered opinion that such a course was not permissible to the High Court."

14. In ***Central Board of Secondary Education through Secretary, All India Pre-Medical/Pre-Dental Entrance Examination and others*** *vs.* ***Khushboo Shrivastava and others (2014) 14 SCC 523****, the Hon'ble Supreme Court while noticing the judgment in* ***Maharashtra State Board of Secondary and Higher Secondary Education*** *case (supra) has held as under:*

"11. In our considered opinion, neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to Respondent 1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters……."

15. A Division Bench of this Court in ***Rustam Garg and others*** *vs****. Himachal Pradesh Public Service Commission, ILR 2016 Vol. (2), 591****, while dealing with an identical proposition has held as under:*

> *"17. In view of the aforesaid exposition of law, we have no doubt in our mind that even when the revised key answers are impugned with respect to questions relating to the subject of law, it is not permissible for this Court to examine the question papers and answer sheets itself, particularly when the Commission has assessed the inter se merit of the candidates. It is not for the Court to take upon itself the task of the statutory authorities and substitute its own opinion for that of the experts."*

5. The similar reiteration of law can be found in another decision of the learned Division Bench of this Court, authored by one of us (Justice Tarlok Singh Chauhan) in ***Bhupinder Singh*** *vs.* ***State of Himachal Pradesh and another 2021 (1) Him. L.R. (DB) 6***.

6. We may, at this stage, refer to a fairly recent judgment rendered by three Judges of the Hon'ble Supreme Court in ***Vikesh Kumar Gupta and another*** *vs.* ***State of Rajasthan and others (2021) 2 SCC 309*** wherein the Hon'ble Supreme Court held that though re-evaluation can be directed, if rules permit, however, deprecated the practice of re-evaluation and scrutiny of the questions by the Courts which lack expertise and it was further held that it was not permissible for the High Court to examine the question papers and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates. Courts have to show deference and consideration to the recommendations of the Expert Committee, who have expertise to evaluate and make recommendations. It shall be apposite to refer to the relevant observations as contained in paragraphs 13 to 17 which read as under:-

> *"13. The point that arises for the consideration of this Court is whether the revised Select List dated 21.05.2019 ought to have been prepared on the basis of the 2nd Answer Key. The Appellants contend that the Wait List also should be prepared on the basis of the 3rd Answer Key and not on the basis of the 2nd Answer Key.*

The 2nd Answer Key was released by the RPSC on the basis of the recommendations made by the Expert Committee constituted pursuant to the directions issued by the High Court. Not being satisfied with the revised Select List which included only a few candidates, certain unsuccessful candidates filed Appeals before the Division Bench which were disposed of on 12.03.2019. When the Division Bench was informed that the selections have been finalized on the basis of the 2nd Answer Key, it refused to interfere with the Select List prepared on 17.09.2018. However, the Division Bench examined the correctness of the questions and Answer Keys pointed by the Appellants therein and arrived at a conclusion that the answer key to 5 questions was erroneous. On the basis of the said findings, the Division Bench directed the RPSC to prepare revised Select List and apply it only to the Appellants before it.

14. Though re-evaluation can be directed if rules permit, this Court has deprecated the practice of re- evaluation and scrutiny of the questions by the courts which lack expertise in academic matters. It is not permissible for the High Court to examine the question papers and answer sheets itself, particularly when the Commission has assessed the inter se merit of the candidates (Himachal Pradesh Public Service Commission v. Mukesh Thakur (2010) 6 SCC 759. Courts have to show deference and consideration to the recommendation of the Expert Committee who have the expertise to evaluate and make recommendations (See- Basavaiah v. H.L. Ramesh (2010) 8 SCC 372.

15.Examining the scope of judicial review with regards to re-evaluation of answer sheets, this Court in Ran Vijay Singh v. State of U.P. (2018) 2 SCC 357 held that court should not re-evaluate or scrutinize the answer sheets of a candidate as it has no expertise in the matters and the academic matters are best left to academics. This Court in the said judgment further held as follows: (Ran Vijay Singh case[9], SCC pp. 369-70, paras 31-32)

> ***"31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination***

authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse — exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination — whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not;

> *and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."*
>
> *16. In view of the above law laid down by this Court, it was not open to the Division Bench to have examined the correctness of the questions and the answer key to come to a conclusion different from that of the Expert Committee in its judgment dated 12.03.2019. Reliance was placed by the Appellants on Richal v. Rajasthan Public Service Commission (2018) 8 SCC 81. In the said judgment, this Court interfered with the selection process only after obtaining the opinion of an expert committee but did not enter into the correctness of the questions and answers by itself. Therefore, the said judgment is not relevant for adjudication of the dispute in this case.*
>
> *17. A perusal of the above judgments would make it clear that courts should be very slow in interfering with expert opinion in academic matters. In any event, assessment of the questions by the courts itself to arrive at correct answers is not permissible. The delay in finalization of appointments to public posts is mainly caused due to pendency of cases challenging selections pending in courts for a long period of time. The cascading effect of delay in appointments is the continuance of those appointed on temporary basis and their claims for regularization. The other consequence resulting from delayed appointments to public posts is the serious damage caused to administration due to lack of sufficient personnel."*

7. Keeping in view the aforesaid exposition of law, the reliefs, as claimed by the petitioner cannot be granted, more particularly, when objections of the petitioner have already been considered by a panel of Experts. The petitioner has not been able to show any provision governing the process of selection from which he may derive the reliefs as claimed. The reliefs as claimed in this petition are not permissible and cannot be granted to the petitioner.

8. Accordingly, there is no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Khub Chand ....Petitioner.

Versus

Himachal Road Transport Corporation
& others ...Respondents.

CWPOA No.4592 of 2019
Reserved on: 06.07.2021
Decided on: 08.07.2021

Constitution of India, 1950- **CCS (Classification, Control and Appeal) Rules, 1965**- Rule 14- Disciplinary Authority imposed punishment of removal of the petitioner from the service on the basis of charges framed against him as well the inquiry report- Held- Disciplinary Authority was bound to act in quasi-judicial manner as well as to assign reasons while imposing the penalty of dismissal- Order of Disciplinary Authority neither reasoned nor speaking- Petition allowed- Orders of Disciplinary Authority and Appellate Authority set aside.

For the petitioner : M/s C.M. Tanwar and Mohar Singh, Advocates.
For the respondents : Mr. Varun Chandel, Advocate. (Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition, the petitioner has primarily prayed for the following reliefs:-

"(i) That the impugned orders dated 27.01.2007 & 18.09.2007 passed by the respondents may kindly be quashed and set- aside.
(ii) That the respondents may be directed to reinstate the petitioner as Driver in the HRTC with all consequential benefits".

2. The case of the petitioner is that he was working as a Driver with the respondent-Corporation since 1998. Vide Memorandum dated 04.05.2005 (Annexure P-1), the petitioner was informed that the respondent-Corporation intended to hold an inquiry against him, under Rule-14 of the (Central Civil Services (Classification, Control and Appeal) Rule 1965 on the statement of article of charges appended with said Memorandum as Annexure A-1. The article of charges were as under:-

" *Article-I:*

That the said Sh. Khub Chand, while on the rolls of HRTC, Rohroo unit and working in the capacity of driver, during the month of February, 2005 and on dated 07.02.2005 the said Sh. Khub Chand, driver was performing his duty with bus No. HP-10/0392 while aforesaid bus was driver by the said driver from Bus Stand, Rohroo to Workshop and when he reached near Sabzi Mandi, Rohroo caused accident by the said bus with two Utilities No.HP-10/0768 and HP-10/0142 under the influence of liquor. For which the said Sh. Khub Chand, driver was also remained in Police Custody and Medical Examination has also been conducted. The Medical Officer has conducted his Medical and furnished his Medical report wherein found that the said Sh. Khub Chand, driver has consumed liquor. Taking liquor while performing the duty of driver is not only highly objectionable but also contrary to the Service Rules as well as Conduct Rules. It was the primary duty of the said Sh.Khub Chand, driver not to take liquor while he was on the active duty of driver and due (due to this act of omission and Commission) there was a scope of fatal accident and HRTC could have suffered loss of revenue alongwith loss of invaluable human lives. But he has failed to perform his duty properly. Hence charge No.1 is against him.

Article-2:

While Sh.Khub Chand, driver was on the rolls of HRTC, Rohroo unit consumed liquor while performing the duty & also caused accident on 07.02.2005 and thus acted negligently while performing his legitimate assigned duties."

3. In these proceedings, the petitioner was proceeded against *ex parte* and vide Annexure P-2, i.e. Office Order dated 27.01.2007, Regional Manager, HRTC, Rohru, District Shimla, H.P. imposed the penalty of removal from service upon the petitioner.

4. Feeling aggrieved, the petitioner preferred an appeal, vide Annexure P-3, which was dismissed by the learned Appellate Authority, vide Office Order dated 18.09.2007 and the same was communicated to the petitioner, vide forwarding letter, dated 24.09.2007 (Annexure P-4). It is further the case of the petitioner that an FIR was registered against him under Section 279 of the Indian Penal Code and criminal proceedings stood initiated against him, vide case No.218-2 of 2007/05, titled as State of H.P. Versus Khub Chand, in which he was convicted and sentenced to undergo simple imprisonment for a period of three months alongwith fine of Rs.500/- with default clause.

5. The appeal filed by the petitioner against the judgment of conviction was allowed and the judgment of learned Trial Court was set aside by the Court of learned Additional Sessions Judge, Shimla, H.P., in Criminal appeal No.22-S/10 of 2008, titled as Khub Chand Versus State of Himachal Pradesh, decided on 24.01.2013.

6. Thereafter, the petitioner represented to the respondent-Corporation vide Annexure P-6, for reinstatement to the service but the same stands rejected, vide Annexures P-7 and P-8, by the respondent-Corporation, on the ground that the departmental inquiry and the criminal proceedings were on different grounds. It is in this background that present petition stands filed by the petitioner, praying for the reliefs already enumerated hereinabove.

7. The writ petition has been opposed by the respondent-Corporation, *inter alia*, on the ground that the action taken by the respondent-Corporation against the petitioner was in accordance with law and rules of the respondent-Corporation. It is further the stand of the respondent-Corporation that the petitioner was granted several opportunities by the Inquiry Officer to submit his defence against the charges between 12.07.2005 and 03.05.2006 and an advertisement was also published in daily newspaper "Amar Ujala", on 02.03.2006 intimating the petitioner about the inquiry, but the petitioner did not come forward for his examination in inquiry and thereafter, charges were proved against him, which subsequently lead to the order of removal on the basis of the Inquiry Report conducted by the Inquiry Officer.

8. In the rejoinder, the petitioner has reiterated his stand taken in the petition and denied the stand of the respondent-Corporation taken in the reply.

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

10. The departmental proceedings were initiated against the petitioner on the charges that the petitioner had consumed liquor while performing his duties as a Driver, on 07.02.2005 and had caused accident under the influence of liquor and further that the act of the petitioner of consuming liquor while on duty and causing accident on 07.02.2005 was a negligent act while performing his assigned duties.

11. Now, when one peruses the Office Order, dated 27.01.2007, vide which the punishment for removal of service was imposed upon the petitioner by the Disciplinary Authority, one finds that no reasoning is assigned in the said order by the Disciplinary Authority, justifying removal of the petitioner from service on the basis of the charges framed against him as well the Inquiry Report. Though, it is a matter of record that the petitioner did not associate himself with the course of the inquiry, yet the Disciplinary Authority was bound to act in a Quasi-Judicial manner and after taking into consideration the

charges leveled against the petitioner as well as the report of the Inquiry Officer he was bound to assign reasons, based on the Inquiry Report, while imposing the penalty of dismissal upon the petitioner. However, rather than doing this, what the Disciplinary Authority has done is that after observing that the petitioner did not participate in the process of inquiry held, it was crystal clear that the petitioner was not interested in serving with the respondent-Corporation anymore and his return in the Corporation would not be fruitful for the respondent-Corporation. On the basis of said justification contained in the above mentioned two lines, the Disciplinary Authority held that it had reached the final conclusion that the petitioner was not fit to be retained in service.

12. To be more precise, the relevant portion of the Office Order, dated 27.01.2007 is being quoted hereinbelow:-

> "*The undersigned has considered the findings of the Inquiry Authority as well as relevant record of the case and observed that Sh. Khub Chand, Driver was performing his duty with Bus No.HP-10/0392 when reached at near Sabzi Mandi, Rohroo caused accident by collided with the said bus with two Utilities and also the said Sh. Khub Chand, Driver was driving the bus under the influence of liquor and was also remain in policy custody. During the course of enquiry, he failed to associate with the enquiry process in the departmental enquiry initiated against him inspite of number of summons issued to him and even when the notice on this effect was published in Aamar Ujala' on 02.03.2006 for holding exparte Inquiry. The Enquiry Authority therefore, conducted the enquiry exparte in his absence. The statements of the prosecution witnesses were recorded in his absence and the said Sh. Khub Chand, Driver was not refuted the evidence examined in the enquiry which prove that he has nothing to say. He was served with the Show Cause Notice and a copy of enquiry report was also supplied to him. He has submitted his reply to the Show Cause Notice on 20.09.2006 and has requested to give him 15 days time for submission of his reply. Thereafter, on 03.01.2007 he has again submitted a reply which was duly considered by the undersigned and found un-satisfactory. From the above position, it is crystal*

clear that he is not interested to serve the Corporation anymore and his further return in the Corporation would not be proved fruitful for the organization. Thus, the undersigned has reached the final conclusion that he is not a fit person to be retained in service.

Now, therefore, the undersigned after having gone through the whole record of the case and keeping in view the totality of the case in exercise of the powers vested in him under Rules 11 to 15 of the Central Civil Services (Classification Control & Appeal), Rules, 1965 and all other powers enabling him in this behalf, hereby imposes the penalty of REMOVAL FROM SERVIE upon the said Sh. Khub Chand, Driver, HRTC, Rohroo with immediate effect to meet the end of justice. Further, nothing will be paid over and above the subsistence allowance already paid to him for the period of suspension w.e.f. 08.02.2005 till his removal from service."

13. Feeling aggrieved, petitioner filed an appeal. The order which has been passed by the Appellate Authority, is even more cryptic. The appeal of the petitioner has been dismissed by the Appellate Authority in the following terms:-

"*Whereas the Regional Manager, HRTC, Rohroo, vide office order No.HRTC;R;1(1438)/2004-7021-25 dated 27/01/07 has imposed the penalty of removal from service upon the said Shri Khub Chand, driver;*

AND WHEREAS, against the aforesaid penalty Sh. Khub Chand, Ex-driver has preferred an appeal dated 08/05/07;

NOW, THEREFORE, the undersigned after going through the appeal and entire record, the appeal preferred by said Shri. Khub Chand, ex-driver is hereby rejected."

14. It is well settled law that the Quasi Judicial Authorities while deciding the rights of the parties are bound to pass reasoned and speaking orders. The rational as to why a reasoned and speaking order should be passed by a Quasi-Judicial authority is that contents of the order should be self-explanatory as to why the conclusion has been arrived at by the authority concerned.

15. In this case, there were two articles of charges framed against the petitioner. The inquiry was held on said two articles of charges and the Inquiry

Report was also submitted by the Inquiry Officer. In the order passed by the Disciplinary Authority, there is no discussion on the charges with reference to the Inquiry report.

16. The penalty of removal from service was imposed upon the petitioner on the ground that he was not interested to serve the Corporation and his return would not be fruitful for the organization, whereas this was not the scope of the Disciplinary Proceedings. This demonstrates that the impugned order, dated 27.01.2007 has been passed by the Disciplinary Authority without any due application of mind. 17. Similarly, even the Appellate Authority has dismissed the appeal of the petitioner without due application of mind. This Court is alive to the fact that the Appellate Authority while concurring with the findings returned by the Disciplinary Authority, need not give elaborate reasons, but then this does not mean that no reasons whatsoever are to be assigned by the Appellate Authority while deciding the appeal. The Appellate Authority has to assign some minimal reasons while disposing of the appeal, which admittedly has not been done in the present case.

18. Therefore, on these counts, this writ petition is allowed. The order passed by the Disciplinary Authority, vide Annexure P-2, i.e. Office Order dated 27.01.2007, as well as by the Appellate Authority, vide Office Order dated 18.09.2007 (Annexure P-3), are quashed and set-aside and the matter is remanded back to the Disciplinary Authority to pass fresh orders on the basis of the Inquiry Report as well as the response submitted by the petitioner to the Inquiry Report. In case, the petitioner so desires, then the Disciplinary Authority shall give personal hearing to the petitioner.

19. With these observations, this writ petition is disposed of. No order as to costs. Pending miscellaneous applications, if any, also stand disposed of. Interim order, if any, stands vacated.

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

BETWEEN:

RAJINDER KUMAR, SON OF SHRI PARAS RAM, RESIDENT OF VILLAGE KHANET, POST OFFICE BYCHRI, TEHSIL & DISTRICT SHIMLA, PRESENTLY WORKING AS LABORATORY ATTENDANT IN GOVT. HIGH SCHOOL NEHRA (GANAHATTI), DISTRICT & TEHSIL SHIMLA, H.P.

....PETITIONER.

(BY SHRI P.D. NANDA, ADVOCATE)

AND

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

2. THE DIRECTOR, HIGHER EDUCATION OF HIMACHAL PRADESH, SHIMLA 171001.

3. THE DEPUTY DIRECTOR OF HIGHER EDUCATION OF HIMACHAL PRADESH SHIMLA 171001.

….RESPONDENTS.

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. KAMAL KANT CHANDEL AND MR. J.S. GULERIA, DEPUTY ADVOCATES GENERAL, FOR THE RESPONDENTS)

CIVIL WRIT PETITION (ORIGINAL APPLICATION No.5787 OF 2019
RESERVED ON: 11.08.2021
DECIDED ON:02.09.2021

Constitution of India, 1950- Article 226- Promotion- Seniority- Petitioner not promoted as Laboratory Attendant from the date when persons junior to him were promoted- Held- Seniority list bad in law- Respondents are directed to promote the petitioner to the post of Laboratory Attendant from the date when persons junior to him were promoted- Writ allowed.

This Petition coming on for pronouncement of judgment 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 case of the petitioner is that he was working with the respondent-department from 24.07.1990 as a Laboratory Attendant on a consolidated salary on part time basis. As his services were not being regularized, he filed CWP No.6249 of 2010 before this Court, which was allowed vide judgment dated 19.06.2012, in terms of a judgment delivered by this Court in CWP No.5444 of 2010, titled as Jeet Ram Versus State of H.P. In compliance thereof, the petitioner was conferred the status of whole time

contingent paid worker w.e.f. 05.05.1998 and thereafter, regularized as Peon-cum-Chowkidar w.e.f. 29.12.1998, vide order dated 19.02.2013 (Annexure A-3). As the name of the petitioner was not being reflected in the seniority list of Class-IV employees, therefore, High Court vide order dated 13.11.2014, passed in CWP No.6609 of 2014 directed the respondents to draw the seniority list of Peon-cum-Chowkidar within a period of ten weeks and in compliance thereto, vide Corrigendum dated 23.01.2015 (Annexure A-5), in partial modification of Office Order dated 04.05.2006, vide which the final seniority list of Class-IV employees as on 31.05.2013 was circulated, the petitioner was assigned seniority number 668-A and his date of appointment was reflected as 29.12.1998. As the petitioner thereafter was not being promoted to the post of Laboratory Attendant from the date when his juniors were promoted, he filed Contempt Petition No.353 of 2015, which was decided on 27.05.2015, with direction to the respondents to comply with the judgment dated 13.11.2014, passed in CWP No.6609 of 2014.

2. Thereafter, the petitioner made a representation to the respondents, dated 26.06.2015, to promote him to the post of Laboratory Attendant w.e.f. 28.05.2008, i.e. the date from which his juniors were promoted. A copy of this representation is appended with this petition as Annexure A-7. The petitioner was promoted to the post of Laboratory Attendant vide order dated 11.09.2015, whereas according to him he was entitled for this promotion to the post of Lab Attendant w.e.f. 28.05.2008, i.e. the date when his juniors were promoted as such. He filed another representation to this effect, i.e. Annexure A-9, dated 14.10.2015, but as no action stood taken upon the same, the petitioner preferred present writ petition, praying for the relief that respondents be directed to consider the case of the petitioner for promotion as Laboratory Attendant w.e.f. 28.05.2008 when juniors to him were promoted against the said post, alongwith all consequential benefits.

3. The petition has been resisted by the respondents, *inter alia*, on the ground that those Class-IV employees of Education Department were considered for promotion to the post of Laboratory Attendant, who exercised their options for being promoted as such and as the petitioner did not opt for his promotion to the post of Laboratory Attendant since 19.02.2013 till 22.10.2014, therefore, he was rightly promoted only after he had exercised this option.

4. I have heard learned counsel for the parties and have also gone through the pleadings of the parties.

5. In this case, as is evident from the facts narrated hereinabove, the petitioner was promoted on regular basis against the post of Peon-cum-Chowkidar w.e.f. 29.12.1998, vide order dated 19.02.2013. In fact, a perusal of Office Order dated 19.02.2013 demonstrates that in compliance to the judgment passed by this Court in CWP No.6249 of 2010-G, dated 19.06.2012, on the recommendation of the Departmental Promotion Committee, the petitioner who was serving as a Part Time Water Carrier, was converted as a Whole Time Contingent Paid Worker w.e.f. 05.05.1998 and was further promoted as regular Peon-cum-Chowkidar w.e.f. 29.12.1998. Thus, though the petitioner was promoted as a regular Peon-cum-Chowkidar w.e.f. 29.12.1998, but this Office Order was issued only on 19.02.2013 only and as his name was not being reflected in the seniority list of Class-IV employees, this was done by the respondent-department only after issuance of Corrigendum dated 23.01.2015.

6. In these circumstances, it is not understood as to how the petitioner was expected to give his option for being promoted against the post of Laboratory Attendant before the issuance of Office Order dated 14.02.2013 and the issuance of Corrigendum dated 23.01.2015.

7. That being the case, after the petitioner was promoted as regular Peon-cum-Chowkidar w.e.f. 29.12.1998 and his seniority position was also duly assigned to him vide Corrigendum dated 23.01.2015, the respondent-department was duty bound to seek the option of the petitioner and offer him promotion against the post of Laboratory Attendant at least from the date when persons junior to him stood promoted to the said post. This admittedly not having been done by the respondent-department, cannot be allowed to act to the detterent of the petitioner. In other words, after the issuance of Office Order dated 19.02.2013 and Corrigendum dated 23.01.2015, the respondent-department ought to have had conferred promotion to the petitioner against the post of Laboratory Attendant from the date when persons junior to him were promoted against the said post and in case he opted not to go for the promotion then consequences would have ensued.

8. Accordingly, this writ petition is allowed by holding the act of the respondent-department of not promoting the petitioner to the post of Laboratory Attendant from the date when persons junior to him were promoted as such, after he stood promoted against the post of Peon-cum-Chowkidar w.e.f. 29.12.1998, vide order dated19.02.2013 and after he stood assigned due seniority in the seniority list of Class-IV employees, vide Corrigendum dated 23.01.2015, as bad in law. Respondents are directed to promote the petitioner to the post of Laboratory Attendant from the date when persons junior to him were promoted and if need so arises the same be done by creating a superannuary post, with consequential benefits. These benefits shall be notional as up to the date of passing of the judgment and thereafter, actual benefits shall accrue to him including monetary benefits and seniority etc.

9. With these directions, this writ petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:-

RAM RATTAN
SON OF SH. SEWAK RAM, R/O SONAKHURAD, P.O CHAIL, TEHSIL KANDAGHAT, DISTRICT SOLAN, HIMACHAL PRADESH.

…….. APPELLANT

(BY MR. ROMESH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH THE DISTRICT COLLECTOR, SOLAN, DISTRICT SOLAN, H.P.

…..RESPONDENT

(BY MR. HEMANT VAID, ADDL. A.G WITH MR. VIKRANT CHANDEL, AND MR. GAURAV SHARMA, DY. A.GS)

REGULAR SECOND APPEAL NO. 375 of 2008
RESERVED ON: 25.8.2021
DECIDED ON:3.9.2021

H.P. Land Revenue Act, 1954 - Section 163 - Appellant encroached upon the suit land and claimed adverse possession during proceedings under Section 163 of H.P. Land Revenue Act, before the Assistant Collector 1st Grade- The Ld. First Appellate Court allowed the appeal preferred by the State and dismissed cross-objections reared by plaintiff Ram Rattan- Held- Possession of plaintiff is permissive- Regular Second Appeal allowed with condition that only after the conclusion of proceedings, to be forthwith drawn, by the plaintiff, before the statutory authority contemplated under H.P. Village Common Lands Vesting and Utilization Act, 1974, plaintiff be entitled in due course of law.

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

J U D G M E N T

The state of Himachal Pradesh/respondent herein, initiated ejectment proceedings, under Section 163 of Land Revenue Act against one Ram Rattan/appellant herein, alleging therein that the afore Ram Rattan had made encroachment over government land, to the extent of 6 biswa of land comprised in khata/khatauni 10 min/15 khasra No. 42 situated in village Sona Khurad, Tehsil Kandaghat (for short "suit land"), and, that hence the afore Ram Rattan be evicted. However, during the pendency of the afore proceedings, before the Revenue Officer concerned, Ram Rattan claimed acquisition of title over the suit land, on the basis of adverse possession. He also claimed that reflections in the apposite column of the Jamabandi appertaining to the suit land qua the State of Himachal Pradesh being owner of the suit land, rather being erroneous. The Revenue Court concerned hence converted itself into a Civil Court, and, thereupon, Ram rattan, instituted a suit before it, claiming therein, that he has acquired valid title over the suit land through adverse possession.

2. The Assistant Collector, 1st Grade (functioning as Civil Court u/s 163(3) of H.P land Revenue Act) (for short A.C 1st Grade) Kandaghat District Solan, H.P, after framing the hereinafter extracted issues, on the contentious pleadings of the contesting litigants, returned findings hence adversarial to the plaintiff Ram Rattan, upon, Issue No.1. Moreover, the A.C 1st Grade proceeded to render dis-affirmative findings on issue No.2 .

> "1. Whether the plaintiff Shri Ram rattan etc have become owner of the land by adverse possession if so its effect….OPP
> 2. Whether the State of HP has the right to evict Sh. Ram Rattan etc from the suit land……..OPD"

3. In the operative portion of the verdict drawn by the A.C 1st Grade, the hereinafter extracted directions were made:-

> "Both issues 1 and 2 are answered in the negative. The plaintiff is not declared to have become owners of the suit land by way of adverse possession. Also the defendant State has no right to evict the plaintiff from the suit land. Proceedings u/s 163 of HP Land Rev.Act are set-aside. The defendant is further restrained from causing any interference in the suit land either by itself or through agents or any official what so ever. Both parties are asked to bear their own cost. Decree sheet be drawn up accordingly. File be consigned to G.R.R. after due completion."

4. The State of Himachal Pradesh being aggrieved from the afore drawn verdict, preferred there-against Case No. 11FTC/13 of 2008 before the learned Addl. District Judge, Fast Track Court, Solan, District Solan, H.P. Ram Rattan also became aggrieved from the findings recorded by the A.C 1st Grade upon issue No.1 (supra), and, also hence preferred within the afore case No. 11FTC/13 of 2008, cross objections No. 15 FTC/13 of 2008.

5. Both the afore appeal, and, cross-objections became decided through a common verdict being rendered thereons by the learned first Appellate Court.

6. The learned first Appellate Court, in the operative part, of its verdict, accepted the appeal preferred before it, by the aggrieved State of Himachal Pradesh, and, also proceeded to dismiss the cross-objections reared by Ram Rattan against findings adversarial to him, as, become rendered, upon, issue No.1 by the A.C 1st Grade.

7. The appellant Ram Rattan (hereinafter referred to as "the plaintiff") became aggrieved from the verdict (supra) hence recorded by the learned first Appellate Court, and, has hence instituted the instant RSA before this Court.

8. When the instant appeal came up for admission, this Court admitted it, on the hereinafter extracted substantial questions of law:-

> "2. Whether area in question never vested in Gram Panchayat Sakori, nor in the State of HP in accordance with law and therefore, ejectment proceedings under section-163 of HP Land Revenue Act could not be initiated.
>
> 5. Whether the Respondent merely by changing entries in the revenue record cannot be held to be owner of the area in question and until and unless proceedings are held under provisions of HP village Common Land Act by the competent authority, this area cannot be held to be owned by the State of Himachal Pradesh and therefore, proceedings under Section-163 of the HP Land Revenue Act are not enforceable?"

9. A careful perusal of the evidence existing, on record discloses, that both the Courts below, did not commit, any impropriety or illegality, as may become aroused from theirs purportedly mis-appreciating evidence on record, and, of theirs purportedly appreciating evidence germane to issue No.1 (supra).

10. The reasons for making the afore conclusion, becomes derived, from the factum of the Jamabandi(s) appertaining to the suit land, and, commencing from the year 1955-1956, and, as becomes borne in Exhibit R-1, besides Jamabandi(s) appertaining to the suit land, and, relating to the years 1968-1969 hence embodied in Exhibit R-2, rather vividly and graphically containing recitals, depictive of the predecessor-in-interest of the plaintiff, holding possession of the suit land. In the classification column of the Jambandi(s) an entry of Gair Mumkin Dukan exists. The afore entries existed during the lifetime of the predecessor-in-interest of the plaintiff, in as much, as, one Sewak Ram. On the demise of afore Sewak Ram, the plaintiff alongwith Kanta, Shakuntala and Sarju, became entered in the column of possession in the Jamabandi, Jamabandi whereof is embodied in Annexure R-11.

11. The factum of the suit land, becoming vested in the ownership of the State of Himachal Pradesh, through operation of the mandate, comprised in the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, has not come to be contested nor has come to be ousted through adduction of cogent and tangible evidence. Even if any claim, with respect to illegality of vestment of the suit land, through operation of the law (supra), in the State of Himachal Pradesh, became rested rather on any evidence of evidentiary vigor, becoming adduced before the A.C 1st Grade, thereupon, too, the afore fact was determinable, only by, the specially constituted mechanism, contemplated in the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, obviously hence the afore plea, was neither convass-able nor was befittingly entertain-able before the A.C 1st Grade.

12. The sequel of the afore discussion, is that any challenge, to legality of the afore vestment was not permissible to be made, either before the A.C 1st Grade or before the leaned First Appellate Court. Therefore, when the afore challenge before the appropriately constituted statutory mechanism, rather remained un-recoursed by the plaintiff. Consequently, the validity of the apposite vestment, and, also of the corresponding thereto entries, as, occurring in the Jamabandi(s) appertaining to the suit land, cannot become tested in the instant proceedings.

13. Be that as it may, earlier to the vestment of the suit land through operation of law, in the State of Himachal Pradesh, it was recorded in the ownership of Nagar Panchayat. The afore entries were also not contestable in the proceedings drawn before the A.C 1st Grade, through recoursings being made before it. On the afore score, too, the afore entries also acquire conclusivity.

14. Since this Court has made the afore drawn conclusion with respect to un-amenability, of, any challenge being laid, to the entries borne in the apposite Jamabandi(s), as, appertaining to the suit land, wherein the suit land

becomes reflected to be owned by the State of Himachal Pradesh. Therefore the apt sequel thereof, is that the possession over the suit land of the predecessor-in-interest of the plaintiff hence as becomes pronounced in the apposite column of the apposite Jamabandi(s), and, thereafter upon his demise, hence, the name(s) of the plaintiff alongwith the afore Kanta, Shakuntala and Sarju, becoming recorded in the column of possession, also acquires an aura of solemnity, and, are connotative of mere permissive possession.

15. The effect of this Court assigning probative sanctity, to the factum of occurrence of the name(s) of persons (supra) in the apposite column of the apposite Jamabandi(s), is reiteratedly that obviously, the suit land became in the permissive possession of the predecessor-in-interest of the plaintiff, and, upon his demise the plaintiff alongwith the afore named persons, alike him obviously also hold only permissive possession of the suit land.

16. Moreover, Since during the lifetime of Sewak Ram, the latter since 1954 and uptill 1968, did not stake any claim for scoring off the relevant entries of possession, as, made in his name, vis-à-vis suit land, nor when he claimed prescriptive title thereon, through efflux of time. Therefore, when the entry (supra) is prima facie connotative of his holding permissive possession of the suit land. Thereupon, when it becomes also amenable to be read, as, an entry bestowing upon him no leverage to espouse qua his holding the suit land with an animus possidendi. Therefore, want of the afore recoursings being made by Sewak Ram i.e predecessor-in-interest of the plaintiff, during his lifetime, the entry of possession recorded in his name, in the relevant Jamabandi, is concluded to be a sequel of his simpliciter permissive possession upon the suit land.

17. The plaintiff and the afore named persons, on demise of their predecessor-in-interest, became recorded to be in possession of the suit land. The afore entry occurred in the year 1998. Consequently since the year 1998,

their purported possession, within a purported animus possidendi, commenced from 1998, and when 30 years, were to elapse therefrom, for theirs being enabled to validly propagate theirs holding the suit land with an animus possidendi. However, when the plaintiff has instituted the plaint in the year 1998. Obviously the afore period of 30 years never elapsed since 1998. Therefore, he was completely barred to stake any valid claim, rather propagating acquisition of prescriptive title over the suit land, through efflux of time. In sequel the finding(s) recorded on issue No.1 is well merited, and, do not require any interference being made by this Court.

18. Be that as it may, in the classification column, of the relevant Jamabandi, a "Gair Mumkin Dukan" is existing, upon, the suit land. The A.C 1st Grade restrained the State of Himachal Pradesh from causing interference in the suit land. However, the learned first Appellate Court, permitted the defendant/State of Himachal Pradesh, to, evict the plaintiff from the 'dukan' over the suit land, after theirs recoursing the procedure constituted under law. Since as afore-stated this Court, has prima-facie, though, validated the vestment through operation of law of the suit land, in the State of Himachal Pradesh. Moreover, when the vestment (supra) through operation of law (supra) of suit property, described, as gair mumkin dukan in the revenue records, may if permissible, save it from its vestment, through the plaintiff depending, upon the apposite saving clause, through his recoursing proceedings before the statutorily contemplated authorities, in statute (supra). Moreover, when the afore endeavor, may if permissible, under law can be recoursed, only before the statutory authority contemplated in the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, and only, if at the site of the suit land, no commercial establishment exists rather only if permissible under law, hence a dwelling house exists, and, subject to an undertaking being furnished by them, before the Collector concerned against theirs using it for commercial purpose. Thereupon subject to afore it may be

recoursed. Therefore, given the observations supra, the verdict of the learned first Appellate Court ordering for eviction of the plaintiff from the suit land, through adoption of the procedure constituted under law, rather suffers from a grave legal fallacy, and, is interfered with.

19. In view of the above, the instant RSA is allowed, with a condition (supra), that only after conclusion of proceedings, to be forthwith drawn, by the plaintiff, before the statutory authority contemplated under Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974, and, upon an adversarial decision, if required under law, being recorded against the plaintiff, thereupto, the defendant may not proceed to issue warrants of possession, vis-à-vis, the suit property, for there-throughs the plaintiff becoming evicted therefrom.

All pending applications stand disposed of accordingly.

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

Sukh Ram and another .....Appellants.

Versus

The District Collector Sirmour and others ....Respondents.

RSA No. 414 of 2018
Reserved on : 24.7.2021
Decided on: 29.7.2021

Code of Criminal Procedure, 1973- Section 292- DNA report- Suit for declaration to correct the name of father and also the apposite records as maintained in the Panchayat, as well as, in the School record be corrected accordingly- Suit as well appeal thereto dismissed- Report from State Forensic Science Laboratory, Junga, qua paternity test sought- Held- As per report co-

plaintiff Sukh Ram cannot claim to be fathered by Manga Ram- Impugned judgment and decrees are affirmed- Appeal dismissed.

For the Appellants: Mr. Romesh Verma, Advocate (Through Video Conferencing).

For the Respondents: Mr. Narender Guleria and Mr. Ashwani Sharma, Addl.A.Gs for respondents No.1 and 2 (Through Physical mode).

Mr. Balwant Singh Thakur, Advocate for respondents No.3 and 4 (Through Physical hearing).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The appellants' (for short "the plaintiffs") instituted Civil Suit No. 127/1 of 2014, before the learned Civil Judge, Nahan, District Sirmaur, H.P. Through, the afore Civil Suit, the plaintiffs prayed for the making of a declaratory decree, that the name their father is Manga Ram, and, not Sobha Ram. Further more, they pray for, the, making of a declaratory decree, that the apposite records as maintained in the Panchayat, as well as, in the Schools concerned be corrected accordingly.

2. However, defendant No.1/respondent No.1, in its written-statement instituted to the suit, contended that the plaintiffs were born from the loins of one Sobha Ram, and, from the womb of Mehandi Devi. Defendant No.1/Respondent No.1 supported the afore contention, on anvil of a Pariwar Register maintained with the Panchayat concerned. Moreover, the corrections as made in the relevant records, and, theirs disclosing that the plaintiffs are sons of Manga Ram, are contended to be fictitiously made, hence only for the

plaintiffs being untenably bestowed with the post retiral and other government benefits arising from the demise of one Manga Ram.

3. The learned trial Court on consideration of oral as well as documentary evidence, as, adduced before it, made a conclusion, that the afore strived declaratory relief, was not amenable for being granted to the plaintiffs, and, consequently the learned trial Court non-suited the plaintiffs.

4. The aggrieved plaintiffs proceeded, to, against the verdict of the dismissal of their suit, as made by the learned trial Court, hence institute Civil Appeal No. 5-N/13 of 2018 before the learned Additional District Judge, Sirmaur District at Nahan, H.P. The learned First Appellate Court did not accept, the plaintiffs' appeal, rather it validated the judgment and decree hence dismissing the plaintiffs' suit, as became recorded by the learned trial Court.

5. The aggrieved plaintiffs proceeded to against the concurrently recorded verdicts of both the Courts below, hence institute the instant Regular Second Appeal before this Court. Even though, the instant RSA was to be admitted on certain formulated substantial questions of law. However, all the substantial questions of law as formulated, at pages 10 and 11 of the paper book, are for the reasons ascribed hereinafter, not the befitting substantial questions of law, nor this Court deems it fit, to formulate any substantial question of law, for its proceeding to, after answering them, hence either allow the RSA, and, to consequently annul the concurrently recorded verdicts, as, made respectively by the learned trial Court, and, by the learned First appellate Court, wherethrough the plaintiffs' suit became dismissed, and/ or to dismiss the extant RSA (a) the existence on record of best documentary evidence, as, comprised in the report of the State Forensic Science Laboratory, and which obviously carries the firmest evidentiary vigor, hence for underwhelming the import, if any, of oral and other documentary evidence, as becomes relied upon by both the learned Courts below, in, dismissing the

afore declaratory plaintiffs' suit. The availability on record of the afore scientific evidence, arises from this Court on 8.10.2018 making the hereinafter extracted order:-

> "The issue in question only relates to the paternity of the plaintiff/appellants as they claim themselves to be the sons of one Manga Ram and not Shobha Ram, as otherwise exists in the government records. Therefore, I am of the considered view that since both Shobha Ram and his wife Surto Devi are alive, therefore, the paternity test qua appellants No.1 and 2 be conducted, as is otherwise proposed by the appellants themselves. Therefore, both the appellants alongwith respondents No.3 and 4 are directed to report at State Forensic Science Laboratory Junga on 26.10.2018 alongwith copy of this Order."

6. Further more, on 20.11.2018 this Court has made the hereinafter extracted order:-

> "Learned Advocate General is present and states that the entire confusion in this Case is on account of non coordination of different departments of the Government and therefore, proceedings proposed to be initiated against the Medical Superintendent, IGMC Shimla be dropped. I find merit in this contention. Accordingly, the proceedings proposed to be initiated against the medical superintendent, IGMC Shimla are ordered to be dropped.
>
> The parties are present in person before this Court and, therefore, blood samples of the appellants, namely, Sukh Ram, Punnu Ram and respondents No.3 and 4 namely Shoba Ram and Surto Devi on the FTA Cards are directed to be taken by the Chief Medical Officer, Zonal Hospital, DDU Shimla, Positively during the course of the day. The samples so collected shall be thereafter taken by LC Mamta No. 895 Women police Station, BCS, New Shimla to FSL Junga during the course of the day and

handed over the same to the concerned Officer at FSL Junga.

FSL Junga is directed to expedite the submission of the report, which in any event should reach this Court on the next date of hearing.

The parties need not be present on the next date of hearing.

List on 8.1.2019."

7. In pursuance to the aforemade orders, the SFSL, Junga has submitted its report. However, on 11.6.2019, this Court, on a perusal of the apposite report of the SFSL Junga, made a conclusion that the apposite report, remains reticent with respect to the trite factum whether the plaintiffs are fathered by co-respondent No.3 one Sobha Ram or not. Consequently, on 11.6.2019 this Court had made the hereinafter extracted order:-

"The issue of plaintiffs being not fathered by defendant No.3 Shobha Ram, remains not echoed in the report of the FSL. Consequently, the FSL concerned, with the relevant material available with it, shall made the relevant matchings and thereafter it shall, within two weeks, hence make a report, whether the plaintiffs are fathered or not fathered by the defendant No.3 Shobha Ram. List after two weeks."

8. On 3.9.2019, the hereinafter extracted order was passed by this Court.

"The learned counsel appearing for the contesting litigants submits that the appellants, as well as co-respondent No.3, Shobha Ram, respectively, have supplied their blood samples, to the Doctor concerned, at the FSL. However, the FSL concerned has not yet reported to this Court whether the appellants are not borne from the loins of Shobha Ram and that they are rather borne from the loins of one Mange Ram. The FSL concerned, is directed to

ensure that the opinion, on the afore blood samples, be positively, hence recorded within two weeks, and the afore opinion shall, clearly pronounce, whether, the appellants are fathered by one deceased Mange Ram or not or whether they are borne from the loins of one Shobha Ram. List after two weeks."

9. However, before extracting, the, conclusions carried in the report of SFSL, Junga, it is imperative to bear in mind that the respective apposite blood samples, on FTA cards, as, become sent to the SFSL concerned, in closed and sealed parcel(s). A perusal of the report of the SFSL discloses, that one sealed white coloured envelope bearing four seals of Food Inspector labeled as REINKA, became received thereat for analyses. The afore exhibits are the respective blood samples on FTA cards of Sukh Ram, Sobha Ram, Mehandi Devi and Punnu Ram, and, on all the afore parcels became embossed four seals of the Food Inspector carrying thereon(s) the English alphabet(s) (REINKA). Further more, since the report of the SFSL concerned, does through, the mandate of section 292 of Cr.P.C carry a presumption of truth. However given the factum that none of the persons from whom the respective blood samples, on FTA cards became collected rather voice through their respective counsel(s), that their respectively collected blood samples on FTA cards were spurious, and, or do not appertain to their respective persons. Therefore, all afore are estopped from rebutting the report of the SFSL, and, concomitantly are constrained to assign conclusivity thereto.

10. The State Forensic Science Laboratory concerned has placed on record its report. The conclusions carried in the report are extracted hereinafter.

" **Conclusions:**

On the basis of the above analysis performed on the aforesaid exhibits, it is concluded that:-

I. Mehandi Devi (source of Exhibit-1-1 (blood sample, Mehandi Devi) **is the biological mother** of Punnu Ram

[source of Exhibit-2 (blood sample on FTA card, Punnu Ram]

II. Shobha Ram [source of **Exhibit -3** (Blood sample on FTA card, Shobha Ram)] **is the biological father** of punnu Ram [source of **Exhibit -2** blood sample on FTA card, Punnu Ram].

III. The DNA profiles of Mehandi Devi [source of Exhibit-1-1 (blood sample, Mehandi Devi)] and Sukh Ram [source of Exhibit-1 (blood sample on FTA card, Sukh Ram)] **are consistent as those of biological mother and offspring.**

IV. Shobha Ram [source of Exhibit -3 (blood sample on FTA card, Shobha Ram)] **is not the biological father** of Sukh Ram [source of Exhibit-1 (blood sample on FTA cared, such Ram].

V. Shobha Ram [source of Exhibit-3 (blood sample on FTA cared, Shobha Ram], Sukh Ram [source of Exhibit-1 (blood sample on FTA card, Sukh Ram)] and Punnu Ram] [source of Exhibit-2 (blood sample on FTA Card, Punnu Ram)] are patrilinealy related."

11. Moreover, when there is no enunciation in the report of the SFSL concerned, that the afore blood samples were tampered with, hence the conclusions carried in the report, are conclusive, and do not support, the argument of co-plaintiff Punnu Ram, that he was not born from the loins of one Sobha Ram rather was born from the loins of Manga Ram. Moreover, he is disclosed therein to be mothered by One Mehandi Devi. Co-plaintiff Sukh Ram though is mothered by Mehandi Devi, however, he is disclosed in the report of SFSL to be not fathered by Sobha Ram. Therefore, co-plaintiff Sukh Ram cannot claim, that he is fathered by Manga Ram, as given, the occurrence of demise of Manga Ram, in the year 2014, thereupon the blood sample(s) on FTA cards of Manga Ram remained uncollected, nor hence could be sent for apposite inter-se matching with the blood samples collected on FTA cards of Sukh Ram. In sequel, for want of the afore best scientific evidence,

co-plaintiff Sukh Ram cannot merely on flimsy oral evidence, hence claim to be fathered by Manga Ram.

12. In view of the above, the present appeal stands dismissed, and, the impugned judgment(s) and decree(s) are maintained and affirmed. Records be sent back. No costs.

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

Between:

SHRI BHAGWAN DASS,
S/O SHRI PARAS RAM,
R/O VILLAGE KATHIARI,
TEHSIL AMB, DISTRICT UNA, HP

...APPELLANT

(BY MR. N.K. THAKUR, SENIOR ADVOCATE WITH MR. DIVYA RAJ SINGH AND MR. KARANVIR SINGH, ADVOCATES, FOR THE APPELLANTS)

AND

1. SHRI CHAMAN LAL, S/O SH. BASANTA,
2. SHRI SHAM LAL , S/O SHRI BIHARI LAL,
3. SMT. SATYA DEVI W/O SHRI BIHARI LAL,
4. SMT. USHA DEVI, W/O SHRI CHAMAN LAL,
5. SMT. KARNA DEVI, W/O SHRI RAKESH KUMAR,

ALL RESIDENTS OF VILLAGE KATHIARI, TEHSIL AMB, DISTRICT UNA, HP

(BY MR.PAWAN GAUTAM, ADVOCATE)

REGULAR SECOND APPEAL NO. 423 of 2009
DECIDED ON:23.09.2021

Specific Relief Act, 1963- Section 5 and 38- Suit for possession by demolition of construction and permanent injunction- Matter compromised- First Appeal dismissed- Held- Demarcation Report Ex. CW1/A cannot be

accepted to be validly made- Fresh demarcation ordered – Matter remanded to First Appellate Court.

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

J U D G M E N T

The plaintiff instituted civil suit No. 232 of 1999, before the learned trial Judge. In the suit (supra), he claimed the making of the hereinafter extracted decrees:

A) Suit for possession by demolition of construction marked by letters A B C D, as shown in red colour in the site plan of the plaintiff being a part of the land measuring 0-03-46. Hence, comprised in Khewat No. 204 min, khatauni No. 511, min and khasra Nos 2554, as entered in the Jamabandi for the year 1996-97, situated in village Kathiari, Tehsil Amb, District Una (H.P.)

B) Suit for issuance of permanent injunction restraining the defendants from raising any further construction taking further forcible possession and changing the nature of the land measuring 0-08-59 Hects, comprised in Khewat No. 204 min, khatauni No. 511 min and khasra No. 2531 and 2554, as entered in the Jamabandi for the year 1996-97, situate in village Kathiari, Tehsil Amb, District Una, under Sections 5 and 38 of the Specific Relief Act."

2. The plaintiff also instituted another civil suit bearing No. 128 of 1999, before the learned trial judge, and in the afore suit, the plaintiff claimed the makings of the hereinafter extracted decree(s), vis-à-vis, the suit khasra No. 1556 and 1557, and, against the defendants.

3. Both the afore civil suits, through a common verdict, recorded thereons, on 29.8.2006, became decided in the hereinafter extracted manner:

> "The Court hereby direct that parties shall abide by the compromise and the result of demarcation report Ext. CW1/A which alongwith map relied and statements Ext. CW1/B and C

> are made part of decree. In view of facts and circumstances, the parties shall bear their own costs. A decree sheet be prepared. Attested copy of this judgment and that of decree sheet be placed on the record of Civil Suit No. 232/1999 titled as Bhagwan Dass Vs. Behari Lal etc. Both the suits be consigned to record room."

4. The aggrieved plaintiff carried thereagainst Civil Appeal No. 27/2006, before the learned First Appellate Court. The learned first Appellate Court, upon Civil Appeal No. 27 of 2006, made thereon a decision of dismissal. Obviously, hence, the judgments and decrees, as became rendered by the learned trial Judge, became affirmed, and, maintained.

5. The aggrieved plaintiff, is led, to constitute thereagainst, the instant appeal, before this Court. When the instant appeal, came up before this Court, on 26.3.2010, it came to be admitted, on the hereinafter extracted substantial questions of law:

> "1. Whether the statements of the parties with respect to the demarcation in a suit for injunction would automatically make the later suit for possession based on title redundant and such findings are unsustainable?
> 2. Whether without clubbing the two suits involving different subject matter can be legally disposed of by a common judgment, more particularly when the issues in both the suits are distinct and specific and the learned Courts below have committed an error of law in holding that both the suits have become redundant?
> 3. Whether the statement of the parties with regard to getting the demar5cation of their land in an injunction suit would take away the right of another party to file suit for possession of his land against others?
> 4. Whether admission made by the Local Commissioner while appearing as a witness and contradicting his own report is sufficient evidence to discard the report of the Local

> Commissioner and the learfned Courts below have committed an error in relying upon such report which is Ext. CW1/A?

6. Though, the concurrent verdicts, as made respectively by the learned trial Judge concerned, and later by the learned first appellate Court, draw sustenance, from a compromise, which is reflected in the order, made by the learned trial Judge, on 29.8.2006, order whereof is extracted hereinafter:

> "Both the learned counsel have made statement that matter has been compromised between the parties and they will get suit land and adjacent land demarcated from Tehsildar as local commissioner as per record of consolidation and result would be binding on both the parties. In view of this, Tehsildar, Amb is appointed as local commissioner with direction to demarcate the suit land and adjacent land as per record of consolidation strictly for the purpose of compromise. His fee is assessed as Rs. 1200/- which shall be shared equally by both the parties.Reference to the local commissioner be issued and report be called for 27.5.2005."

7. However, for the reasons to be assigned hereinafter, the reliance as placed upon the order (supra), and, also, both the learned Courts below, on anvil thereof accepting the report of the Demarcating Officer, rather is completely flawed. The pre-dominant reason(s), for making the afore conclusion, becomes anviled upon the factum of order (supra) impermissibly, binding the parties to accept the orders (supra), especially when unless the report of the Demarcating Officer, became cogently proven, to be drawn, in accordance with law, thereupon, it held not validity, in the eyes of law, nor also, the order (supra), as made by the learned trial Judge, could be fastened with any conclusive and binding effect, hence, upon the contesting litigants concerned.

8. Be that as it may, since this Court, assigns the afore reasons, for hence conditionally fastening any conclusivity to the order (supra) as made by the learned trial Judge concerned, thereupon, it is led to determine the legal potency, and, efficacy of the demarcation report, as became drawn by the Demarcating Officer concerned. Upon a reading of the testification of the Demarcating Officer concerned, if manifest displays become borne therein, vis-à-vis, the demarcating officer rather flouting the relevant guidelines, appertaining to the conducting of a valid demarcation. Thereupon, this Court would discard the report of the Demarcating Officer, and, also would concomitantly conclude that no finality or conclusivity, is to be fastened, upon the contesting litigants, vis-à-vis, the order (supra), as became made by the learned trial Judge. A closest perusal of the testification, of the Demarcating Officer, who stepped into witness box as a Court witness, and, who during his examination-in-chief, tendered and proved Ext. CW1/A, also does reveal, that yet during the course of his cross-examination, his accepting suggestions, as became meted to him, by the learned counsel for the plaintiff, that vis-à-vis, disputed khasra Nos. 1555, and, 1556, incorrect measurement(s) being made. Moreover, with his further admitting, in his cross-examination, that in Ext. CW1/A an erroneous reflection occurs that the length from Point "B" to "J", being 29 karams. Besides, with his also admitting in his cross-examination, that his omitting to record the correct dimensions of the afore. Moreover, with his also admitting in his cross-examination, that he did not spell in Ext. CW1/A, the measurement as made from C to D. Consequently, the demarcation report, as prepared by him, and, as embodied in Ext. CW1/A, cannot be accepted to be validly made, nor also hence the order (supra) could be fastened, with any aura of conclusive, and, binding effect, vis-à-vis, the litigants concerned.

9. Be that as it may, imperatively upon an invalidly prepared demarcation report, borne in Ext. CW1/A, the learned trial Judge could not

make the impugned verdict (supra), nor the learned first appellate Court could proceed to affirm it.

10. However, for deciding the lis interse the contesting litigants, this Court deems it fit to remand, the lis to the learned first appellate Court to, enable it to, within two weeks, hereafter, appoint a demarcating officer, for conducting, a valid demarcation of the suit khasra Nos. The Demarcating Officer concerned shall, within three weeks, thereafter, submit his report before the learned first appellate Court. The learned first appellate Court, shall ensue the stepping into the witness box, of the author of the demarcation report, and shall also, ensure his being cross-examined, by the counsel for the aggrieved. Obviously, thereafter the learned first appellate Court, shall within four weeks, thereafter, record fresh findings upon the issues, which fell for contest, in, the suit for possession (supra), as became instituted, by the plaintiff and, also shall record fresh findings, upon the civil suit (supra), for injunction, as became instituted by the plaintiff against the defendants. Substantial questions of law are accordingly answered in favour of the plaintiff and against the defendants.

11. Therefore, the instant appeal succeeds, and, the judgments and decrees, impugned before this Court are set aside. No order as to costs. Records be forthwith sent down to the learned First Appellate Court. Also, the pending application(s), if any, are disposed of.

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

Between:-

SHRI GITA RAM
SON OF SH. RAM SARAN (DECEASED)
THROUGH HIS LRS:-

1(A) SMT. SAWROOPI DEVI, WIDOW OF LATE SH. GITA RAM.

1(B) SH. MADAN GOPAL SON OF LATE SH. GITA RAM

1(C) SH. VIJAY KUMAR S/O LATE SH. GITA RAM

1(D) SH. GUMAN SINGH, SON OF LATE SH. GITA RAM

1(E) SH. NARESH KUMAR SON OF LATE SH. GITA RAM

1(F) SMT. SUDESH THAKUR D/O LATE SH. GITA RAM

ALL R/O VILLAGE CHOHRA, P.O JHAJA, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

2. SH. SHIRI RAM S/O SH. RAM SARAN
3. SMT. LAJWANTI D/O LATE SH. JAI RAM.

4. SMT. BIMLA D/O LATE SH. JAI RAM

5. SMT. SALOCHNA D/O LATE SH. JAI RAM

6.SH. SURINDER KUMAR S/O LATE SH. JAI RAM.

7. SH. NARINDER KUMAR, SON OF LATE SH. JAI RAM

ALL R/O VILLAGE CHOHRA, POST OFFICE JHAJA, VIA CHAIL, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

…….. APPELLANTS

(BY MR. ROMESH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH THE DISTRICT COLLECTOR, SOLAN, DISTRICT SOLAN, H.P.

…..RESPONDENT

(BY MR. HEMANT VAID, ADDL. A.G WITH MR. VIKRANT CHANDEL, AND MR. GAURAV SHARMA, DY. A.GS)

REGULAR SECOND APPEAL NO. 473 of 2008
RESERVED ON: 25.8.2021
DECIDED ON:3.9.2021

H.P. Land Revenue Act, 1954- Section 163- Question of Title- Adverse possession- Appellant encroached upon the suit land and claimed adverse possession during proceedings under Section 163 of H.P. Land Revenue Act, before the Assistant Collector 1st Grade- The Ld. First Appellate Court dismissed the appeal preferred by the appellants and accepted cross-objections reared by the State- Held- In so far as the respective verdicts, as, made by both the Courts below to respectively save from vestment and order for vestment of the house, as, borne on the suit land, is concerned, the same is quashed and set aside. Therefore, the instant RSA is partly allowed. (Para 14)

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

J U D G M E N T

The State of Himachal Pradesh/respondent herein initiated ejectment proceedings under Section 163 of Land Revenue Act against appellants herein (for short "plaintiffs"), in respect of land khasra No. 698/403, 588/1 and 685 min measuring 39-17 bighas situated in mauza Chohra, Pargana Chail, Tehsil Kandaghat, District Solan, H.P. (for short "suit land"). However, during the pendency of the afore proceedings before the Revenue Officer concerned, the plaintiffs claimed acquisition of title over the suit land on the basis of adverse possession. He also claimed that reflections in the apposite column of the Jamabandi appertaining to the suit land qua the State of Himachal Pradesh being owner of the suit land rather being erroneous. The Revenue Court concerned hence converted itself into a Civil Court, and, the plaintiffs, instituted a suit before it, claiming therein that they have acquired a valid title over the suit land through adverse possession.

2. The Assistant Collector, 1st Grade (functioning as Civil Court u/s 163(3) of H.P land Revenue Act) (for short A.C 1st Grade) Kandaghat District Solan, H.P, after framing the hereinafter extracted issues, on the contentious pleadings of the contesting litigants, returned findings hence adversarial, to the appellants/plaintiffs therein, upon Issue No.1. Moreover, the A.C 1st Grade proceeded to render dis-affirmative findings on issue No.2 .

> "1. Whether the plaintiff's have become owner of the suit land by adverse possession-if so its effect……OPP
>
> 2. Whether the State of H.P has the right to evict the plaintiffs' from the suit land. OPD"

3. In the operative portion of the verdict drawn by the A.C 1st Grade, the hereinafter extracted directions were made:-

> "After going through the evidence on record and the arguments put forward I am of the view that the plaintiff's plea of adverse possession does not hold whereas the State being the actual owner has every right to correct the Revenue entries in its favour and to evict the plaintiffs from the suit land. They are accordingly ordered to be evicted from the sut land. However the defendant state is restrained from evicting the plaintiff from the house constructed in khasra No. 685 minmeasuring 0-9 biswas which was constructed in 1970 and which was not to be vested with the State Govt. as per sub-section 2 (c) of Section 3 of H.P Village Common Land Vesting and Utilisation Act, 1974. Parties are directed to bear their own cost. Decree sheet be drawn up accordingly. File be consigned to G.R.R after due compliance."

4. The appellants herein being aggrieved from the afore drawn verdict, preferred there-against Case No. 39 FTC/13 of 2007 before the learned District Judge, Fast Track Court, Solan, District Solan, H.P. The State of H.P also became aggrieved from the findings recorded by the A.C 1st Grade upon issue No.2 (supra) and hence preferred within the afore case No. 39 FTC/13 of 2007, cross objections No. 39 FTC/13 of 2008.

5. Both the afore appeal and cross-objections became decided through a common verdict being rendered thereon(s), by the learned first Appellate Court.

6. The learned first Appellate Court, in the operative part of its verdict, dismissed the appeal preferred before it, by the aggrieved appellants herein, and, also proceeded to accept the cross-objections reared by the State of Himachal Pradesh against the adversarial findings recorded against it, upon issue No.2, by the A.C 1st Grade.

7. The appellants (hereinafter referred to as "the plaintiffs") became aggrieved from the verdict hence recorded by the learned first Appellate Court, hence instituted the instant RSA before this Court.

8. When the instant appeal came up for admission, this Court admitted it, on the hereinafter extracted substantial questions of law:-

> "2. Whether Respondent has not acquired title of ownership over suit lands keeping in view the fact that land in suit was previously in separately and exclusive possession of the predecessor of the appellants and thereafter they continue to possess the same and therefore since the land in suit was not utilized for the benefit of the village community therefore, same would not vest neither in Nagar/Gram Panchayat nor in the State of H.P.
>
> 3 Whether the Assistant Collector 1st Grade failed to comply with the prescribed procedure as provided under Section 163 of HP Land Revenue Act?"

9. A careful perusal of the evidence existing on record, discloses that both the Courts below, did not commit any impropriety or illegality, as may become aroused from theirs purportedly mis-appreciating evidence on record, and, or upon theirs purportedly not appreciating evidence germane to issue No.1 (supra).

10. The findings adversarial to the plaintiffs, as, become recorded upon issue No.1, assume the completest aura of validity, as the plaintiffs, came into possession of the suit land, upon, demise of one Sholiya, whose demise occurred in the year 1968. The patwari concerned reported about the illegal entries in the year 1991. The entries appertaining to the plaintiffs become recorded in the column of possession of the apposite Jamabandi. It appears that since the land comprised in khasra No. 698/403, is village common land, whereon(s) the entire body Bartandarans, whose names occur in the list of Bartandarans, rather collectively hold in consonance with their rights depicted in the Wajib Ul Urj, the apposite right of user thereof.

Thereupons, the plaintiffs, did not ever hold any right to claim exclusivity of possession thereof, moreso to the ouster of the other estate right holders. The afore inference is well merited, as, in so far as Khasra No. 698/403 is concerned, as no exclusivity of possession by the plaintiffs can either be assumed thereon nor can be validated by this Court. Obviously it being village common land rather whereon(s) the entire village community, does collectively have a right, to make joint user thereof in the manner supra.

11. Even otherwise as afore-stated, when the plaintiffs assumed possession of the suit land in the year 1968, and, with the Patwari concerned making detection of unlawful entries in the year 1991, thereupon up till 1991 from 1968, the requisite period of 30 years, was enjoined to elapse, for hence the plaintiffs validly staking a claim for theirs holding possession of the suit land hence with any animus possidendi. However, since during the afore interregnum the plaintiffs, did not make, the afore espousal before the Civil Court concerned, thereupon they are barred to raise the afore plea before the A.C 1st Grade.

12. Be that as it may, even prima-facie the afore plea, was not amenable for becoming recoursed by the plaintiffs, as the rights in so far as, Khasra numbers (supra) are concerned, the entire village body held, and, holds the apt collective right of user of the suit land, in the manner supra, and, hence all of them were required to be impleaded as co-defendants in the civil suit, whereas none of them has been impleaded, hence makes the suit to be mis-constituted, for non arraying of all necessary and proper parties to the lis. The afore may have been undone, only upon, evidence becoming adduced, that all the other villagers or estate right holders, though holding collective rights alongwith the plaintiffs to equally use the suit land, rather theirs becoming completely ousted from user thereof, by proven overt ousting acts of the plaintiffs. However, even the afore evidence is amiss. Therefore, given the description of the suit land in the Jamabandi, as Shamlat land, the plaintiffs

obviously, cannot claim exclusive right of user of the suit land, and, obviously to the exclusion of the other estate holders, nor also they can claim prescriptive acquisition of title thereon, through afflux of time, especially when the basic rubric governing the acquisition of title by prescription rather becoming embodied in the maxim animus possidendi, obviously remaining for reasons supra, hence un-satiated. Therefore, they cannot rest any valid claim to validate their possession over the suit land.

13. However a house raised on Khasra No. 685, and, measuring 9 biswas, and, constructed in the year 1970, and hence may be falling within the realm of the apposite saving clause, if permissible under law. Thereupon, the learned A.C 1st Grade, after applying thereons the apposite saving clause, saved the eviction therefrom of the plaintiffs. The learned A.C 1st Grade, hence clearly beyond the ambit of the jurisdiction to be exercised rather through his recoursing the mandate of Section 163(3) of the land Revenue Act, has untenably after adopting the procedure rather to be adopted by the statutory authority contemplated in the Himachal Pradesh Village Common Lands Vesting and Utilization, Act 1974, has untenably saved, the, eviction of the plaintiffs from the dwelling house. Reiteratedly, also for the reason, that the special statutory mechanism constituted in the H.P Village Common Lands Vesting and Utilization Act 1974, was the only recoursable remedy with the plaintiffs, to save from vestment, the afore house, rather in the State of Himachal Pradesh. Though the learned first Appellate Court partly reversed the verdict (supra) as made by the collector concerned in so far as it is relating to dwelling house. However, both the learned Courts below, could not make the respective verdict(s) supra, unless the afore statutory mechanism qua therewith, became recoursed, which however, has evidently, remained unrecorded at the instance of the plaintiffs.

14. Consequently, in so far as the respective verdicts, as, made by both the Courts below to respectively save from vestment and order for

vestment of the house, as, borne on the suit land, is concerned, the same is quashed and set aside. Therefore, the instant RSA is partly allowed (supra) with a condition that the plaintiffs may, only qua dwelling house recourse forthwith the special statutory mechanism (supra), and, till a decision in accordance with law, is made thereon by the legally competent authority, as is constituted for the relevant purpose, under the special statute (supra) rather there up to the plaintiffs may not be evicted from the suit house. However, the verdict of the learned first Appellate Court in so far as it ordering for the eviction of the plaintiffs, in accordance with law, from the suit land, is maintained and affirmed. All pending applications stand disposed of accordingly.

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

Between:-

1. SURINDERA DEVI W/O SH. TIKKA RAJINDER CHAND,

2. SMT. KRISHNA DEVI, W/O SH. KASHMIR SINGH S/O MOOLA.

3. SH. KASHMIR SINGH, S/O MOOLA SINGH, S/O DEVI SINGH.

4. SH. PRAKASH CHAND (DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:

   (I) RAM PYARI, W/O SH. PRAKASH CHAND.

   (II) SH. ROSHAN LAL, S/O SH. PRAKASH CHAND.

   (III) SH. CHAMAN LAL, S/O SH. PRAKASH CHAND.

   (IV) SH. SURESH KUMAR, S/O SH. PRAKASH CHAND.

   (V) SMT. VANDANA DEVI, D/O SH. PRAKASH CHAND.

5. MANMOHAN SINGH S/O SH. JAGJIT SINGH (SH. JAGJIT SINGH DELETED VIDE ORDER DATED 1-10-2020)

6. CHAJJU RAM S/O SH. MANGAL SINGH
ALL RESIDENTS OF VILLAGE RAMGARH, TEHSIL AND DISTRICT UNA, H.P.

…….. APPELLANTS.

(BY SH. R.K GAUTAM, SR. ADVOCATE
WITH MS. MEGHA KAPUR GAUTAM, ADVOCATE)

AND

1. KISHORI LAL SON OF LAKHU RAM;

2. CHHAJJU RAM SON OF SH. LEKHU RAM; (EX-PARTE VIDE ORDER DATED 1.10.2019)

CASTE RAJPUT, RESIDENT OF VILLAGE BANGARH, TEHSIL AND DISTRICT UNA, H.P.

…..RESPONDENTS

(BY. BHUPENDER GUPTA, SR. ADVOCATE
WITH MR. AJIT JASWAL, ADVOCATE FOR
RESPONDENT NO.1

RESPONDENT NO.2 EX-PARTE).

REGULAR SECOND APPEAL NO. 501 of 2004
RESERVED ON: 19.8.2021
DECIDED ON : 27.8.2021

H.P. Land Revenue Act, 1954- Section 37 and 46- Declaratory suit for correction of entries in record of right-H.P. Tenancy and Land Reforms Act- Section 104- Conferment of proprietary rights- Jurisdiction of Civil Courts- Held- The mandate of Section 46 of H.P. Land Revenue Act, preserves a right in any aggrieved, from an erroneous entry occurring in the revenue records, to institute a suit for declaration, for seeking its correction. (Paras 13 to 16)

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

J U D G M E N T

Plaintiff/respondent No.1 Kishori Lal instituted a Civil Suit bearing No. 38/92 before the learned Sub Judge, 1st Class, Court No.1, Una, District Una. H.P. In the afore Civil Suit, the plaintiff claimed the making of a declaratory decree against the defendants, and, vis-à-vis, the suit khasra numbers, and, the plaintiff also claimed the making of a decree for permanent prohibitory injunction against the defendants, and, vis-à-vis, the suit khasra numbers..

2. The afore espoused relief(s) became accorded, vis-à-vis, the plaintiff by the learned trial Court through its verdict drawn on 30th May, 2002.

3. The aggrieved defendants thereagainst carried an appeal bearing No. 50/2002, before the learned District Judge, Una, H.P. The learned first Appellate Court partly accepted the appeal, and, made the hereinafter extracted relief:-

> "In view of my findings on point Nos. 1 and 2 above, the appeal is partly accepted and the relief of declaration as granted by the learned trial Judge is set-aside and decree for permanent injunction restraining the defendants from interfering in the possession of the plaintiff over the suit land comprised in khewat No.2 min. Khatauni No.2, min khasra Nos. 1080 and 1081 measuring 8 kanalas 18 marlas, situate in village Bangarh The and Distt. Una, HP is hereby granted with no order as to costs.

4. The reasons which prevailed, upon, the learned first Appellate Court, to decline to the plaintiff, the relief of declaration in as much as his becoming owner of the suit land, through operation of the mandate carried in Section 104 of H.P Tenancy and Land Reforms Act, 1972, are embodied in paragraph 28 of its verdict, paragraph whereof stands extracted hereinafter:-

> "28. In the case in hand the plaintiff has sought declaration that he has become owner of the suit land under the provisions of H.P Tenancy and Land Reforms Act. 1972. To my mind such a declaration normally cannot be granted by the Civil Court as only a Land Reform Officer can decided about the conferment of proprietary rights under Section 104 readwith Rule 29 of the H.P Tenancy and Land Reforms Act. This view appears to have been taken by the Hon'ble High Court in the case of Gopal Krishan versus Jagtamba Parsad 2002 (1) S.L.J. 425 and Roshan Lal versus Surjan, 1999 S.L.J (1) 502 (HP). In both these cases it was held that power to grant injunction is a common law remedy exclusively within the province of civil court. However the question of conferment of the proprietary rights does not fall within the jurisdiction of the Civil Court and parties are at liberty to approach the Land Reform Officer for the determination of such dispute. Accordingly, declaration granted by the learned trial Judge to the effect that the plaintiff has become owner of the suit land measuring 8 kanals 18 marlas comprised in khewat No.2 min. khatauni No.2 min. Khasra Nos. 1080 and 1081 situate in village Bangarh Tehsil and Distt. Una is liable to be set-aside and it is held that plaintiff is in possession of the suit land as a tenant. In view of this both these points are decided accordingly."

5. The defendants became aggrieved from the afore drawn verdict of the learned first appellate Court, and, obviously were led to institute there-against the instant appeal before this Court.

6. Earlier this Court had upon the extant Regular Second Appeal pronounced a verdict on 11.3.2015. Through the afore drawn verdict, it had proceeded, to, affirm the verdict, as, become recorded by the learned first Appellate Court, and, accordingly answered the substantial questions of law, which became extracted hereinafter:-

"1. Whether the Courts below wrongly interpreted Chuhniya Devi vs. Jindu Ram [1991 (1) Sim. L.C. 223], which resulted in miscarriage of justice?

2. Whether the findings of the trial Court as affirmed are dehors the evidence on record?"

7. Against the afore drawn verdict, the aggrieved therefrom carried Civil Appeal No. 9933 of 2017, before the Hon'ble Apex Court. The Hon'ble Apex Court, upon, the afore Civil Appeal, made a decision on 31.7.2017, which becomes extracted hereinafter:-

"1) Leave granted.

2). Two substantial questions of law were framed in the present case which are reflected from para 2 of the impugned judgment. The sub-Judge ultimately held that the Civil Court had jurisdiction and decreed the suit. The first Appellate Court partly reversed the decree holding as under:-

"28. In the case in hand the plaintiff has sought declaration that he has become owner of the suit land under the provisions of H.P Tenancy and Land Reforms Act. 1972. To my mind such a declaration normally cannot be granted by the Civil Court as only a Land Reform Officer can decided about the conferment of proprietary rights under Section 104 readwith Rule 29 of the H.P Tenancy and Land Reforms Act. This view appears to have been taken by the Hon'ble High Court in the case of Gopal Krishan versus Jagtabna Parsad 2002 (1) S.L.J. 425 and Roshan Lal versus Surjan, 1999 S.L.J (1) 502 (HP). In both these cases it was held that power to grant injunction is a common law remedy exclusively within the province of civil court. However the question of conferment of the proprietary rights does not fall within the jurisdiction of the Civil Court and parties are at liberty to approach the Land Reform Officer for the determination of such dispute. Accordingly, declaration granted by the learned trial Judge to the effect that the plaintiff has become owner of the suit

land measuring 8 kanals 18 marlas comprised in khweat No.2 min. khatauni No.2 min. Khasra Nos. 1080 and 1081 situate in village Bangarh Tehsil and Distt. Una is liable to be set-aside and it is held that plaintiff is in possession of the suit land as a tenant. In view of this both these points are decided accordingly.

29. In view of my findings on point Nos. 1 and 2 above, the appeal is partly accepted and the relief of declaration as granted by the learned trial Judge is set-aside and decree for permanent injunction restraining the defendants from interfering in the possession of the plaintiff over the suit land comprised in khewat No.2 min. Khatauni No.2, min khasra Nos. 1080 and 1081 measuring 8 kanalas 18 marlas, situate in village Bangarh The and Distt. Una, HP is hereby granted with no order as to costs. Decree sheet be prepared accordingly."

3). The High Court, in second Appeal, recorded as under:-

"9. In this view of the matter, Courts below rightly held the jurisdiction of the Civil Court not to be barred under the provions of the H.P. Tenancy and Land Reforms Act, 1972. Thus, it cannot be held that Courts below erred in correctly applying the principle of law laid down by this Court in Chuhniya devi Vs. Jundu Ram, 1991 (1) Sim. L.C. 223.

10. Substantial questions of law, as framed, essentially deals with the question of factual appreciation of evidence by the Courts below. Having heard learned Counsel for the parties, Court is of the considered view that no question, much less substantial question of law arises for consideration."

4). Having heard the learned counsel appearing for the parties and having perused the record of the case, were are of the view that both the Courts did not hold the same thing, as is clear from the partial allowance of the appeal by the first Appellate Court. Second, we are also of the view that substantial question of law

does arise and this is not a case of mere factual appreciation of evidence as has been held. We, therefore, set aside the impugned judgment and remand the matter to be heard on merits.

5). The Civil Appeal is disposed of accordingly."

8. Consequently, after remand of the lis to this Court, by the verdict (supra) drawn by the Hon'ble Apex Court, this Court has proceeded, to, hear arguments addressed on behalf of the contesting litigants, by their respective counsel(s).

9. With the consent of the learned counsel for the parties, this Court proceeds to answer the substantial questions of law, whereon the instant RSA became admitted on 22.11.2004, by this Court.

10. Before meteing an answer to substantial question of law No.1, it is deemed imperative, to, cull the questions of law which became answered by this Court in a verdict drawn upon a case titled as Chuhniya Devi vs. Jindu Ram [1991 (1) Sim.L.C.223]. Questions whereof and also the answers meted thereon are extracted hereinafter:-

"5. In Chuhniya Devi's case (supra), the Full Bench after reviewing various decisions on the subject and the relevant provisions of the H.P. Land Revenue Act, 1954 and H.P. Tenancy and Land Reforms Act, 1972 formulated the following questions:¬ Whether the civil court has jurisdiction, in respect of an order ¬ (a) made by the competent authority under the H. P. Land Revenue Act, 1954, and (b) of conferment of proprietary rights under section 104 of the H. P. Tenancy and Land Reforms Act, 1972. which has not been assailed under the provisions of these Acts. and thereafter the questions were answered as follow:¬ (a) that an order made by the competent authority under the H. P. Land Revenue Act,

> 1954, is open to challenge before a civil court to the extent that it relates to matters falling within the ambit of section 37 (3) and section 46 of that Act ; and (b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under section 104 of the H. P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the pro visions of the Act had not been complied with."

11. Not only a reading of the afore questions of law formulated in verdict (supra), but also the answers meted thereto, and as, become extracted (supra) are imperative. A reading of both the afore, unfolds that the questions as became formulated in verdict (supra), pointedly and squarely appertained to the validity of jurisdiction of Civil Courts, to, test the legality of orders made under the statutory provisions (supra). The answers as became meted thereon, and, as become extracted (supra), make clear and candid displays, in as much, as the orders made by the statutory authorities concerned, upon, theirs exercising jurisdiction, under statute (supra), rather acquiring conclusivity, and any challenge thereon being barred. However with an exception that the questions falling within the domain of Section 37(3), and, Section 46 of the Himachal Pradesh Land Revenue Act, 1954 (for short " the Land Revenue Act") being left open to become challenged before the Civil Courts concerned. However yet if, it has also been expostulated therein, that the Civil Court has no jurisdiction to determine the validity of an order made by the statutory authority concerned, especially when there-through conferment of proprietary rights is made upon the Gair Marusi concerned. However even the afore bar against exercising of jurisdiction by a Civil Court concerned, has an exception,

and, is comprised in the statutory authority evidently not conforming to the fundamental principles of judicial procedure, and/or, where the apposite statutory provisions become evidently breached.

12. Since the verdict pronounced in Chuhniya Devi's case has preserved jurisdiction in the Civil Court concerned, to determine and try the controversy(s) falling within the realm of Section 37 (3), and, those falling within the realm of Section 46 of the Land Revenue Act. However, since the afore excepting provisions, to, the rule afore carried in verdict (supra) are argued to be affirmatively workable, vis-à-vis, the extant lis. Therefore, it becomes imperative for this Court to extract the statutory provisions (supra), provisions whereof becomes extracted hereinafter, and, to also apply them, vis-à-vis, the lis at hand:-

> "Section 37 of H.P Land Revenue Act:
> Determination of dispute- (1) If during the making, revision or preparation of any record or in the course of any enquiry under this Chapter a dispute arises as to any matter of which an entry is to be made in a record or in a register of mutations, a Revenue Officer may of his own motion or on the application of any party interested, but subject to the provisions of the next following section, and after such inquiry as he thinks fit, determine the entry to be made as to that matter.
> (2) If in any such dispute the Revenue Officer is unable to satisfy himself as to which of the parties thereto is in possession of any property to which the dispute relates, he shall ascertain through the Gram Panchayat constituted under the Himachal Pradesh Panchayati Raj Act, 1994 (4 of 1994) or any other agency so prescribed by the Financial Commissioner or by summary inquiry who is the person best entitled to the property, and shall be order direct that, that person be put in possession thereof, and that an entry in accordance with that order be made in the record or register.

> (3) A direction of a Revenue Officer under sub-section (2) shall be subject to any decree or order which may be subsequently passed by any Court of competent jurisdiction.
>
> Section 46 of H.P Land Revenue Act:
> Suit for declaratory decree by persons aggrieved by an entry in a record- If any person considers himself aggrieved as to any right of which he is in possession by an entry in record of rights or in a periodical record, he may institute a suit for a declaration of his right under Chapter VI of the Special Relief Act, 1963 (47 of 1963)."

13. A reading of the afore provisions, as, become carried in the Land Revenue Act, especially of sub Section 3 of Section 37 of the Land Revenue Act, does candidly unveil, that any order made by the Revenue Officer concerned, and, appertaining to preparation or revision of any records of right, rather making the afore order to be testable or being determinable, through a Civil Suit becoming filed before the Civil Court concerned. Moreover, any decree or order as may become affirmatively rendered thereons by the Civil Court concerned, rather in the apposite subsequent suit becoming instituted there-before, by the aggrieved concerned completely prevailing upon the challenged therebefore order, as, earlier thereto made by the Revenue Officer concerned.

14. Moreover, the mandate carried in Section 46, of the Land Revenue Act, preserves a right in any aggrieved, from an erroneous entry occurring in the revenue records, to institute a suit for declaration, for seeking correction of the relevant entry, as becomes carried in the relevant records of right.

15. The applicability(s) of the afore preserved statutory jurisdiction(s) in the Civil Court concerned, is to be tested, on the anchor of the declaratory relief, as, becomes espoused, by the aggrieved plaintiff, in as much, upon, an

erroneous entry carried, in the relevant records of right, he espouses that his becoming untenably debarred of his statutory right of ipso facto conferment of proprietary rights, upon him, through affirmative application(s) vis-à-vis him, of the mandate carried in Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (for short "Tenancy and Land Reforms Act.

16. Since a deepest reading of the relevant clause, as carried in the plaint, does unfold, that the aggrieved plaintiff, nursed a grievance against an invalidly made entry in the records of right, in as much, as, his earlier entry in the jamabandi appertaining to the suit land, as a Gair Marusi, becoming abruptly deleted, in the latest jamabandi(s), despite in the earlier thereto jamabandi(s) appertaining to the suit land, and, commencing from 1952-1953 up till 1962-1963, his validly becoming recorded as a Gair Marusi, over the suit land. Therefore the afore declaratory suit relief as becomes claimed by him, for setting aside the deletion of his name as a Gair Marusi, in the latest jamabandi appertaining to the suit land, and, also for the quashing of the concomitant thereto entries rather reflecting the defendants to be the land owners of the suit land, can be concluded to be validly constituted before the learned Civil Court concerned, through a civil suit filed therebefore, as both do fall, within the realm, and, domains of section 37(3), of Land Revenue Act, as well as within the domain of Section 46, of, the Land Revenue Act. Consequently, when both reliefs, do fall, within the realm(s) thereof. Therefore, with this Court in a verdict drawn upon Chuhniya Devi's case (supra), has, vis-à-vis, the afore rather preserved the jurisdiction of the Civil court concerned. As a sequel, the Civil suit for the afore purpose, was maintainable before the Civil Court concerned.

17. Be that as it may, it yet to be tested whether the deletion or abrupt disappearance of the name of the plaintiff, as a Gair Marusi in the relevant column of the jamabandi concerned, despite his being earlier reflected in the apposite column of, the, Jamabandi(s), to be a Gair Marusi,

conspicuously in the Jamabandi(s) commencing from 1952-1953 uptill 1962-1963 continuously, can come to be validated.

18. The test for pronouncing, vis-à-vis, the afore abrupt deletion of the name of the plaintiff, as a Gair Marusi in the relevant jamabandi, is whether it became preceded by a valid order becoming pronounced by an empowered Revenue Officer concerned. However, a deepest reading of the entire evidence, on record, does not disclose, that the apposite deletion of the plaintiff in the apposite column of Jamabandi concerned, hence as a Gair Marusi, over the suit land, ever became founded upon, or became preceded by a valid order becoming made by the empowered Revenue Officer concerned. Consequently the afore abrupt deletion is vitiated and also it becomes nonest.

19. The defendants would succeed in asking for, the, valid deletion of the name of the plaintiff, as a Gair Marusi in the jamabandi(s) appertaining to the suit land, and, commencing from 1952-1953 uptill 1962-1963, only upon clinching evidence becoming adduced by them, and, the afore evidence visibly displaying, that the afore occurrence(s) of the plaintiff, as a Gair Marusi, upon the suit land, hence on the afore phases, was not valid, as the plaintiff was never during the afore phases, provenly liquidating rent in cash in kind to the land owners concerned. However the afore evidence is grossly amiss. Since only, upon, emergence of the afore clinching evidence, the entries as become carried in the Jamabandi(s) concerned, and, commencing from 1952-1953 and continuing up till 1962-1963, could lead to an inference that the entries (supra) rather acquiring the taint of vitiation, whereas, the evidence (supra) never becoming adduced on record, whereas only upon, its adduction into evidence, this Court may be constrained, to, take a view that the subsequent apposite deletion in the latest jamabandi appertaining to the suit land, even when becomes not founded, upon, any valid order rendered by an empowered Revenue Officer, yet hence the afore deletion prima-facie, and, tentatively is

lawful. Thereupon, want of evidence (supra) constrains this Court, to, annul the questioned entries.

20. Since the learned first Appellate Court, has denied the declaratory decree to the plaintiff, on the ground, that the order of conferment of proprietary rights upon a proven Gair Marusi hence holding possession in the afore capacity over the suit land, rather prior to the coming into force of the relevant statute, hence was required to be made by the empowered Revenue Officer. However, the afore denial by the learned first Appellate Court, is completely mis-founded, and, also is legally fallacious, as, the mandate carried in Section 104 of Tenancy and Land Reforms Act, does ipso facto, through a statutory leverage purveyed, upon, a Gair Marusi, evidently holding possession of the suit land in the afore capacity, prior to the coming into force the statute (supra), rather makes him empowered, to, seek statutory conferment of proprietary rights upon him. The effect of the afore ipso facto statutory conferment of proprietary rights, upon, a proven Gair Marusi hence validly holding possession of the suit land prior to coming into force of the apposite mandate occurring in the Tenancy and Land Reforms Act, obviously also did not require any order, to the effect (supra) becoming rendered by the Revenue Officer concerned.

21. Therefore, this Court declares the challenged revenue entries to be *void abinitio* and also annulls them, and, the afore bring to fore, the further legal effect, that when the plaintiff was evidently, prior to coming into force of the mandate carried in Section 104 of Tenancy and Land Reforms Act, a proven Gair Marusi, over the suit land. Consequently, the further statutory sequel thereof is, as declared supra by this Court, that the plaintiff dehors making of any order for hence conferring rights, upon him, by an empowered Revenue Officer concerned, rather became entitled to statutory conferment of proprietary rights, upon him, and, also that the afore declaration, is a dire legal necessity in pursuance, to this Court nullifying the apposite revenue

entries. The making of or attestation of an order of mutation, by the empowered Revenue Officer, is, only a sequel thereof, or, is a mere ministerial imperative function.

22. Since the verdict made by the learned 1st Appellate Court to the extent as extracted hereinbefore has declined, the declaratory relief to the plaintiff, and, when the afore denial is for the reasons (supra) per incuriam, vis-à-vis, the relevant statute. Therefore, dehors the plaintiff not instituting any appeal against the verdict (supra), or, his not instituting any cross-objections against the hereinbefore extracted portion of the verdict (supra),yet this Court deems it fit, to rather for ensuring the completest compliance being meted to the relevant statutory provisions as contained in the relevant statute, also grant the espoused declaratory relief to the plaintiff. Conspicuously, also when the afore is a natural legal sequel of this Court invalidating the questioned legal entries, also is a natural legal corollary, of, this Court, thereupons granting the relief of permanent prohibitory injunction to the plaintiff.

23. As a sequel, and, reiteratedly, the reasons (supra) drawn upon by the learned first Appellate Court, to, deny to the plaintiff, the benefit of statutory conferment of proprietary rights upon him, is, completely astray from the mandate carried in Section 104 of H.P Tenancy and Land Reforms Act, and, are required to be quashed and set aside. Accordingly, the substantial questions of law are answered accordingly. The instant RSA is dismissed, and, the verdict of the trial Court is maintained and affirmed, whereas, the verdict made by the learned first Appellate Court is also partly quashed and set aside. However, the decree granted by the learned first Appellate Court for permanent prohibitory injunction against the defendants, is affirmed and maintained. All pending applications stand disposed of accordingly.

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

Between:

MEHBOOB
S/O SHRI NUR MOHD,
R/O VILLAGE BANJLI,
PARGANA TISSA, TEHSIL CHURAH,
DISTRICT CHAMBA

…APPELLANT

(BY ANAND SHARMA, SENIOR ADVOATE WITH MR. KARAN SHARMA, ADVOCATE, FOR THE APPELLANT)

AND

1. MAN SINGH
   S/O SHRI PARMA,
   R/O VILLAGE BANJLI,
   P.O. GANED, PARGANA TISSA,
   TEHSIL CHURAH, DISTRICT CHAMBA

..NON-APPLICANT-RESPONDENT-DEFENDANT

2. LATIF MOHD,
   S/O NOOR MOHD,
   R/O VILLAGE JANOH,
   PARGANA TISSA,
   TEHSIL CHURAH,DISTRICT CHAMBA
3. SHRI WAZIR MOHD.
4. SHRI DARBIB MOHD.,
   BOTH SONS OF SH. FAROOQ MOHD,
   R/0 VILLAGE KALUNDA,
   PARGNA TISSA
   TEHSIL CHURAH,
   DISTRICTCHAMBA
5. SH. BANJEER MOHD MINOR,

6. SH. RAJDEEN, MINOR
S/O SHRI FAROOQ MOHD,
THROUGH THEIR BROTHER SH.WAZIR MOHD
WHO IS THEGUARDIAN OF MINOR RESPONDENTS
NO. 6 AND 7, RESIDENTS OF
R/O VILLAGE KALUNDA, PARGANA TISSA,
TEHSIL CHURAH,DISTRICT CHAMBA
7. NASEER AHMAD, S/O SH. NOOR MOHD,
R/O VILLAGE JANOH,
P.O. GANED, PARGNA TISSA,
DISTRICT CHURAH

NON-APPLICANT-DEF
ENDANTS-PROFORMA
RESPONDENTS

(BY MR. AMAN SOOD, ADVOCATE FOR THE RESPONDENTS No. 2 to 7)

REGULAR SECOND APPEAL NO. 580 of 2006
Reserved on : 11.8.2021
Decided on: 20.08.2021

Specific Relief Act, 1963- **H.P. Land Revenue Act, 1973**- Section 171- Suit for declaration and possession and subsequent appeal thereto dismissed- Correction of the entries in the Jamabandi- Held- Section 171 completely bars the making of corrections in the Musabi or the records of right- Trial Judge rightly held that suit is not maintainable- Matter remanded to First Appellate Court with the direction of demarcation of the suit land.

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

J U D G M E N T

The plaintiff instituted civil suit No. 84/2000, before the learned Civil Judge (Jr. Divn) Chamba. In the afore suit, he claimed the making of a decree for declaration, and, for possession, reliefs whereof, are extracted hereinafter:

> "A) Decree fordeclaration to this effect that area of the land comprising in khasra No. 909, khatta khatoni No. 115/121 situated in mohal shikari, Pargana Tissa, Tehsil Churah, Distt. Chamba is

03-08-00 bighas and not 01-19-00 bighas as shown in the present Jamabandi. Thus, the area of Khasra No 909 (suit land) may be declared 03-08-00 bighas.

B) Decree for possession of the land comprised in khatta khatoni No. 115/121 bearing khasra Nos 909 measuring 01-19-00 bighas out of the total land 03-08-00 bighas which has been encroached upon by the defendant, situated in mohali Shikari, Pargana, Tissa, Tehsil Churah, Distrcit Chamba, be passed in favour of the plaintiff and proforma defendants No. 2 to 4 and against defendant No. 1 with costs."

2. The learned trial Judge, through its verdict made, on 30.6.2005, upon Civil suit No. 84/2000, proceeded to dismiss the afore civil suit. The aggrieved plaintiff constituted, against the afore made verdict, of, dismissal, of, his suit, by the learned Civil Judge (Jr. Divn), Chamba, civil appeal bearing No. 56 of 2005, before the learned first appellate Court. The learned first appellate Court, through its verdict, made on 26.9.2006, upon Civil Appeal No. 56 of 2005, , dismissed the afore civil appeal, and, obviously affirmed and maintained the verdict, of, dismissal of civil suit No. 84 of 2000, as made earlier by the learned trial judge concerned.

3. The plaintiff is aggrieved from the afore concurrently recorded judgments, and, decrees, as made by both the learned Courts below, and, is led to thereagainst institute the instant appeal before this Court. When the instant appeal came up for hearing on 16.5.2007,it became admitted, on the hereinafter extracted substantial questions of law:

1. Whether there has been misreading and mis-appreciation of oral as well as documentary evidence by both the Courts below?

2. Whether the learned first appellate Court erred in holding the suit to be not maintainable?

4. Ext.PA is the jamabandi appertaining to the suit land, wherein the area of the suit land, is, reflected to be 1-19-00 bighas. A rebuttable presumption

of truth is attached to the entries occurring in the records of rights. Since, the entries occurring in the record of rights, were a sequel of settlement operations, becoming conducted, in the mohal concerned. Therefore, the reflections of the area of the suit land therein, hence as 1-19-00 bighas, prima-facie, assume an aura of solemnity and truthfulness, as no cogent rebuttal evidence became adduced. The reason(s) for the afore conclusion, arise from the factum, that during the course of holding of settlement operations, by the revenue agency concerned, rather all the relevant documents, with respect to the relevant estates, hence are made available to the settlement staff concerned. The apposite musabi, is one of the most important documents, for the settlement staff, hence holding valid settlement operations in the mohal concerned. The dimensions/areas of all the apposite estates, hence occurring in the mohal concerned, are, reflected in the musabi. The updations of all the relevant records, appertaining to any estate right holder, and as arising from valid mutations of inheritance, exchange or sale and relinquishments, if not earlier entered in the relevant columns, of the Jamabandi concerned, also occur during settlement operations. Since, the apposite Jamabandi has been prepared, during the course of settlement operations, as became undertaken in the mohal concerned. Therefore, the area of the suitland, as entered in the Jamabandi, appertaining to the suit land, is to be concluded, to be in concurrence, as well as in complete tandem, with the displays thereof, as occur in the musabi. The afore discrepancy was curable, only through, an appropriate application, for apposite corrections, rather being carried in the Musabi, hence becoming filed, naturally before the revenue agency concerned. Only thereafters similar corresponding entries could validly occur in the jamabandi concerned. Unless the afore exercises were earlier, to the filing of the extant suit, hence undertaken by the plaintiff concerned, thereupon, the bar constituted under Section 171 (2) (vi) of the

Himachal Pradesh Land Revenue Act, provisions whereof stand extracted hereinafter:

"171 (2) (vi):- Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officers-

(2) A Civil Court shall not exercise jurisdiction over any of the following matters, namely
(vi) the correction of any entry in a record of rights, [periodical] record or register of mutations;

hence completely barring the making(s) of corrections, in the Musabi or the record(s) of rights, would become aroused, especially when the detailings therein, of, dimension(s) of the suit land, did occur, during holding of settlement operations in the mohal concerned. Moreover, since the aforesaid detailing therein, did occur, only after the dimension(s) of the apposite suit land, becoming borrowed from the Musabi concerned. Therefore, for wants of the afore recoursings by the plaintiff, does constrain this Court, to concur with the findings, returned on issue No. 4, by the learned trial Judge, wherein he for the afore reasons, has declared that the extant suit is not maintainable, before him.

5. Be that as it may, even the field books, are to bear completest concurrence, and, harmony with the musabi concerned. The plaintiff proclaimed, that after the afore correction being made, a decree for possession of land measuring 1-19-00 bighas, as comprised in khasra No. 909, dimension whereof are claimed to be 03-08-00 bighas, being rendered, vis-à-vis, him. However, since as aforestated, the correction of the Jamabandi concerned, cannot be endeavored by the plaintiff, in the instant suit. Therefore, the afore made purported encroachments, by the defendants, upon the plaintiff's land, measuring 01-19-00 bighas, though came to be purportedly reflected in the demarcation report, hence carried in Ext.

PW1/A, rather also cannot come to be sustained by this Court. Moreover, the further reason(s) for this Court, in not accepting Ext. PW1/A, is comprised, further in the factum that the afore exhibit, does not detail the salient validating feature, inasmuch as PW-1, who proceeded to undertake the exercise of holding demarcation of the apposite contiguous estate(s), evidently failing, to determine the relevant pakka points from the musabi concerned. Furthermore, Ext. PW1/A also does not detail that PW-1, carried measurement through his either adopting the valid triangular or square system of measurement. Thus, since Ext. PW1/A, is, in transgression of the relevant mandate carried in the H.P. Land Records Manual, therefore, it hold no legal sanctity. Moreover, when Ext. PW1/A is silent, with respect to the area of khasra No. 909, being not 1-19-00, bighas, rather it being 03-08-00 bighas. Consequently, since the contesting defendant, is, the owner of lands contiguous to the suit land, hence, it is difficult to conclude that the area, if any, in possession of the contesting defendant(s), is, not owned by him, nor it can be concluded that the plaintiff is entitled to any decree for possession.

6. Be that as it may, further fortification to the afore inference, becomes garnered from the factum, that adjoining to khasra No. 909, occurs government land, comprised in khasra Nos. 883, 893 and 919, yet dimension(s) of the afore land adjoining to the suit khasra Nos., rather not becoming reflected in Ext. PW1/A. Consequently, the afore Ext. PW1/A, is made dehors any reliance being made upon the musabi concerned, whereas, the relevant musabi was the most relevant, and, important document, for making the relevant measurements.

7. Further, during the pendency of the instant appeal, before this Court, the plaintiff instituted an application, cast under the provisions of Order 41 Rule 27 CPC. With the afore application, he appended an application, filed before the Revenue Officer concerned, wherethroughs he strived for seeking correction of the dimensions of suit khasra No. 909, from

01-19-00 bighas to 03-08-00. The afore application resulted in an order of the Revenue Officer concerned. Upon the afore application, the Revenue Officer concerned, after making apposite interse comparisons, interse the dimensions of the suit land, as occurred in the field book, with the musabi concerned, has made an order, that the dimension of the suit khasra No. is, incorrectly recorded in the Jamabandi concerned, to be 01-09-00 bighas, whereas its correct dimension, is 03-08-00 bighas. The afore application, bearing No. 12549 of 2013 was contested by the respondents, through theirs instituting a reply thereto. In the reply furnished to the application, the respondent contended, that the participation of the defendants in the relevant proceedings, is a forged participation. Therefore, it is contended that no reliance can be placed upon, either the report of the revenue officer concerned, hence detailing the aforesaid factum, or upon proceedings, appertaining to the determinations of the dimensions of the contiguous estate(s) of the contesting litigants.

8. The mandate contained in order 41 Rule 27CPC, permits this Court, to allow adduction of additional evidence, only when it is just and essential, for adjudicating the controversy, arising amongst the contesting litigants. Though, this Court, has (supra), stated that the plaintiffs' suit, is barred by the mandate of clause (vi) of sub-section (2) Section 171 of the H.P. Lands Revenue Act, as becomes extracted (supra). However, since the plaintiff, through an application, cast under the provisions of Order 41 Rule 27 CPC, has strived, for the placing on record, the report as well as the consequent therewith proceedings, as becomes drawn by the Revenue Officers concerned, and, both disclosing that the dimensions/areas, of the suit khasra No. is not 01-19-00 bighas, rather is 03-08-00 bighas. Therefore, when the appropriate remedy under law, has been purportedly recoursed by the plaintiff. Consequently, all afore may be just and essential for deciding the lis at hand. In sequel, even if there is/are departures or breaches from

the principles of natural justice, either in the drawing of the relevant proceedings, or even when there is any forged participation of the defendant in the relevant proceedings. Nonetheless, all the afore are contestable before the learned first appellate Court, after remand to it, by this Court, to, rather, in accordance with law, decide the issue appertaining to the validity of the strived correction, and, the issue with respect to the validity of making of a decree for possession, vis-à-vis, the suit land. The sequitur is that CMP No. 12549 of 2013 is allowed.

9. The inevitable inference, is that this Court retains the instant regular second appeal, on its docket, uptill, upon remand, of the lis, to the learned first appellate Court, and, only after the latter permitting the contesting litigants, to adduce, their respective evidences, with respect to the validity or otherwise of the proceedings/orders, as drawn by the revenue officer concerned, hence the learned first appellate Court, rendering fresh finding(s) qua validity or otherwise of the apposite order, for correction and or, of proceedings(supra) drawn thereon(s), besides also upon its returning fresh findings vis-à-vis, purported encroachments, being made, by the defendants, upon the plaintiff's land.

10. Necessarily, the learned first appellate Court, shall, order for re-demarcation of the suit property, only after its becoming convinced, that the evidence adduced by the contesting litigants, vis-à-vis, the apposite order, as well as vis-à-vis, the consequent therewith proceedings, as, hence drawn by the revenue officer concerned, are of solemn evidentiary worth. The afore exercise be ensured to be mandatorily completed within six months hereafter. The verdict of the learned first appellate Court, upon issues (supra) shall be placed, before this Court, after conclusion of six months.

11. With the afore observations, the appeal is accordingly disposed of. Also, the pending application(s), if any, are disposed of. No costs.

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

Between:-

IQBAL MOHD.
S/O SHRI SULEMAN,
RESIDENT OF VILLAGE CHANAL MAJRA, POST OFFICE GURU MAJRA,
TEHSIL BADDI, DISTRICT SOLAN, H.P. .....PETITIONER

(BY SH.N.S. CHANDEL, SENIOR ADVOCATE, ALONGWITH SH.VINOD GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH ...RESPONDENT

(BY SH.ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) NO.1566 OF 2021

Between:-

AKBAR HUSSAIN
S/O SHRI UMARDEEN,
RESIDENT OF VILLAGE NANWAL,
POST OFFICE KHERA,
TEHSIL NALAGARH, DISTRICT SOLAN,
H.P. .....PETITIONER

(BY SH.N.S. CHANDEL, SENIOR ADVOCATE, ALONGWITH SH.VINOD GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH …RESPONDENT

(BY SH.ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
NO.1553 OF 2021
DECIDED ON: 14.09.2021

Code of Criminal Procedure, 1973 - Section 438 - Anticipatory bail - Offence punishable under Sections 336, 307, 147, 148 and 149 of the Indian Penal Code, 1860 and Section 25 of the Arms Act, 1959 - Allowed subject to conditions.

These petitions coming on for orders this day, the Court passed the following:

J U D G M E M T

In these petitions, Petitioners have approached this Court seeking bail under Section 438 Code of Criminal Procedure (in short 'Cr.P.C.'), in case FIR No.161 of 2021, dated 15.06.2021, registered in Police Station Nalagarh, Police District Baddi, H.P., under Sections 336, 307, 147, 148 and 149 of the Indian Penal Code (in short 'IPC') and Section 25 of the Arms Act, 1959.

2. Status report stands filed and records also made available.

3. Records of cross FIR No.147 of 2021 dated 24.05.2021 registered in Police Station Nalagarh, Police District Baddi, H.P., was also made available.

4. It transpired from the record that on 24.05.2021, FIR NO.147 of 2021 was registered on the basis of statement made by one Rajinder Singh,

recorded under Section 154 Cr.P.C., wherein it was stated that on 24.05.2021 complainant alongwith his companions namely Simran alias Simmu, Akbar alias Akku, Nazim alias Raja, Iqbal Mohammad alias Pala, Rammi, Rajan and others was going in two vehicles bearing registration Nos.HP-12M-7845 and HP12N-7845 from Bhud to Falahi Kotla and when they reached near Petrol Pump Khera, at about 3.00 p.m., some vehicles came from Nalagarh side and out of those vehicles, one black coloured Scorpio hit the car bearing registration No.HP-12M-7845, and 10-15 persons came out of other vehicles including Balbir alias Ballu, Rakesh, Avtar, Jagpal alias Kakku, Vijay Kumar alias Vishu and Bindu and they fired on the car and some of them and others were carrying swords (Kirpan and Darat etc.) and in this incident Simran alias Simmu received bullet shot in his chest whereas Avtar and Nazim received bullet injuries and complainant and Iqbal Mohammad alias Pala were also injured, however, Rammi and Rajan did not receive any injury. Thereafter, the assailants had run away from the spot in their vehicles and injured were taken to hospital, where Simran alias Simmu was declared dead. Two gunshot grievous injuries were found on the body of Akbar. Similarly two grievous bullet injuries were also found on the person of Nazim alias Raja. Whereas, Iqbal alias Pala and complainant had received blunt injuries.

5. It was also stated in the aforesaid statement by the complainant that earlier also, on 22.05.2021 at about 9.00 p.m. petitioner Iqbal Mohammad alias Pala was restrained by Jagpal and 7-8 other boys near Harison Hotel at Nalagarh and they tried to hit him with sword, but he had run away from the spot swiftly, but Jagpal and his companions had again intercepted his vehicle and had shown pistol and sword to the petitioner with threat that they would kill him and on the basis of complaint of the petitioner in this regard, a Rapat No.36 dated 22.05.2021 was entered in the Daily Diary of Police Station Nalagarh at 11.15 p.m. According to petitioners, accused party as detailed in FIR No.147 of 2021 was searching Simran alias Simmu

and others to kill them and one day before the incident all of them had also visited the native village of Simran alias Simmu in his search.

6. On the basis of aforesaid complaint of Rajinder Singh, after registration of FIR, accused persons in that FIR were arrested and weapons of offences were also recovered from them. Vehicles used by them as well as Car No.HP-12M-7845 were searched and inspected. As per prosecution case in FIR No.147 of 2021 during inspection of vehicles, one bullet of 8MM was recovered from Scorpio bearing registration No. HP-15E-1717 which was used by accused persons in the said FIR (FIR No. 147/2021). The accused persons in FIR No.147 of 2021 are in judicial custody.

7. With respect to the same incident FIR No.161 of 2021 has been registered on 15.6.2021, on the basis of joint complaint submitted by some villagers of accused in FIR No. 147/2021 Balwant Singh and others to Sub Divisional Police Officer Nalagarh, which was sent to Police Station for further action and was received in the Police Station on 15.06.2021. It was stated in the said complaint that death of Simran alias Simmu in the incident of 24.05.2021 was unfortunate accident however it had been heard that deceased was involved in the business of Chitta, drugs etc. and children of complainant in FIR No. 161/2021 were opposing his activities by saying that deceased was spoiling lives of children and their children had made a complaint against deceased on No.1100 and they had been also uploading posts on social media in this regard and, therefore, deceased was having enmity with them and used to threat to kill them and deceased had been following and chasing their children and had made their life hell and all these information were being given by the local boys namely Pradeep, Gurpal, Rakesh, Jolly, Bablu, Rajan etc. It was further stated that on 23/24.05.2021 there was a marriage in the village and the accused persons (in FIR No. 161/2021) were having knowledge that children of complainant side had been attending the marriage and on 23rd and 24th May large number of vehicles had

come to their village. It is further stated that it is heard that on the day of incident, half an hour prior to the incident, some vehicles had come to their village. It was further stated that on 24.5.2021 boys of complainant side were coming from Nalagarh to their home and deceased Simran alias Simmu alongwith others was going towards Nalagarh in search of boys of complainant side and they met them at Khera. As per complaint, deceased Simran alias Simmu was going alongwith his companions in five vehicles bearing registration Nos.HP-12N-7845, HP-12M-7845, HP-12L-1019, HP-93-4095 and HP-12K2462 and it was deceased who had hit the car of the boys of complainant side by going wrong side and had opened indiscriminate firing upon the boys of complainant side after hitting their vehicle. It was further stated that assailants were 25-30 boys in number having pistol and sharp weapons in their hands, and Simran alias Simmu, Rajan and Jindu were having pistol in their hands and other boys Shammi, Mandeep, Jhakhiyan, Nupi Fauji, Krishan, Makha, Raja Pahalwan, Pala, Santosh alias Sonu Massih Plassi, Rammi, Harsh Bagwaniyan (Kasambowal), Pradeep alias Pappu, Johny, Iqbal, Akbar alias Akku, Jolly, Gurpal, Rakesh, Bablu, Vicky, Iqbal were having sharp weapon in their hands. Lastly, it was stated that FIR be lodged from the side of the boys of the complainant (accused in FIR No. 142/2021)

8. On the basis of aforesaid complaint, FIR in present case, has been registered and police has arrested ten accused persons, who are in judicial custody in Kanda Jail, Sub-Jail Kaithu and Sub-Jail Solan. Balbir Singh alias Ballu, accused in FIR No.147 of 2021, has been cited as a spot witness and as per prosecution story in present case, on 24.05.2021 deceased Sirmanjeet Singh alias Simmu, Akbar alias Akku, Rajan, Nazim Raja, Rajinder alias Jindu, Iqbal alias Pala, Rammi, Iqbal petitioner and Baljeet and Bablu were coming towards Nalagarh in vehicles bearing registration Nos. HP-12M-7845, HP12N-7845 and HP12L-1019. It was further claimed that from vehicle No.HP-12M-7845 two live cartridges of 8MM were recovered from the spot and

Simran alias Simmu as per CCTV footage had been seen firing from his pistol which is yet to be recovered. Whereas, Simranjeet alias Simmu has expired. It has also been stated in the status report that though petitioners have joined investigation, but they are not disclosing anything about pistol of deceased Simran alias Simmu and either accused Iqbal alias Pala, Rammi and Nazim alias Raja are yet to be arrested, who have gone underground.

9. Learned counsel for the petitioner has submitted that FIR No.161 of 2021 has been registered about 20 days after the incident that too on a complaint which is based upon hearsay information. Whereas, accused in FIR NO.147 of 2021 were arrested on 24.05.2021 and the facts mentioned in the complaint dated 15.06.2021, if really true, were very much in the knowledge of the accused persons and their family members, but for 20 days they remained silent which reflects that it is an afterthought on the part of the accused in FIR NO.147 of 2021, concocted to save those accused by implicating the petitioners and others in a false case who in fact are victims. It has further been stated that FIR in present case was not lodged by the spot witnesses, but by the strangers who were not at all present on the spot. It has further been stated that in the status report filed in present case, it has been alleged that two empty cartridges were recovered from the vehicle of deceased Simran alias Simmu, whereas, no such recovery was shown or recorded during the investigation of FIR No.147 of 2021, despite the fact that at that time, all the vehicles were inspected and searched by the Investigating Officer as well as team of RFSL and during that, no such recovery of cartridges from the vehicle of Simran alias Simmu was ever claimed or brought on record.

10. Referred call details of Iqbal, it has been further stated that he being complainant in Rapat No.36 dated 22.05.2021, was in contact with ASI Harjeet Singh through his Mobile No.9418463221 and the said ASI was calling him (Iqbal) and others to the Police Station with reference to Rapat No.36 and for that purpose, on 24.05.2021, Iqbal had talks with the said ASI at 12:40,

12:58, 13:20 and 13:05 and in pursuant to these calls Iqbal and others were coming to Police Station Nalagarh, but on the way vehicle of deceased Simran alias Simmu was hit by the accused in FIR No.147 of 2021 and indiscriminate firing and blow of sharp and blunt weapons were made by them upon Simran and his companions leading to death of Simran alias Simmu, causing gunshot injuries to Avtar @ Akku and Nazim and blunt injuries to Iqbal alias Pala and Rajinder Singh. Whereas, none of the assailants were accused in FIR No.147 of 2021 had received any injury. It has been submitted that had there been attack and assault from the side of deceased Simran alias Simmu and his companions as claimed in present FIR, then, boys of complainant side in present case, would have or anyone of them would also have received injuries, but absence of injury clearly indicates that a false story was concocted to save the assailants, who had killed Simran alias Simmu and injured his companions. It has been further stated that it being a cross FIR in present case, investigation should have been done by the same Investigating Officer, but this principle has not been followed by the prosecution as the prosecution was knowing that in such eventuality investigation in present case would lead to cancellation of FIR lodged against the petitioners and others.

11. It has been further submitted that prosecution case in FIR No.147 of 2021 runs counter to the case in present FIR No.161 of 2021 and stance of the prosecution in both cases is irreconcilable and, therefore, it has been claimed that on the basis of unbelievable and improbable hearsay story, concocted by the accused in FIR No.147 of 2021, personal liberty of the petitioners should not be curtailed.

12. Lastly, it has been submitted that petitioners, in case they are enlarged on bail, are ready and willing to abide by any condition imposed upon them and also ready to furnish surety(ies) to the satisfaction of the Court.

13. Learned Additional Advocate General referring contents of the status report including the complaint dated 15.06.2021 has submitted that it is evident from the status report as well as record that petitioners have been found involved in commission of a serious offence under Section 307 of IPC in the broad daylight on a public highway and, therefore, they are not entitled for bail and, therefore, prayer for rejection of these petitions has been made.

14. Considering entire material on record but without assessing it on merit and also considering principles and factors relevant to be considered at the time of deciding bail applications with reference to aforesaid facts and circumstances placed before me, and submissions made by learned counsel for the petitioners as well as learned Additional Advocate General, I find that at this stage, petitioners are entitled for bail.

15. Accordingly, present petitions are allowed and petitioners are directed to be enlarged on bail and interim bail granted on 09.08.2021 is confirmed, subject to furnishing personal bonds in the sum of `30,000/- each with one surety each in the like amount, to the satisfaction of the trial Court, within three weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure the presence of petitioners/accused at the time of trial and also subject to following conditions:-

(i) That the petitioners shall make themselves available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that the petitioners shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to Court or to any police officer or tamper with the evidence. They shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that the petitioners shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioners shall not commit the offence similar to the offence to which they are accused or suspected;
(v) that the petitioners shall not misuse their liberty in any manner;
(vi) that the petitioners shall not jump over the bail;

(vii) that in case petitioners indulge in repetition of similar offence(s) then, their bail shall be liable to be cancelled on taking appropriate steps by prosecution;
(viii) that the petitioners shall not leave the territory of India without prior permission; and
(ix) that the petitioners shall inform the Police/Court their contact numbers and shall keep on informing about change in addresses and contact numbers, if any, in future.

16. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioners as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioners as it may deem necessary in the interest of justice.

17. In case the petitioners violate any condition imposed upon them, their bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

18. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

19. Observations made in these petitions hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

20. Petitions are disposed of in aforesaid terms.

21. Petitioners are permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy but if required, may verify it from Website of the High Court.

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

Between:

SALMAN KHAN
AGE 30 YEARS,
S/O LATE SH. MANPHUL,
R/O VILLAGE BHAGWANPUR,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR, HP,
PRESENTLY LODGED IN
MODAL CENTRAL JAIL,
NAHAN, DISTRICT SIMAUR,
H.P.

....PETITIONER

(BY MR. RAHUL SINGH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. KAMAL KISHORE SHARMA
AND MR. R.P. SINGH, DEPUTY

ADVOCATES GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No.1429 of 2021
DECIDED ON: 03.09.2021

Code of Criminal Procedure, 1973 - Section 439 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 22, 61, 85 - Recovery of 242 capsules of Spasmo - Proxyvon Plus- Intermediate quality- Rigors of Section 37 of Narcotic Drugs and Psychotropic Substances Act not attracted- Fundamental postulate of criminal jurisprudence is the presumption of innocence- Bail petition allowed subject to conditions.

Cases referred:

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

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

O R D E R

Bail petitioner namely Salman Khan, who is behind bars since 13.7.2021, has approached this Court in the instant proceedings filed under Section 439 Cr.PC for grant of regular bail in case FIR 104 of 2021, registered at PS Majra, Tehsil Paonta Sahib, District Sirmour, under Sections 22-61-85 of the NDPS Act.

7. Status report filed in terms of order dated 26.7.2021, reveals that on 13.7.2021, police after having received secrete information raided the house of the petitioner and allegedly, recovered one bag kept in almirah, containing 15 strips of tablet namely PARVION SPAS, 7 strips of PYEEVON-SPAS PLUS and four strips of SPASMO-PROXYVON PLUS. In total, 242 capsules/tablets came to be recovered from the almirah kept in the house of the bail petitioner. Since no plausible explanation came to be rendered on

record by the bail petitioner qua the possession of the aforesaid quantity of prohibited drug, police after completion of necessary codal formalities, registered FIR detailed herein above against the petitioner on 13.7.2021 and since then, he is behind bars. Since investigation in the case is complete and nothing remains to be recovered from the bail petitioner, petitioner has approached this Court in the instant proceedings for grant of regular bail

8. Mr. Kamal Kishore Sharma, learned Deputy Advocate General while fairly admitting factum with regard to completion of investigation contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of the offence alleged to have been committed by him, he does not deserve any leniency. He further submits that since huge quantity of prohibited drugs came to be recovery from the conscious position of the petitioner, it cannot be accepted that prohibited drugs were kept by the petitioner at his room for his personal use, especially when he failed to place on record prescription slip, if any, given by a doctor. Lastly, Mr. Kamal Kishore Sharma, learned Deputy Advocate General submits that since petitioner has committed offence having adverse impact on the society, it would be not in the interest of justice to enlarge him on bail at this stage, who in the event of his being enlarged on bail may not only flee from justice, but would also indulge in such like activities again and as such, prayer for grant of bail at his behalf may be rejected.

9. Having heard learned counsel for the parties and perused material available on this record, this Court finds that 242 capsules/tablets of SPASMO-PROXYVON PLUS, which is a prohibited drug came to be recovered from the almirah kept in the house of the petitioner that too in the presence of the independent witnesses and as such, it cannot be said that petitioner has been falsely implicated. Since tablets of SPASMO-PROXYVON PLUS contain TRAMADOL HYDROCHLORIDE, which is a prohibited drug under the UNDPS Act, same cannot be kept /stored without there being specific licence issued

by the competent authority. Though in the instant case, petitioner has claimed that some persons inimical to him with a view to falsely implicate him had kept the aforesaid prohibited drugs in his almirah, but such plea of him cannot be accepted at this stage, especially, when there is no evidence worth credence to that effect available on record. However, having taken note of the fact that contraband allegedly recovered from the bail petitioner is of intermediate quantity coupled with the fact that no case in past stands registered against the petitioner, prayer made on his behalf for grant of bail deserves to be considered.

10. Since quantity allegedly recovered from the house of the petitioner is intermediate, rigors of Section 37 of the Act are otherwise not attracted in the presence case. Since it is not in dispute that besides petitioner, other family members also reside in the house, from where allegedly, 240 tablets/capsules came to be recovered, it would be too premature at this stage to conclude complicity, if any, of the petitioner in the alleged commission of offence and as such, there appears to be no reason for this Court to let the bail petitioner incarcerate in jail for an indefinite period during trial. Hon'ble Apex Court in catena of judgment has held that one is deemed to be innocent till the time his/her guilt is proved in accordance with law. Petitioner, otherwise also, being first offender deserves leniency. Apprehension expressed by the learned Deputy Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice or may again indulge in such activities, can be best met by putting bail petitioner to stringent conditions.

11. Needless to say, object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail.

Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a***

mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him to taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care ad caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and the grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That

detention in custody of under trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

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

(xvii) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(xviii) nature and gravity of the accusation;
(xix) severity of the punishment in the event of conviction;
(xx) danger of the accused absconding or fleeing, if released on bail;
(xxi) character, behaviour, means, position and standing of the accused;
(xxii) likelihood of the offence being repeated;
(xxiii) reasonable apprehension of the witnesses being influenced; and
(xxiv) danger, of course, of justice being thwarted by grant of bail.

17. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

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

earliest. (See: <u>Paramjit Singh v. State (NCT of Delhi)</u>, (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).

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

"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more

persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

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

Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

19. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 50,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

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

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

(l) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to

dissuade him/her from disclosing such facts to the Court or the Police Officer; and

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

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

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

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

Between:-

VIKAS SHARMA
SON OF SH. DEV RAJ SHARMA,
R/O VILLAGE CHHAROL,
P.O PRAGPUR, TEHSIL DEHRA, DISTRICT KANGRA, H.P PRESENTLY WORKING AS WARDER DISTRICT JAIL DHARAMSHALA.

…….. PETITIONER.

(BY MR. VIJAY KUMAR ARORA,
ADVOCATE)

AND

1. UNION OF INDIA THORUGH SECRETARY (HOME), NORTHBLOCK, NEW DELHI-110001

2. THE GENERAL MANAGER, INDIA GOVERNMENT MINT, ALIPORE, KOLKATA, 700053.
3. STATE OF HIMACHAL PRADESH THORUGH PRINCIPAL SECRETARY (HOME) SHIMLA.H.P.
4. THE DIRECTOR GENERAL (PRISONS) GOVT. OF H.P. SHIMLA.

.....RESPONDENTS

(BY. MR. RAJINDER THAKUR, CGC FOR RESPONDENTS NO. 1 AND 2)

(BY MR. ASHWANI SHARMA, MR. NARENDER GULERIA AND MR. HEMANT VAID, ADDL.A.GS WITH MR. VIKRANT CHNDEL AND MR. GAURAV SHARMA, DY.A.GSFOR RESPONDENTS NO. 3 AND 4)

CIVIL WRIT PETITION No. 878 of 2017
RESERVED ON 11.8.2021
DECIDED ON: 20.8.2021

Constitution of India, 1950 - Article 226 - Gallantry Service Medal- Delay- Benefits - Held- Respondents to ensure utmost promptness, the medals are manufactured and its awarding promptly done only at Republic Day or Independence Day functions - Petition allowed with the direction to purvey benefits to petitioner of conferment of the gallantry medal.

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

O R D E R

Through, the instant petition the writ petitioner espouses, for the granting of the hereinafter extracted main reliefs No. (a) and (b):-

(a) "That non-grant of monetary as well as other benefits to the petitioner which are admissible to the recipient of this prestigious award from the announcement of the Award

shows clear cut discrimination with him and therefore, the petitioner humbly prays for appropriate directions.

(b) That the action on the part of the respondents showing disrepute to this prestigious award by sending it through courier and thereafter presented the same to the petitioner by the Hon'ble Chief Minister on the celebrations of Himachal Day after the gap of more than three years against the norms prescribed for the conferment/presentation of the Award. The petitioner is entitled for all the consequential benefits of this award and other benefits as are applicable to recipient of this award but the same was not given to him in view of this the action of the respondents are arbitrary unconstitutional and thereby causing grave injustice to the petitioner."

2. The writ petitioner, as revealed by Annexure P-3, became nominated in the year 2000, for gallantry service medal. The awarding of the medal to the petitioner, rather occurred much belatedly therefrom, in as much, as, in the month of 2009, April, and, earlier thereto it became sent through Courier to the petitioner. The afore manner of despatch of the honour concerned, upon the writ petitioner aroused grievances in the writ petitioner, on the ground that it militates, the mandate carried in Annexure P-4, in as much, as, vis-à-vis, an echoing occurring therein, that the presentation of gallantry medal to the awardee(s) concerned rather being during ceremonial functions of Independence Day and Republic Day. In consequence thereof, the petitioner became conferred the gallantry award at the Himachal Day function, held at Rohru, on 15.4.2010, by the then Chief Minister.

3. The writ petitioner avers, that he has to be also bestowed with the benefits as become borne in Annexure P-14. Consequently, he prays that the benefits echoed in Annexure P-14, be made available, to him through a mandamus being made upon the respondents.

4. The respondents No.3 and 4 in their reply meted to the writ petition, contend that there was no inordinate delay in the conferment of gallantry medal, upon, the writ petitioner. Contrarily in their reply, they contend that the conferment of gallantry award, upon the writ petitioner, was a sequel to an order emanating on 26.1.2007 from the Secretariat of the President of India. A contention is also reared in the reply, that the delayed conferment, if any, of gallantry medal, upon, the writ petitioner, in as much, as, in Republic Day or in Independence Day, was a sequel of the General Manager, India Government Mint, Alipore, Kolkata, delaying the manufacture of medals. The respondent also explicates therein, that even the afore delay on the part of General Manager, India Government Mint, Alipore, Kolkata, is a sequel to the latter rather not receiving an intimation, from the Government of India, Ministry of Home Affairs, hence with respect to the afore gallantry award being made vis-à-vis the writ petitioner, and, in as much as, in the notification, as emanated from the Secretariat of the President of India, hence nominating therein recipients of gallantry awards/medals, rather the name of the writ petitioner not being carried therein.

5. The afore impediment besetting General Manager, India Government Mint, Alipore, Kolkata, the manufacturer of the Gallantry medal, in his not earlier thereto manufacturing it, is, unfolded in Annexure P-6 on 4.4.2009. Even though, the afore contention reared in the afore reply on affidavit furnished to the writ petition, does make prima-facie valid, the factum of delayed manufacturing of gallantry medal appertaining to the writ petitioner. However, the factum of the staff concerned working with General Manager, India Government Mint, Alipore, Kolkata, rather dispatching the gallantry medal directly to the writ petitioner through courier, does amount to breach of protocol, vis-à-vis, the awarding(s) of conferment of honours upon the writ petitioner, and, as becomes enshrined in Annexure P-4, wherein an echoing occurs, that awardees concerned, are to be bestowed apposite

honours, only during a ceremonial function of Republic Day or Independence Day. However, the making of Annexure P-4 though is subsequent to the conferment of the honour upon the writ petitioner, honours whereof became conferred upon him in the year 2007, even if it be so, since the celebrity concerned has been through Annexure P-3, been accepted to be a recipient of the honour of Gallantry medal rather only in ceremonial function of Republic Day or Independence Day. Consequently, the afore mode does comprise the befitting manner of honoring a celebrity, and, hence holds retrospective effect. Therefore in no manner the dispatching to him through courier of the medal to his abode from the General Manager, India Government Mint, Alipore Kolkata, can become the befitting manner of honoring a celebrity with the presidential conferment of a gallantry award. The afore manner has to be deprecated.

6. The official concerned working with co-respondent No.2, is to be held responsible, for lapse (supra) and, respondent No.2 is directed to issue a show cause notice upon the Official concerned, working at General Manager, India Government Mint, Alipore, Kolkata, as to how he breached the protocol occurring in Annexure P-4.

7. Since apart from conferment of the gallantry medal, upon the writ petitioner, the celebrities are to be purveyed the benefits embodied in Annexure P-14. Consequently, in terms thereof, subject to apposite entitlement of the writ petitioner, the respondents concerned are directed to forthwith purvey benefits thereof, through theirs making communications to the writ petitioner.

8. The conferment of gallantry medal, upon the writ petitioner, did come to be made upon him, by the then Chief Minister at a State Level function i.e Himachal Day function held at Rohru. However, when for promoting acts of bravery and courage rather gallantry awards are made upon the celebrity concerned. Therefore, for ensuring that the spirit of bravery does not ever ebb, rather through delays in the conferment of gallantry award,

upon the celebrity concerned. Moreover since the petitioner has been led to approach this Court, this Court deems it fit, to make a mandamus, upon the respondents to upon reflection of name(s) of the apposite awardees(s), in the apposite list, to ensure that with utmost promptness, the medals are manufactured, and, they shall ensure that the awarding of medal, upon, the recipients being promptly done, only at Republic Day or Independence day functions. The promptness in the manufacturing of the medal and also theirs prompt conferment, upon the awardees concerned only in Republic Day function and Independence Day function, will ensure that the act(s) of bravery remain enlivened, especially when it is the salutary purpose behind the honoring of celebrities through medals or gallantry awards.

9. In view of the above, the present petition stands disposed of alongwith all pending applications.

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

Between:

1. SURINDER KUMAR
SON OF LATE SH. BISHAN DASS,
R/O VILL. BHALETI, P.O. DOHGI,
TEHSIL BANGANA, DISTRICT UNA, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK PROCESSING PLANT,
JUNGLEBERRI,
TEHSIL SUJANPUR,
DISTRICT HAMIRPUR, H.P.

2. LALIPULEKH SHARMA
SON OF LATE RAM LAL SHARMA,
R/O VILL. SHAKRORI, P.O. CHABA,
TEHSIL SUNI, DISTRICT SHIMLA, H.P.,

PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK CHILLING CENTRE,
BAGTHAN,
P.O. BAGTHAN,
DISTRICT SIRMOUR, H.P.

3. OM PRAKASH CHAUHAN
SON OF LATE SH. D.D. CHAUHAN,
R/O V.P.O. & TEHSIL RAMSHAHAR,
DISTRICT SOLAN, H.P.
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK PROCESSING PLANT,
ROHRU, DISTRICT SHIMLA, H.P.

4. RAMESH CHAND PATIAL
SON OF SH. PREM SINGH PATIAL,
R/O VILL. NAGARDA,
P.O. & TEHSIL, NADAUN,
DISTRICT HAMIRPUR, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK PROCESSING PLANT,
JUNGLEBERRI, TEHSIL SUJANPUR,
DISTRICT HAMIRPUR, H.P.

5. TILAK RAM
SON OF LATE SH. DEVI DASS,
R/O VILL. BANDA, P.O. BASANTPUR,
TEHSIL SUNI, DISTRICT SHIMLA, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK CHILLING CENTRE,
KEPU, DISTRICT SHIMLA, H.P.

6. BARU RAM SHARMA
SON OF SH. PUNIA RAM SHARMA,

R/O VILL. GUDDIMANPUR,
P.O. SHARLIMANPUR,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
H.P. MILK FEDERATION,
NAHAN UNIT AT KANSHIWALA,
TEHSIL NAHAN,
DISTRICT SIRMOUR, H.P.

7. ARUN KANWAR
SON OF SH. YASH PAL SINGH,
R/O GOMATI NIWAS,
TOP FLOOR,
NEAR UMA MARKET,
CHAKKER,
SHIMLA-171005,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT, H.P.
MILK FEDERATION, TOTU,
SHIMLA-1710011.

8. RAJINDER SINGH CHANDEL
SON OF LATE SH. LACHHMAN SINGH,
R/O VILL. BERI DAROLAN,
P.O. BEHNAJATTAN, TEHSIL JHANDUTTA,
DISTRICT BILASPUR, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK CHILLING CENTRE, MOHAL,
DISTRICT KULLU, H.P.

9. RAMESH CHAND
SON OF SH. CHET RAM,
R/O DHALARIA HOUSE,
UPPER RAM NAGAR, DHARAMSHALA,

DISTRICT KANGRA, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK CHILLING CENTRE,
BINDRAVAN, TEHSIL PALAMPUR,
DISTRICT KANGRA, H.P.

10. SUBHASH LATH
SON OF SH. SAGAR CHAND LATH,
R/O V.P.O. TAKARLA, TEHSIL AMB,
DISTRICT UNA, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK PROCESSING PLANT,
LALSINGHI (JHALERA),
DISTRICT UNA, H.P.

11. GHAMANDA SINGH
SON OF LATE SH. SADHU RAM,
R/O VILL. MAKRAYANA COLONY,
JOGINDERNAGAR,
TEHSIL JOGINDERNAGAR,
DISTRICT MANDI, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
MILK CHILLING CENTRE,
KUNNU, DISTRICT MANDI, H.P.

12. DINESH KUMAR
SON OF SH. JIA LAL,
R/O VILL. KATAL,
P.O. CHANAWAG, VIA DHAMI,
TEHSIL SUNNI,
DISTRICT SHIMLA, H.P.,
PRESENTLY POSTED AS
TECHNICAL SUPERINTENDENT,
H.P. MILK FEDERATION, TOTU,

SHIMLA-1710011.

....PETITIONERS

(BY MR SURINDER SAKLANI,
ADVOCATE)

AND

2. HIMACHAL PRADESH STATE
COOPERATIVE MILK
PRODUCERS FEDERATION,
TOTU, SHIMLA,
DISTRICT SHIMLA, H.P.
THROUGH ITS MANAGING DIRECTOR.

3. REGISTRAR, COOPERATIVE SOCIETIES,
HIMACHAL PRADESH, SHIMLA-171009.

....RESPONDENTS

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

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 1730 OF 2020
DECIDED ON: 10.09.2021

Constitution of India, 1950 - Article 226 - Promotion- Incharge Chilling Centres to the post of Technical Superintendent- Since petitioners, in terms of Rule 13 of Service Rules framed by the Milk Federation had become eligible for promotion to the post of Technical Superintendent after their having acquired three years experience against the post of Incharge Chilling Centres- Respondent Milk Federation ought to have promoted them from the due date- Callous and negligent attitude of the department cannot be a ground to deny

the legitimate claim of the petitioners- petition allowed with the direction to promote the petitioners from the date when they completed three years service against the post of Incharge Chilling Centres along with consequential benefits.

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

O R D E R

Being aggrieved and dis-satisfied with order dated 2.3.2017 (Annexure A-19), whereby representations having been filed by the petitioners herein, pursuant to judgment dated 11.4.2016, passed by the Erstwhile HP State Administrative Tribunal in TA No. 5397 of 2015, further upheld by this Court vide judgment dated 16.11.2016 passed in CWP No. 1636 of 2016, came to be rejected, petitioners have approached this Court in the instant proceedings, praying therein for following main reliefs:

> *"That in view of the facts and circumstances enumerated hereinabove, it is respectfully prayed that the impugned communication, dated 2.3.2017 as contained in Annexure A.22, whereby representation of the applicants has been rejected, may kindly be quashed and set aside with further directions to the respondents to promote the applicants from their due dates as per judgment rendered by this Hon'ble Tribunal in T.A.No.5397/2015 and O.A. No.3261/2015 as upheld by the Hon'ble High Court of Himachal Pradesh vide judgment, dated 16.11.2016 in C.W.P. No.1636/2016, with all consequential benefits of pay, arrears, seniority etc."*

2. Precisely, the facts of the case, as emerge from the record are that petitioners, who are/were Incharge Chilling Centres owned by the Milk Federation filed TA No. 5397 of 2015, praying therein for direction to the Federation to promote them to the post of Technical Superintendants in the Federation after declaring them qualified and eligible to be promoted to the

said post from the date of their having completed five years service (***now stands amended to three years***) as Incharge Chilling Centres with all consequential benefits. Claim of the petitioners, as has been taken note herein above, came to be opposed on behalf of the Milk Federation on three grounds; i.) the diploma acquired by the petitioners herein from IGNOU is only of one year duration; ii.) aforesaid diploma is through distance learning and as such, respondents have no practical experience and; iii.) Service Rules occupying the field were framed in the year, 1994, whereas the diploma was started in the year, 2005. Respondent-Federation claimed that the petitioners cannot be promoted to the post of Technical Superintendants in terms of service rules, wherein vide Rule -13, post of the Technical Superintendants (Production/Store/Marketing/MIS/P&I), is required to be filled up by way of promotion on seniority cum merit basis from amongst the Incharge Chilling Centres, having five years regular service on posts, provided that, eligible candidates possess Degree in Dairy Technology/ Dairy Husbandry or Diploma in Dairy Technology/Dairy Husbandry. If eligible candidates are not available in the feeder cadre, then posts of Technical Superintendants are required to be filled up by way of direct recruitment. Learned Tribunal below on the basis of pleadings as well as record made available to it, vide judgment dated 11.4.2016 (Annexure A-14) allowed the TA having been filed by the petitioners alongwith consequential benefits in accordance with service rules.

3. Being aggrieved with the aforesaid judgment rendered by the Tribunal, the Milk Federation filed CWP No. 1636 of 2016, which came to be dismissed on 16.11.2016 (Annexure A-15) by the Division Bench of this Court. Aforesaid judgment passed by the Division Bench of this Court has attained finality, because against the same, no appeal, if any, ever came to be filed in the superior court of law by the respondent-milk Federation. In compliance to judgment dated 11.4.2016, whereby a direction was issued to the Milk Federation to consider respective cases of the petitioners for the posts of

Technical Superintendants from the due date with all consequential benefits, which was further upheld by this Court vide judgment dated 16.11.2016, passed in CWP No. 1636 of 2016, respondent-Milk Federation issued office order dated 4.1.2017, promoting the petitioners to the posts of Technical Superintendants in the pay-scale of Rs. 10300+34800 plus GP Rs. 4400/- prospectively. Since as per judgment dated 11.4.2016, passed by the learned Tribunal, further upheld by this Court vide judgment dated 16.11.2016, respondent-Milk Federation was to consider respective cases of the petitioners for promotion to the post of Technical Superintendants from the due date alongwith consequential benefits i.e. date of passing of diploma in Dairy Technology/Dairy Husbandry and respondent-Milk Federation ignoring Rule-13 of service rules framed by the Federation, proceeded to promote the petitioners to the post of Technical Superintendants w.e.f. 4.1.2017 (Annexure A-17), petitioners herein filed representation to the Managing Director, Himachal Pradesh State Cooperative Milk Producers' Federation vide communication dated 30.11.2017 (Annexure A-18), however fact remains that aforesaid representation was rejected by the respondents Federation vide order dated 2.3.2017 (Annexure A-19) on the ground that as per provisions of sub-section (VII), Chapter 16.25 (g) of Handbook on Personnel Matters page No.-539-40, Vol.-1 (Second Edition), promotions are made in order of the consolidated select list, but such promotion always has prospective effect even the cases where the vacancy relates to earlier year. In the aforesaid order, respondents also stated that neither any meeting of the DPC was held earlier nor the posts of Technical Superintendant were filled up through Direct Recruitment besides the fact that no junior official was ever promoted and as such, promotions of Technical Superintendant have been rightly made effective from the date of promotion.

4. Being aggrieved and dissatisfied with the aforesaid explanation rendered on record by the respondent-Federation, while rejecting the

representation of the petitioners, petitioners have approached this Court in the instant proceedings praying therein for the relief(s) as have been reproduced *supra*.

5. Having heard learned counsel for the parties and perused material available on record, this Court finds that there is no dispute *interse* parties that all the petitioners prior to their promotion to the posts of Technical Superintendant were discharging their duties as Incharge Chilling Centres owned by the respondent Milk Federation w.e.f. 1.5.1988, 15.11.2000, 22.11.2000, 16.7.2003, 11.7.2003, 15.7.2003, 21.10.2008, 20.10.2008, 3.11.2008 and 14.11.2010, respectively. It is also not in dispute that as per Rule 13 of Service Rules, posts of Technical Superintendants, at the first instance, are to be filled up by way of promotion from amongst the Incharge, Chilling Centres, having three years experience (*earlier it was "five years"*) and degree or diploma in Dairy Technology/Dairy Husbandry or in alternate, by way of direct recruitment, in case eligible candidates are not available in the feeder cadre. Since there is/was no ambiguity in the rule, as has been taken note herein above, Tribunal below as well as this Court in earlier petitions filed by the petitioners, have upheld the same. Though, in earlier petition i.e. TA No. 5397 of 2015, decided on 11.4.2016, respondent Federation claimed that to become entitled for promotion to the post of Technical Superintendants, a candidate should have two years diploma in Dairy Technology/Dairy Husbandry, but such prayer of Milk Federation was rejected on account of the fact that there is no mention, if any, with regard to the duration of course in service Rule-13.

6. Besides above, heavy reliance was placed upon the opinion expressed by the Indian Council of Agricultural Research (ICAR) that to become entitled to the promotion to the post of Technical Superintendants a candidate should have two years diploma in Dairy Technology/Dairy Husbandry, but such plea was also rejected by the Erstwhile Tribunal as well

as this Court in earlier proceedings on the ground that opinion, if any expressed by ICAR cannot override the specific provision contained in the service rules, until and unless same are amended suitably. Since as per Rule 13, post of Technical Superintendants, at the first instance, is to be filled up, by way of promotion from amongst the Incharge Chilling Centres, having possessed diploma in Dairy Technology/Dairy husbandry, petitioners are well within their rights to claim promotion to the post of Technical Superintendants from the date when they completed three years service as Incharge Chilling Centres.

7. In the case at hand, as per supplementary affidavit filed by respondent-Managing Director, Milk Federation, in terms of order dated 9.8.2021, all the petitioners had completed three years of tenure as Incharge Chilling Centres much much prior than the issuance of promotion order dated 4.1.2017 (Annexure A-17), whereby all the petitioners have been given promotion from the prospective date i.e. 4.1.2017. Since Rule 13 of service Rules framed by the respondent-Federation itself provides for appointment to the post of Technical Superintendants to be made at the first instance by way of promotion from amongst the Incharge Chilling Centres having three years service, all the petitioners are entitled to be promoted to the posts of Technical Superintendants from the date they completed three years tenure of Incharge Chilling Centres. Since validity of aforesaid Rule-3 of service Rules framed by the Federation has been already upheld by the Tribunal as well as by this Court in previous litigation, question with regard to validity and correctness of the same cannot be gone into in these proceedings. Since there is specific rule provided under the service rules framed by the respondent-Milk Federation, for promotion to the post of Technical Superintendants, claim of the petitioners cannot be rejected while placing reliance on the provisions contained under Handbook on Personnel Matters. It is not fault of the petitioners that despite there being availability of vacancies, respondent-

Federation failed to convene the meeting of DPC to fill up vacancies. Since petitioners, in terms of Rule -13 of service Rules had become eligible for promotion to the post of Technical Superintendants after their having acquired three years experience against the post of Incharge Chilling Centres, Respondent Milk Federation ought to have promoted them from the due date, but definitely not from the date of passing of order dated 4.1.2017 (Annexure A-17), which definitely came to be issued after a long litigation inter-se petitioners and respondent-Federation.

8. It is none of the case of the respondent-Federation that no posts of Technical Superintendants were available when petitioners herein had become eligible for promotion after their having served continuously for three years against the post of Incharge Chilling Centres. Since posts of Technical Superintendants were available when all the petitioners had become eligible for promotion on account of their having completed three years' regular service against the post of Incharge Chilling Centres, case of the petitioners cannot be rejected on the ground that promotions are made in order of the consolidated select list and such promotions always have prospective effect, even if vacancies relate to earlier year. When rules framed by the respondent-Federation itself provide for the time period in which one can be considered for promotion to the higher post, mere non-convening of DPC that too on account of callous and negligent attitude of the department, cannot be a ground to deny the legitimate claim of the petitioners.

9. Consequently, in view of the detailed discussion made herein above, this court finds merit in the present petition and as such, same is allowed and order dated 2.3.2017 Annexure A-19, is quashed and set-aside. Respondents are directed to promote the petitioners from the date when they had completed three years service against the post of Incharge Chilling Centres alongwith consequential benefits. Needless to say, in terms of aforesaid direction issued by this Court, order dated 4.1.2017 contained in

Annexure A-17, would also be modified by the respondent-Federation to that extent. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Between:

1. NARESH SHARMA S/O SH. KRISHAN DATT, VILLAGE BAGARTI, P.O. MASYANA TEHSIL AND DISTRICT HAMIRPUR POSTED AS JBT AT GPS NALTI.
2. SAROJ KUMARI W/O VIJAY DHIMAN, RESIDENT OF VILLAGE DOHRWIN, P.O. NALTI, TEHSIL AND DISTRICT HAMIRPUR, H.P. JBT AT GPS GALORE.
3.SAROTI DEVI D/O SH. SHIV RAM, RESIDENT OF VILLAGE RAILI, P.O. RAILI JAJRI, TEHSIL BARSAR, DISTRICT HAMIRPUR H.P., HT AT ROPA RAJPUTTAN.
4.SEEMA KUMARI D/O SH. MUNSI RAM, VPO BHUKKAR, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., HT AT GPS SAMKARI.
5. SANTOSHI DEVI D/O SH. KIRPA RAM, VPO BHUKKAR, TEHSIL BHORANJ DISTRICT HAMIRPUR, H.P., HT AT GPS CHHOUN.
6. SHOK KUMAR S/O SH. SHAKTI CHAND R/O VILLAGE DHALOT, P.O. BOHNI, TEHSIL AND DISTRICT HAMIRPUR, H.P., POSTED AS GPS LAGDEVI.
7. RAJNEESH KUMAR S/O SH.

VISHESHWAR NATH, VPO KHAGGAL, TEHSIL AND DISTRICT HAMIRPUR, H.P., HT AT GPS BALETA.

8. SURINGDER KUMAR S/O SH. SUKH RAM, VILLAGE JADWAL, P.O. BARA, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P., PRESENTLY POSTED AT GPS JEEHAN.

9. RAMESH KUMAR S/O SH. JAI RAM R/O VILLAGE BARIN MANDIR, P.O. TOUNI DEVI, TEHSIL TOUNI DEVI, DISTRICT HAMIRPUR, H.P., JBT AT GPS DARBHIAR.

10. RAVINDER KUMAR S/O SH. SHANKAR DATT, VILLAGE CHAMARDI, P.O. DATLANDER, TEHSIL SUJANPUR, DISTRICT HAMIRPUR, H.P., JBT AT GPS BHATERA.

11. BALBIR SINGH S/O SH. OM PARKASH, RESIDENT OF VILLAGE BHALANA P.O. REE, TEHSIL SUJANPUR, DISTRICT HAMIRPUR, H.P., JBT AT GPS CHALOKHAR.

12. KULDEEP CHAND R/O VILLAGE GHANSUHI, P.O. JHIRARLARI, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P., JBT AT GPS GALOTE.

13. SANJEEV CHANDEL S/O SH. JAGDISH CHAND CHANDEL, R/O VILLAGE MOHIN, TEHSIL AND DISTRICT HAMIRPUR, H.P., JBT GPS ROPA KOT.

14. RAJESH KUMAR S/O SH. KANSHI RAM R/O VILLAGE PADAL, P.O. HAMIRPUR, TEHSIL AND DISTRICT HAMIRPUR, H.P., JBT GPS PANJHALI.

15. DALJIT SINGH S/O SH. UDHAM SINGH, VPO DHANGOTA, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P., JBT AT GPS SAMTANA KHURD.

16. SURINDER PAUL S/O SH. KARAM CHAND R/O VILLAGE KAIHRAN, P.O. BARA, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P. POSTED AT GPS BATAHLI.

17. KUSHAL KUMAR S/O SH. MURARI LAL R/O VILLAGE PAKHROL, P.O. SERA TEHSIL NADAUN, DISTRICT HAMIRPUR H.P., POSTED AT BRCC NADAUN, (PRY)

18. UTTAM SINGH BHARMOTA S/O SH. GIAN CHAND BHARMOTA, VPO CHAKMOH, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P., POSTED AT GPS MUTHAN.

19. PARNESH KUMAR S/O SH. BALDEV DASS, VPO BADHANI, THEIL BHORANJ DISTRICT HAMIRPUR, H.P., JBT AT GPS BADHANI.

20. NARESH KUMAR S/O SH. DEV SHARMA, VPO DUNGRI, TEHSIL BHORANJ, DISTRICT HAMIRPUR H.P., JBT AT GPS DHAMROL.

21. PARDEEP KUMAR S/O SHRI

KISHAN DASS, R/O VILLAGE GUJREHRA, P.O CHABUTRA, TEHSIL SUJANPUR, DISTRICT HAMIRPUR, H.P., JBT AT MAJHOG SULTANI.

22. JEEVAN KUMAR S/O SH. ATTAR SINGH, R/O VILLAGE ANU KALAN, TEHSIL & DISTRICT HAMIRPUR, H.P., JBT AT GPS MATHANI.

23. RAKESH KUMAR S/O SH. PARTAP CHAND, R/O VILLAGE KARGOO, P.O. BADHERA, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P., JBT AT GPS PANSAI.

24. PARVEEN KUMAR S/O SH. RASILA RAM, R/O VPO KHAGGAL TEHSIL AND DISTRICT HAMIRPUR, H.P., JBT AT GPS NADIANA SADIANA.

25. SANJAY KUMAR SHARMA S/O SH. AGYA RAM SHARMA, VILLAGE KHAJJIAN, P.O. BAHINA, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P., JBT AT GPS KIARA BHAG.

26. VINOD KUMAR S/O SH. ROOP LAL, R/O VILLAGE BHABLE, P.O. KAROTHA, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., JBT AT MUNDKHAR.

27. RASHI SHARMA W/O SH. NARESH SHARMA R/O VILLAGE BAGARTI, P.O. MASYANA TEHSIL AND DISTRICT HAMIRPUR, H.P., GPS ROPA.

28. ANIL KUMAR S/O SH. HARI RAM R/O VILLAGE NAHLWIN, P.O.

AGHAR, TEHSIL AND DISTRICT HAMIRPUR, H.P., JBT AT GPS DAROUNDLA.
29. VIJAY KUMAR S/O SH. HEM RAJ, R/O VILLAGE BHADROON, P.O. KANJIAN, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P., JBT AT GPS KANJIAN.
30. DESH RAJ S/O SH. BHAGAT RAM, R/O VILLAGE TIKKER RAJPUTTAN, P.O. BAMBLOO, TEHSIL, BARSAR, DISTRICT HAMIRPUR, H.P., JBT AT GPS BIAR.
31. MEENA KUMARI W/O SH. RAJ KUMAR, R/O VPO ROPA, TEHSIL AND DISTRICT HAMIRPUR, POSTED AT GPS ROPA SAHIL.

....PETITIONERS.

(BY SHRI HAMENDER SINGH CHANDEL, ADVOCATE)

AND

1. STATE OF H.P. THROUGH PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF H.P., SHIMLA-2.
2.DIRECTOR OF ELEMENTARY EDUCATION, HIMACHAL PRADESH SHIMLA-1.
3. DEPUTY DIRECTOR OF

ELEMENTARY EDUCATION, DISTRICT HAMIRPUR, H.P.

4 MS. REENA KUMARI D/O RATTAN LAL, R/O VPO PAIRI, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P.

5. MS. INDU BALA W/O SH. BRIJ LAL, R/O VPO MAIR, TEHSIL AND DISTRICT HAMIRPUR, H.P.

6.SANJEEV KUMAR SHARMA S/O SH. FINA NATH SHARMA, R/O VILLAGE CHHANER, P.O. CHAMIANA. TEHSIL SUJANPUR, DISTRICT HAMIRPUR, H.P.

7. SUNIL KUMAR S/O SH. HARI DASS, R/O VPO DUDHANA, TEHSIL AND DISTRICT HAMIRPUR, H.P.

8. SALOCHNA SHARMA W/O SH. RAVI KANT SHARMA, AGED 58 YEARS, R/O VPO DAUGRI, TEHSIL NANDAUN, DISTRICT HAMIRPUR, H.P.

9. GURDEV SINGH, AGED 57, YEARS, S/O SH. PREM SINGH, R/O VILLAGE GOPALNAGAR, P.O. DARUHI, TEHSIL AND DISTRICT HAMIRPUR, H.P., PRESENTLY OFFICIATING AS BLOCK ELEMENTARY EDUCATION OFFICER (GOVT. PRIMARY SCHOOL KAKRIAN) HAMIRPUR BLOCK, DISTRICT HAMIRPUR, H.P.

10. RAJ KUMAR S/O SH. KRISHAN CHAND, R/O VILLAGE THANA BRAHMNA, P.O. BALIAH,

TEHSIL BARSAR DISTRICT HAMIRPUR, PRESENTLY WORKING AS CENTRE HEAD TEACHER AT GOVT PRIMARY SCHOOL, SALAURI, OFFICIATING AS BLOCK ELEMENTARY EDUCATION OFFICER IN EDUCATION BLOCK BIJHARI, DISTRICT HAMIRPUR, H.P.

11. ONKAR SINGH S/O SH. HARNAM SINGH, R/O VILLAGE GOPALNAGAR, P.O. DARUHI, TEHSIL & DISTRICT HAMIRPUR, H.P., PRESENTLY WORKING AS CHT IN GOVT. PRIMARY SCHOOL RANGES, EDUCATION BLOCK GLORE, DISTRICT HAMIRPUR, OFFICIATING AS BLOCK ELEMENTARY EDUCATION OFFICER AT EDUCATION BLOCK GLORE, DISTRICT HAMIRPUR, H.P.

12. MADAN LAL S/O SH. BHAGAT RAM, R/O VILLAGE BHATER, P.O. MOHIN, TEHSIL AND DISTRICT HAMIRPUR, PRESENTLY WORKING AS CENTRAL HEAD TEACHER (CHT) IN GOVT. PRIMIARY SCHOOL AMROH, EDUCATION BLOCK HAMIRPUR, DISTRICT HAMIRPUR H.P.

13. OM PARKASH S/O SH. MUNSHI RAM, R/O VILLAGE SERVI, P.O. BAINU, TEHSIL BARSAR, DISTRICT HAMIRPUR, PRESENTLY WORKING AS

CENTRAL HEAD TEACHER (CHT) IN GOVT. PRIMARY SCHOOL MAHARAL, EDUCATION BLOCK BAIJHARI, DISTRICT HAMIRPUR, H.P.

14. PURSHOTAM CHAND SHARMA, S/O SH. K.L. SHARMA, R/O VILLAGE BHASYAR, P.O. HARETA, TEHSIL NADAUN, DISTRICT HAMIRPUR, PRESENTLY WORKING AS CENTRAL HEAD TEACHER IN GOVT. PRIMARY SCHOOL KARSAI, EDUCATION BLOCK BIJHARI, DISTRICT HAMIRPUR, H.P.

15.BHUVNESH CHAND S/O SH. CHIRANJI, R/O HOUSE No.90,WARD No.04,VPO NADAUN, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P., RETIRED CENTRAL HEAD TEACHER.

16. SUJATA RANI W/O SH. JIWAN SHARMA, R/O VPO MEHRE, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P., PRESENTLY WORKAING AS HEAD TEACHER IN GOVT. PRIMARY SCHOOL KHAJIAN, TEHSIL BARSAR DISTRICT HAMIRPUR, H.P.

17. SUMAN BALA W/O SH. RAMESH CHAND, R/O VPO MEHRE (HPPWD COLONY), TEHSIL BARSAR, DISTRICT HAMIRPU, H.P. PRESENTLY WORKING AS HEAD TEACHER IN

GOVT. PRIMARY SCHOOL BUMBLOO, DISTRICT HAMIRPUR, H.P.

18. KANTA DEVI W/O SH. ASHOK THAKUR, R/O VPO MEHRE (GARLI ROAD), TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P. PRESENTLY WORKING AS HEAD TEACHER IN GOVT. PRIMARY SCHOOL JEOLI DEVI, DISTRICT HAMIRPUR, H.P.

19. RATTANI DEVI W/O SH. PRITAM CHAND R/O VPO MEHRE (HPPWD COLONY), TEHSIL BARSAR DISTRICT HAMIRPUR, H.P., PRESENTLY WORKING AS HEAD TEACHER IN GOVT PRIMARY SCHOOL CHAMBEL, DISTRICT HAMIRPUR, H.P.

20. RANAJANA RANI, W/O SH. KRISHAN LAL, R/O HOUSE NO. 189, PARTAP NAGAR, WARD NO-3, MUNICIPAL COUNCIL HAMIRPUR, DISTRICT H.P., PRESENTLY WORKING AS HEAD TEACHER, GPS KANGRI, CENTRE- CHABUTRA, ELEMENTARY EDUCATION BLOCK-SUJANPUR, DISTRICT HAMIRPUR, H.P.

21. SMT. VIJAY KUMARI WIFE OF SHRI KRISHAN LAL SEHGAL, AGED 56 YEARS, RESIDENT OF HOUSE NO.490, WARD NO.11, BEHIND SABJI MANDI DOSARKA, HAMIRPUR, H.P., PRESENTLY WORKING AS HEAD TEACHER IN

GOVERNMENT PRIMARY SCHOOL BAKARTI, UNDER COMPLEX GOVERNMETN PRIMARY CENTRE SCHOOL BARIPHARNOL, EDUCATION BLOCK HAMIRPUR, THESIL 7 DISTRICT HAMIRPUR, H.P.

....RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR.ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENTS NO.1 TO 3.

MR. SURINDER SAKLANI, ADVOCATE, FOR RESPONDENTS NO.4 AND 5.
RESPONDENTS NO.6 AND 7 *EX PARTE*.
MR. ASHOK KUMAR SHARMA, ADVOCATE, FOR RESPONDENT NO.8.
MR. ONKAR JAIRATH, ADVOCATE, FOR RESPONDENTS NO.9 TO 15.
MR. R.L. CHAUDHARY AND MR. H.R. SIDHU, ADVOCATES, FOR RESPONDENTS NO.16 to 19 & 21.
MR. BHUVNESH SHARMA AND MR. JAI RAM SHARMA, ADVOCATES FOR RESPONDENT NO.20)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.180 of 2019
DECIDED ON: 09.09.2021

Constitution of India, 1950 - Article 226 - Seniority list- Petitioner were neither issued any notice nor they were put to caveat by the department as to on account of what reasons their seniorities were unsettled- Held- Seniority list issued at the back of petitioners without issuing any notice is not sustainable being violative of principles of natural justice- Directions issued.

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

J U D G M E N T

CMP No.325 of 2021

For the reasons stated therein, this application is allowed and disposed and Smt. Vijay Kumari, wife of Shri Krishan Lal Sehgal, is impleaded as party respondent No.21 in CWPOA No.180 of 2019.

CWPOA No.180 of 2019

By way of this petition, the petitioners have prayed for the following reliefs:-

> "*(i) That the impugned final seniority list dated 1.4.2013, Annexure A-7, may be declared illegal and may be quashed and set aside;*
>
> *(ii) That inter se seniority position as existed prior to the issuance of impugned final seniority list may be ordered to be restored.*
>
> *(iii) That in case any promotions are made during the pendency of the O.A. on the basis of the impugned seniority list, such promotions affecting the rights of the applicants may be held illegal and quashed;*"

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

The undisputed facts are that the petitioners were recruited and appointed against the posts of JBT in the year 1998-1999/2000. Thereafter, five seniority lists were issued, depicting the seniority of Junior Basic Training Teacher (JBT Teacher) as in district Hamirpur, qua which the petitioners had no grievance. This was followed by issuance of a tentative seniority list dated 03.01.2013 (Annexure P-6), reflecting the tentative seniority of JBT Teachers

as it stood on 31.12.2012, in district Hamirpur, H.P. With regard to this tentative seniority list also the petitioners were not having any grievance, as according to them they were rightly placed in the said seniority list. Their grievance arose from the finalization of tentative seniority list dated 03.01.2013 and issuance of final seniority list Annexure P-7, dated 01.04.2013, which reflected the final seniority of JBT Courses teachers, working in various primary schools of district Hamirpur, H.P., as it stood on 30.09.2012. The grievance of the petitioners is that without any notice etc., in this final seniority list, they were arbitrarily placed before private respondents No.4 to 7, who otherwise were always reflected below the petitioners in the previous seniority lists and which seniority lists were never assailed by the said private respondents.

3. This petition was originally filed before learned erstwhile Himachal Pradesh Administrative Tribunal and registered as O.A. No.5771 of 2016. Learned counsel for the petitioners has argued that leaving all other contentions aside, the impugned seniority list is not sustainable in the eyes of law, for the simple reason that the settled seniority of the petitioners has been unsettled by way of said final seniority list, dated 01.04.2013 without any notice to the petitioners at their back. According to him, the petitioners were neither issued any notice nor they were put to any caveat by the department as to on account of what reasons their seniorities were unsettled by way of issuance of a final seniority list dated 01.04.2013. On this short count, he submits that the petition be allowed and the impugned final seniority list be set aside.

4. Learned Additional Advocate General while opposing the petition has argued that there are valid and cogent reasons available with the department, on account of which the seniority position of the petitioners as reflected earlier was reworked by the State as is borne out even from the reply which has been filed to the petition by the State.

5. Mr. Surinder Saklani, learned counsel appearing for the contesting private respondents has also supported the stand of the State. He further submitted that as the cause of action accrued upon the petitioners on the date when the final seniority list was issued, the petition is not filed within the statutory period provided under the Administrative Tribunal Act.

6. In rebuttal, learned counsel for the petitioners submitted that it is settled law that an order has to be defended by the propounder of the order on the basis of the contents thereof and subsequently, infirmities in the same cannot be cured by way of affidavits etc. He has further submitted that the petition as was originally filed before learned Tribunal was well within limitation because the final seniority list was never communicated to the petitioners and as from the date when the same came to the notice of the petitioners, the original application was filed well within limitation.

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

8. It is not in dispute that in the final seniority list, dated 01.04.2013, which reflects the final seniority of the JBT Course Teachers, working in various primary schools in district Hamirpur, H.P. as on 30.09.2012, the seniority position of the petitioners as was reflected in the tentative seniority list, dated 03.01.2013, was altered to their disadvantage. There is nothing on record to demonstrate that any notice was given to the petitioners putting them to a caveat that there were reasons available with the department, on the basis of which, it intended to rework the seniority position of the petitioners as was reflected in the tentative seniority list. In other words, no show cause notice was issued to the petitioners by the department as to why the seniority position of the petitioners as was reflected in the tentative seniority list, dated 03.01.2013, be not altered.

9. In addition, there is nothing on record from which it can be inferred that the final seniority list was ever circulated to the petitioners after it was finalized vide Notification dated 01.04.2013.

10. Hon'ble Supreme Court, in *D.K. Yadav* Versus *J.M.A. Industries Ltd., (1993) 3 SCC 259*, has been pleased to hold that it is a fundamental Rule of Law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting/forward his/her case. Hon'ble Supreme Court has been further pleased to hold that any order involving civil consequences must be made consistently with the Principles of Natural Justice.

11. Similarly, Hon'ble Supreme Court, in *Mohinder Singh Gill and Another* Versus *The Chief Election Commissioner, New Delhi and Others, (1978) 1 SCC 405*, has been pleased to hold that civil consequences covers infraction of not merely property or personal rights, but of civil liberties, material depravities and non-pecuniary damages.

12. It is settled law that a person gains seniority in a cadre from the date when he is born in that particular cadre. The importance of the seniority viz-a-viz an employee is that the same gains importance when the eligibility of a person has to be seen for the purposes of promotion to the next higher post, be it a selection post or non selection post.

13. In this background, it is but natural that if settled seniority of a party is disturbed at his back, it has civil consequences qua him because it adversely affects his subsequent rights of promotion etc.. Therefore, in this background, this Court is of the considered view that as the final seniority list dated 01.04.2013, vide which the seniority positions of the petitioners were disturbed to their disadvantage, was issued at their back without issuing them any show cause notice, the same is not sustainable in the eyes of law as the same has been issued by violating the principles of natural justice.

14. Accordingly, this writ petition is allowed to the extent that the final seniority list of JBT Course Teachers, as it stood issued on 01.04.2013 by the respondent-department reflecting the final seniority list of JBT Course Teachers, as it stood on 30.09.2012 with regard to district Hamirpur qua the petitioners and the original respondents No.4 to 7, is ordered to be quashed and set aside. It is further directed that in case the department still intends to redraw the seniority of the petitioners as it stood reflected in the tentative seniority list (Annexure P-6), then a notice shall be issued to the petitioners, mentioning therein the reasons, on the basis of which the department intends to take such an action, within three weeks from today. As from the date of receipt any such notice, response thereto shall be filed by the petitioners definitely within a period of two weeks from the said date and appropriate orders upon the same shall be passed by the authority concerned within three weeks as from the date of receipt of the said response. Till then, status-quo, qua the petitioners and the contesting respondents, i.e. respondents Nos.4 to 7, shall be maintained. In case the department does not issues any notice in the said period, then the petitioners and respondents No.4 to 7 be assigned said seniorities as were earlier reflected in the tentative seniority list. Petition stands disposed of accordingly, so also pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Between:

1. STATE OF HP,
THROUGH PRINCIPAL
SECRETARY (HORTICULTURE)
TO THE GOVERNMENT
OF HIMACHAL PRADESH,
SHIMLA-2

2. DIRECTOR OF HORTICULURE,
HIMACHAL PRADESH,
SHIMLA-2

3. THE FRUIT TECHNOLOGIST
HORTICULTURE DEPARTEMNT,
DHAULA KAUN, DISTRICT
SIRMOUR, H.P.

....PETITIONERS

(BY MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES
GENERAL WITH MR. KAMAL
KISHORE SHARMA AND
NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL.)

AND

1. DEV RAJ,
S/O SH. PANNU RAM,
R/O VPO DHAULA KUAN,
DISTRICT SIRMOUR, H.P.

2. SHARAFT ALI,
S/O SH. MHOD. ALI,
R/O VPO RAJGARH,
DISTRICT SIMOUR, H.P.

3. FIROZ KHAN,
S/O SH. ANGAR ALI,
R/O VILLAGE RAMPUR,
BANJARAN, P.O. DHAULA KUAN,
DISTRICT SIRMOUR, H.P.

4. RUKMANI DEVI,
D/O SH. NETAR SINGH,
R/O VPO KOLAR,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR, H.P.

....RESPONDENTS

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

CIVIL WRIT PETITION NO. 841 OF 2017

Between:

1. SH.DEV RAJ,
S/O SH. PANNU RAM,
R/O VPO DHAULA KUAN,
DISTRICT SIRMOUR, H.P.

2. SH. SHARAFT ALI,
S/O SH.MOHAMMOD ALI,
R/O VPO RAJAH,
TEHSIL RAJGARH,
DISTRICT SIMOUR, H.P.

3. SH. FIROZ KHAN,
S/O SH.ANGAR ALI,
R/O VILLAGE RAMPUR
BANJARAN, P.O. DHAULA KUAN,
DISTRICT SIRMOUR, H.P.

4. SMT. RUKMANI DEVI,
D/O SH. NETAR SINGH,
R/O VPO KOLLAR,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR, H.P.

....PETITIONERS

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

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH ITS SECRETARY
(HORTICULTURE) TO THE
GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA-02

2. THE FRUIT TECHNOLOGIST
HORTICULTURE DEPARTEMNT,
DHAULA KAUN, DISTRICT
SIRMOUR, H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES
GENERAL WITH MR. KAMAL
KISHORE SHARMA AND
NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL.)

CIVIL WRIT PETITION No. 2280 of 2016
DECIDED ON: 16.09.2021

Constitution of India, 1950- Article 226- Industrial Disputes Act, 1947- Award of Ld. Industrial Tribunal-cum-Labour Court, Shimla, whereby while ordering reinstatement of the respondents with seniority and continuity, refused to grant back wages- Held- Respondents employer failed to prove that employee was gainfully employed and was getting same and similar emoluments during the period of termination and as such Tribunal ought to have awarded back wages while holding the petitioner entitled for reinstatement alongwith continuity and seniority in service- Award of Ld. Tribunal is quashed and set aside- Petition allowed.

Cases referred:

Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324;
Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand (Dead) through LRs, (2018) 18 SCC 299;

These petitions coming on for orders this day, the Court passed the following:

O R D E R

Both the above captioned petitions filed under Article 226 of the Constitution of India, lay challenge to award dated 3.9.2015 (Annexure P-1), passed by the Industrial Tribunal-cum-Labour Court, Shimla (in short "*the Tribunal*"), whereby the learned Tribunal below while ordering reinstatement of the respondents-claimants in CWP No. 2280 of 2016 and petitioners in CWP No. 841 of 2017, with seniority and continuity, refused to grant back wages.

2. For the sake of brevity, facts of CWP No. 2280 of 2016 are being taken notice herein below and for more clarity, parties shall be referred as employer and claimants herein after.

3. For having bird's eye view, certain undisputed facts, as emerge from the record are that claimants, who were appointed on daily wage basis in the respondent-department, in the month of March, 1996, August, 2006 and 27.4.2008, respectively, made representation to the Labour Inspector, Paonta Sahib, vide application dated 28.5.2009, with regard to weekly rest. Since no action came to be taken by the Labour Inspector, Paonta Sahib, on the demand raised by the claimants, they served upon the competent authority notice under Section 7 A of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, however, in the meantime, their services were terminated on 7.8.2009.

4. Being aggrieved and dis-satisfied on account of their termination, claimants approached this Court by way of CWP No. 3000 of 2009, titled *Dev*

Raj and Anr v. State of HP and Ors, which came to be disposed of, vide judgment dated 2.1.2010. Coordinate Bench of this Court, while allowing the aforesaid petition, directed the respondents to re-engage the claimants forthwith, however, observed in the judgment that reengagement of the petitioner shall abide by the outcome of the proceedings initiated under the Act. After disposal of the aforesaid petition filed by the claimants, the appropriate government, under Section 10 of the Act, made following reference to the Industrial Tribunal-cum-Labour Court, Shimla:-

> *"Whether termination of the services of S/Shri Dev Raj S/o shri Punnu Ram, Sharafat Ali S/o Shri Mohd. Ali, Firoz Khan S/o Shri Aagar Ali and Ms. Rukmani Devi D/o Shri Netar Singh by The Fruit Technologist Dhaula Kaun, Tehsil Paonta Sahib District Sirmour, HP w.e.f. 7.8.2009, without issuing chargesheet, conducting enquiry and without following the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what service benefits and relif the above named workmen are entitled to from the above employer ?".*

5. Claimants filed claim petition before the Tribunal below, averring therein that they were engaged by the respondent-department in the month of March, 1996, 3.10.2007, August, 2006 and April, 2008, respectively, and since their appointment, they had been regularly rendering their services, but suddenly without any rhyme and reason, on 7.8.2009, their services were illegally terminated without applying the mandatory provisions of the Act. Claimants claimed that before termination, neither they were served the notice under Section 25 of the Act, nor they were paid compensation, if any, in lieu of the notice. Since despite repeated requests, no heed was paid to the requests of the claimants for their reengagement, they were compelled to file aforesaid CWP against the respondent-department, wherein admittedly, this Court while ordering reengagement of the claimants ordered that order of reengagement shall abide by the outcome of the proceedings, if any, pending before the

Industrial Tribunal-cum-Labour Court. Claimants claimed that pursuant to orders passed by the High Court in CWP No. 3000 of 2019, they were re-engaged and since then, they have been regularly working, but respondents have not paid them complete wages from the date of their re-engagement till date and their services were terminated with a view to teach them lesson for raising their legitimate demand in the competent court of law. Claimants also claimed before the Tribunal below that their work and conduct always remained upto the satisfaction of the officials and they completed 240 days in each calendar year and as such, their termination w.e.f. 7.8.2009 deserves to be quashed and set-aside with direction to the employer to give all consequential benefits including the back wages.

6. Aforesaid claim putforth by the claimants (workmen) came to be resisted by the employer, who in its reply filed to the claim petition specifically denied the factum with regard to engagement of the petitioner by the respondent-department for the period mentioned in the claim petition. Employer claimed that since vide letter dated 28.3.2006, petitioner/claimant No.1 had undertaken the liability of any kind pertaining to claimants No. 2 to 4, they are not liable for any claim. Employer also claimed that department had given full and final payment to the petitioners for their re-engagement as per existing rates in compliance to directions passed by the High Court in CWP No. 3000 of 2009. Lastly, employer claimed that claimants were engaged to do seasonal work and there is no question of their termination.

7. On the basis of pleadings adduced on record by the respective parties as well as evidence in support thereof, Tribunal below vide award impugned in the instant proceedings, held termination of the claimants bad in law and accordingly, directed the employer to re-instate them with seniority and continuity in service forthwith, but without back wages.

8. Being aggrieved and dis-satisfied with the aforesaid award impugned in the instant proceedings, both employer and workman/claimants

have approached this Court in the instant proceedings, employer has laid challenge to the award on the ground that once it stood proved that none of the claimant was engaged by them qua the seasonal work, rather work was awarded to claimant No.1, who thereafter, for execution of the same, engaged claimants No. 2 to 4 and as such, there is no question of reinstatement of the claimants. Being aggrieved on account of denial of back wages, claimants have approached this Court in the instant proceedings.

9. Having heard the learned counsel for the parties and perused material available on record, this Court finds that challenge to the award impugned in the instant proceedings has been laid by employer primarily on the ground that Tribunal below has failed to appreciate the evidence in its right perspective, as a consequence of which, findings contrary to the record have come to the fore to the detriment of the employer.

10. Mr. Narender Thakur, learned Deputy Advocate General, vehemently argued that employer successfully proved on record by leading cogent and convincing evidence that none of the claimant was ever engaged by the respondent-department for seasonal work, rather for that purpose, contract was awarded to claimant No.1, who with a view to the execute the work engaged claimants No. 2 to 4. However, having carefully perused pleadings as well as evidence led on record by the respective parties vis-à-vis finding returned by the Tribunal below with regard to the engagement of the claimants by the employer, this Court finds no force in the aforesaid submissions made by the learned Deputy Advocate General. It is not in dispute that claimants being aggrieved of their disengagement by the employer had approached the Labour Inspector Paonta Sahib, but since demand raised by them wes not being paid any heed, they were compelled to approach this Court by way of CWP No. 3000 of 2009. This Court vide judgment dated 2.1.2010, ordered for re-engagement of the claimants forthwith, meaning thereby, factum with regard to engagement of the claimants prior to their filing

writ petition in this Court, which ultimately came to be disposed of on 2.1.2010, cannot be disputed by the employer. If claimants were not disengaged by the employer, there was no occasion for them to approach this Court by way of CWP referred herein above, rather, this Court having taken note of the employment of the claimants in the employer-department ordered for re-engagement, but since claimants had already raised demand for industrial dispute, this Court observed in the order that their re-engagement shall abide by the outcome of the award passed by the Industrial Tribunal-cum-Labour Court.

11. In the case at hand, employer with a view to dispute the claim of the claimants that they were engaged by the employer on daily wage basis placed on record photocopy of letter dated Ext.RA, perusal whereof reveals that claimant No.1 namely Dev Raj vide communication dated 28.3.2006 had requested the Fruit Technologist, Horticulture, Dhaula Kuan, District Sirmaur, to provide him work, but no documents have been led on record by the employer to prove that pursuant to the aforesaid request made by claimant No.1, he was awarded the contract. As per employer, they had invited tender for the execution of the work through contractor and claimant No.1 being contractor had agreed to work or to provide workers to the respondent-department as per letter Ext.R-1, Ext.RP-II and Ext.RP-3. However, as has been observed herein above, no document worth credence has been led on record by the respondent suggestive of the fact that pursuant to aforesaid tender invited by the department, work was awarded to claimant No.1, who in turn, to execute the same, engaged claimants No. 2 to 4. Employer also placed on record bills raised by claimant No.1 Ext.RP6 to Ext.RP8 and Ext.RP10 to Ext.RP13, but bills, as have been taken note herein above, nowhere suggest that claimant No.1 engaged claimants No. 2 to 4 for execution of work allegedly awarded to him by way of contract, rather perusal of aforesaid document reveals that prayer has been made on behalf of the

claimants to increase the amount being paid to them on hourly basis. In none of the aforesaid documents, there is mention, if any, with regard to claimants No. 2 to 4 and as such, it is difficult to conclude that they were not engaged by the employer, rather by claimant No.1. Similarly, there is no evidence led on record by the employer that payment of hourly basis was being made to claimants No. 2 to 4 by claimant No.1.

12. Interestingly, record reveals that claimant No.1 was working with the respondent-employer department w.e.f. 1996 whereas other claimants were engaged in the years 2006 and 2007, respectively, and employer invited tenders as per Ext.R2 for execution of work through contractor on 30.4.2007. There is no document adduced on record by the employer to demonstrate that prior to 30.4.2007, work was being awarded through contract to claimant No.1. Even for the sake of arguments, if it is believed that claimant No.1 was awarded work on contract basis, employer ought to have placed on record agreement, if any, arrived inter-se employer and claimant No.1 pursuant to work awarded to him on contract basis. However, in the case at hand, there is no such document available on record. Careful perusal of tender Ext.R-2 reveals that work, if any, could be awarded to a registered contractor. Interestingly, in the case at hand, department has nowhere proved that claimant No.1 was a registered contractor and as such, he was awarded the contract. Though Het Ram RW-1, deposed that w.e.f the year 2002 workers were being engaged through contractor to do the seasonal work as per requirement but this witness deposed that tenders were invited for execution of seasonable work on hourly basis and pursuant to that, claimant No.1 provided the workers to do the seasonal work. He deposed that prior to 2002, Dev Raj has worked in the department for 89 days as seasonal labourer, whereafter he was never engaged a seasonable worker by the department. He deposed that claimant No.1 being contractor provided labour to do the seasonal work to the employer on hourly basis. Ext.RP-2 had been submitted

by claimant No.1 but as has been taken note herein above, none of the documents adduced on record by the employer reveal that claimants No. 2 to 4 were engaged by claimant No.1 for the execution of work awarded to him on contract basis, rather statement of RW1 Het Ram itself suggests that before 1992, claimant No.1 was engaged for 89 days to do seasonal work. This witness in his cross-examination admitted that claimant No.1 had worked as worker with the department employer w.e.f 1995, but on hourly basis. He also admitted that all the claimants were removed from the service on 7.8.2009. Interestingly, this witness in his cross-examination admitted that claimant Firoz Khan being driver had filled logbook of vehicles bearing registration Nos. HP-17-A-4078 and HP-17-A-4489. It is not understood that if above named Firoz Khan was not employed by the employer, rather by claimant No.1, where was the occasion for this person to fill up the logbook. This witness admitted that in the log-book, there is no mention regarding the entry of Firoz Khan being engaged through contractor.

13. Perusal of entire evidence led on record by the respective parties, especially by the employer, leaves no reason for this Court to differ with the finding rendered by the Industrial Tribunal that all the claimants were engaged by the employer directly and not through the contractor. Since all the claimants were engaged by the employer, their services could not be dispensed with, without applying the provisions contained under the Act. It is not in dispute that in the case at hand, employer before disengaging the claimants neither issued notice under Section 25 of the Act nor in lieu thereof, paid any compensation. Having taken note of the aforesaid glaring aspect of the matter, this Court vide judgment dated 2.1.2020, passed order for re-engagement of the claimants.

14. In view of the detailed discussion made herein above, this Court finds no illegality and infirmity in the finding returned by the Tribunal below with regard to engagement of the claimants by the employer.

15. As far as question with regard to grant of back wages to the claimants is concerned, this Court finds force in the submission of Mr. V.D. Khidtta, learned counsel appearing for the claimants that once the Tribunal below found the claimants entitled for reinstatement alongwith seniority and continuity in service, it ought have held them entitled for back wages. It is not in dispute that before holding claimants entitled for reinstatement, Tribunal below on the basis of evidence led on record by the respective parties arrived at a definite conclusion that that provisions of Section 25 of the Act were not adhered to by the employer while disengaging them and as such, they deserve to be reinstated, meaning thereby, claimants were out of job for no fault of them, rather they were not allowed to work by the employer. Moreover, this Court finds from the perusal of the award impugned in the instant proceedings that no specific reason has been assigned by the authority while denying the back wages to the claimants. There is no material worth the name available on record suggestive of the fact that department was able to demonstrate on record any adversity or hindrance in the grant of aforesaid relief. Once Tribunal below while answering the reference had come to a conclusion that action of the employer in terminating the service of the claimants is bad and dehors the rules, natural consequence was order for re-engagement/reinstatement from the date of termination alongwith back wages. Otherwise also Section 11 A of the Industrial Disputes Act empowers the Industrial Tribunal to award consequential benefits. Section 11-A of the Act is reproduced as under:-

> "Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by

> its awards, set aside the order of discharge of dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge of dismissal as the circumstances of the case may require." "Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter".

16. The Hon'ble Apex Court in case titled ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC 324*** has held that reinstatement entitles an employee to claim full back wages and denial of back wages would amount to indirectly punishing the employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that the employee was gainfully employed during the intervening period.

17. Hon'ble Apex Court in case bearing Civil Appeal No. 6188 of 2019, titled ***Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors,*** *decided on 21.8.2019***,** has also held as under:-

> "9. Several judgments of this Court have laid down the principles pertaining to the grant of back wages. In Hindustan Tin Works, a three-judge Bench of this Court adjudicated on the criterion for grant of back-wages where a termination has been held to be illegal. The appellant in that case was a private limited company with an industrial unit. The Labour Court held that the retrenchment of employees by the appellant was not bona fide and awarded full back wages to the employees, which was challenged before

the Supreme Court. This Court made the following observations:

"9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer.

Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying.

If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness.

That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..."

(Emphasis supplied)

The Court further clarified that while the payment of full back wages would be the normal rule, there can be a departure from it where necessary circumstances have been established:

"11. In the very nature of things there cannot be a straightjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner.

The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (see Susannah Sharp v. Wakefield [(1891) AC 173, 179])." Taking note of the financial problems of the appellant company, the Court granted compensation to the extent of 75% of back wages. The principle laid down in Hindustan Tin Works has been followed by other decisions of this Court.4

10. In Surendra Kumar Verma v. Central Government Industrial Tribunal-cum- Labour Court5, the termination of the services of the appellants was held to

be in contravention of Section 25-F of the Industrial Disputes Act by the Labour Court, but the appellants were denied the payment of back wages. In appeal, a three-judge bench of this Court observed:

"6... Plain common-sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders.

The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

11. In Deepali Surwase, the appellant had been employed as a teacher in a primary school run by a trust. The services of the appellant had been terminated by the management of the school pursuant to an ex-parte inquiry proceeding. The School Tribunal quashed the termination of the appellant"s services and issued a direction for the grant of full back wages. In appeal, the High Court affirmed the view of the Tribunal that the

termination was illegal, but set aside the direction for grant of back wages. In appeal, a two-judge Bench of this Court laid down the following principles:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money...The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages.

If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emolument."

(Emphasis supplied)

The Court laid down the following principles to govern the payment of back wages:

"38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating

authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same.

The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P)

> Ltd. v. Employees [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L & S) 53] ."
>
> 12. In the present case the first inquiry resulted in a report which came to the conclusion that the charge of misconduct was not substantiated. Upon finding that the convening of a fresh inquiry without recording reasons was contrary to law, the High Court would have ordinarily granted liberty to the Municipal Council to take a fresh decision after due notice to the appellant. Such a course of action was, however, rendered impracticable by supervening events. The writ petition instituted by the appellant before the High Court in 1996 remained pending for nearly eighteen years. The appellant had been removed from service on 29 June 1996. Considering the lapse of time, reopening the proceedings would not be expedient in the interest of justice particularly when the appellant had, in the meantime, attained the age of superannuation in 2005. Relegating the appellant to a protracted course of action by restoring the proceedings before the disciplinary authority would also not be fair and proper after a lapse of nearly fourteen years since his retirement.
>
> 13. Having due regard to the principles which have been enunciated in Deepali Surwase by this Court, the High Court was not, in our view, justified in denying the back-wages to the appellant altogether. Bearing in mind the circumstances which have been noted above, a lumpsum compensation should be directed to be paid."

18. In the aforesaid judgment, it has been clearly held that in the cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule, but such rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court must take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found/proved against the employee/workman, the financial condition of the employer and similar other factors. An employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least

make a statement before the adjudicating authority or the court of first instance that he was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. In the case at hand, there is nothing on record suggestive of the fact that respondent-employer was able to prove that the employee was gainfully employed and was getting same and similar emoluments during the period of termination and as such, Tribunal below ought to have awarded back wages while holding the petitioner entitled for reinstatement alongwith continuity and seniority in service.

19. Learned Deputy Advocate General, placed reliance upon judgment rendered by the Hon'ble Apex Court in ***Rajasthan State Road Transport Corporation, Jaipur v. Phool Chand (Dead) through LRs, (2018) 18 SCC 299***, wherein it has been categorically held that it is necessary for the workman to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or his family. There cannot be any quarrel with the aforesaid proposition of law laid down by the Hon'ble Apex Court in the aforesaid case, but Hon'ble Apex Court in **Deepali Gundu's** case (supra) has held that if an employee or workman, whose services are terminated, is desirous of getting back wages, is required to plead or at least, made a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages, but once workman makes such a plea, onus shifts upon the employer to specifically plead and prove that the employee was gainfully employed and was getting same and substantially similar emoluments. In para 38.3 of the judgment supra Hon'ble Apex Court has held that burden of proof of the existence of a particular fact lies on the person, who makes a positive averment about its

existence. It is always easier to prove a positive fact than to prove a negative fact and hence once the employee shows that he was not employed, the onus is upon the employer to specifically plead and prove that the employee was gainfully employed

20. Consequently, in view of the aforesaid detailed discussion as well as law taken note herein above, CWP No. 2280 of 2016, having been filed by the employer, is dismissed being devoid of any merits and CWP No. 841 of 2017 having been filed by the claimants, is allowed, as a consequence of which, impugned award dated 3.9.2015, is quashed and set-aside to the extent it refused to grant back wages to the claimants and respondents are directed to pay the back wages to the claimants alongwith up-to-date interest from the date of their termination i.e. 7.8.2009 with seniority and continuity in service, within a period of six weeks from today. Accordingly, CWP No. 841 of 2017 is disposed of alongwith with pending applications, if any.

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

Between:

2. GURVINDER SINGH,
S/O SH. SWARAN SINGH,
R/O BASTI, WARD NO.18,
DISTRICT SANGROOR,
PUNJAB.

3. KULDEEP SINGH,
S/O SH. JAIB SINGH,
R/O SUNDER BASTI,
WARD NO.18,
DISTRICT SANGROOR,
PUNJAB.

….APPELLANTS

(BY MR. NIKHIL CHUGH, ADVOCATE)

AND

4. STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY MR. SUDHIR BHATNAGAR
& MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. KAMAL KISHORE SHARMA &
MR. NARENDER THAKUR,
DEPUTY ADVOCATES GENERAL)

CRIMINAL APPEAL NO. 333 OF 2017
DECIDED ON: 14.09.2021

Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20, 25 and 29 read with Section 3 of the Indian Evidence Act, 1872 – Conviction – Held - Evidence of official witnesses are trustworthy- No link missing- Conviction upheld - First offender sentence reduced.

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

JUDGMENT

Instant appeal filed under Section 374 (2) of the Cr.PC., lays challenge to the judgment passed by Learned Special Judge (II) (Additional Session Judge), Kullu, H.P., whereby the appellants-accused (hereinafter referred to as "*the accused*"), came to be convicted and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 70,000/- and in default of payment of fine, to further undergo simple imprisonment for one year, for having committed offences punishable under Sections 20, 25 and 29 of NDPS Act (herein after referred to as "*the Act*").

5. Precisely, story of the prosecution, as emerge from the record, is that on 9.11.2014, at 7:00 pm, police party consisted of PW-12 HC Deepak

Kumar, PW-11 Constable Naveen Kumar and HHC Lal Singh of Police Post Jari, was present at a distance of 10 meters in front of Police Post, Dunkhara, Jari District Kullu on Bhuntar-Manikaran road. Police party stopped one scooter bearing registration No. PB-07H-7372 coming from Manikaran side being driven by accused No.1 namely Gurwinder Singh. On the askance of police, accused disclosed their names to be Gurvinder Singh and Kuldeep Singh. PW-12 HC Deepak Kumar asked the accused to produce the documents of the scooter, who in turn, opened the dickey of the scooter, underneath the handle in front, where one yellow coloured cloth bundle was found kept there. Accused were asked to get the bundle checked, but they started making excuses to get the bundle searched. Investigating Officer PW-12 HC Deepak Kumar asked the PW-11 Constable Naveen Kumar to bring the independent witnesses. PW-11 Constable Naveen Kumar on the askance of PW12 HC Deepak Kumar brought PW9 Dhale Ram, who at that relevant time, was working as security guard in MPCL. PW-12 HC Deepak Kumar after having associated PW9 Dhale Ram and PW-11 Constable Naveen Kumar as witnesses gave their personal search to the accused, but nothing incriminating was found in their possession, regarding which memo Ext.PW9/A was prepared and signed by the witnesses as well as accused persons. On opening the said bundle, seven chappad of black coloured substance wrapped with transparent polythene were found. PW-12 HC Deepak Kumar, I.O., prepared the identification memo Ext.PW9/C at police post Jari, which was situate at the distance of 10 meters from the spot. I.O. alongwith recovered substance, scooter of the accused persons and witnesses came to Police Post Jari, where ASI Dharam Chand was also associated in the investigation. On weighing, the recovered substance was found to be 722 grams. Recovered charas was again put in the said yellow cloth and put inside the cloth parcel, which was sealed with six seals of seal impressions “T”. Polythene wrappers were also sealed in a separate cloth parcel and sample

seal of seal “T” was separately obtained on piece of cloth Ext.PW9/E. PW-12 HC Deepak Kumar filled NCB-I form in triplicate Ext.PW1/A and sample seal was also taken on the same, which was handed to PW9 Dhale Ram, vide memo Ext.PW9/G. RC of the scooter Ext.PW11/B and DL Ext.PW11/C were also taken into custody by the police. As per RC of the vehicle, person namely Tilak Raj of Chandigarh was found to be the original owner of the said scooter. The recovered substance/charas, alongwith RC of the scooter, DL and scooter alongwith keys were taken into possession vide seizure memo Ext.PW9/B in the presence of the witnesses. PW9 Dhale Ram and PW-11 Constable Naveen Kumar put their signatures on the seizure memo Ext.PW9/B. During investigation, it was found that the accused persons had purchased the said charas from one Nepali National at Kasol. PW-12 HC Deepak Kumar, I.O., prepared ruqua Ext.PW12/A and handed over the same to PW-11 Constable Naveen Kumar with the directions to take the same to PS Kullu for registration of the case, on the basis of which, FIR Ext.PW6/A came to be registered at the PS Kullu. On 9.11.2014, PW6 Inspector Neel Chand after having received ruqua Ext.PW12/A at PS. Kullu, through PW-11 Constable Naveen Kumar registered FIR Ext.PW6/A and made endorsement Ext.PW6/B on ruqua. He after preparing the case file, handed over the same to PW-11 Constable Naveen Kumar with direction to hand over the same to the Investigating Officer on the spot. On 10.11.2014, at around 1:00 pm, the case property i.e. parcel stated to be containing 722 grams of charas sealed with six seals of seal impressions “T” alongwith NCB-I in triplicate, sample seal and other relevant documents were produced before PW6 Inspector Neel Chand, SHO, P.S. Kullu, H.P., who resealed the parcels with three seals of seal impressions of “H” and after taking sample seal on piece of cloth Ext.PW6/C as well as on NCB-I in triplicate Ext.PW1/C, handed over the case property alongwith sample seals, NCB-I in triplicate and other relevant documents and also the keys of the vehicle to PW1 HC Gajender Pal, MHC, Kullu. On 10.11.2014, PW1 HC

Gajender Pal, MHC, Kullu, on receipt of the case property alongwith NCB-I in triplicate and other relevant documents from PW6 Inspector Neel Chand deposited the same in Malkhana at Sr. 265. On 12.11.2014, HC Gajender Pal, MHC, after filling the relevant columns of NCB-I in triplicate Ext.PW1/C sent the sealed parcel containing charas alongwith samples seals of "T&H", NCB-I in triplicate and other relevant documents with docket prepared by PW-6 Inspector Neel Chand vide RC No. 501 of 2015 Ext.PW2/B through PW2 Constable Sanjay Kumar, for deposit at SFL, Junga. On 1.12.2014, PW3 Constable Mahesh Kumar brought back the case property alongwith result from SFSL, Junga and handed over the same to MHC, who thereafter prepared the special report Ext.PW7/A and handed over the same to Sh. Nihal Chand, Additional SP Kullu, who after making endorsement Ext.PW7/C handed over the same to his Reader PW7 HC Balbir Sharma, who made an entry in the relevant register. On 12.11.2014, PW10 Gagan Deep Singh brother in law of the accused Gurvinder Singh handed over an affidavit to the police, which was taken into possession vide memo Ext.PW10/B duly signed by Gagan Deep Singh and PW-11 Constable Naveen Kumar. PW-12 HC Deepak Kumar, I.O. recorded the statements of the prosecution witnesses as per their versions and thereafter, on receipt of the report from SFSL and on completion of investigation, presented the case file before PW-6 Inspector Neel Chand, SHO, PS, Kullu, for preparing the challan. After presentation of the challan, presence of the accused was procured and copies of challan were supplied to them in compliance of Section 207 Cr.PC. Court having found prima-facie case against the accused under Sections 20, 25 and 29 of the Act, proceeded to frame charges against them under aforesaid provisions of law, to which accused pleaded not guilty and claimed trial. Prosecution with a view to prove its case, examined as many as 12 witnesses, whereas despite opportunity, no evidence in defence came to be led on record by the accused, who otherwise in

his statement recorded under Section 313 Cr.PC denied case of the prosecution in *toto* and claimed themselves to be innocent.

6. Learned Special Judge on the basis of evidence led on record by the respective parties, found story of the prosecution to be correct and accordingly, vide judgment dated 22.5.2017, convicted and sentenced them as per description given herein above. In the aforesaid background, accused have approached this Court in the instant appeal, seeking therein their acquittal after setting aside the judgment of conviction and order of sentence recorded by the court below.

7. Having heard learned counsel for the parties and perused material available on record, this Court finds that primarily, challenge to the impugned judgment of conviction recorded by the court below is on the ground that since independent witness namely PW9 Dhale Ram was declared hostile, version, if any, put forth by him, could not be taken into consideration/believed by the learned trial court while concluding guilt, if any, of the appellants-accused. Besides above, it has been also stated in the grounds of appeal that there is total non-compliance of Section 57 of the Act.

8. Mr. Nikhil Chugh, learned counsel appearing for the appellants-accused, while making this Court peruse evidence led on record by the prosecution vehemently argued that there are lot of contradictions and inconsistencies in the statements of prosecution witnesses and as such, same could not be made basis to hold the accused guilty of having committed offences punishable under Sections 20, 25 and 29 of the Act. Lastly, Mr. Chugh, contended that since intermediate quantity of charas came to be recovered from the dickey of the scooter, which was not owned by any of the appellants, court below erred in concluding that aforesaid quantity of charas came to be recovered from the conscious possession of the accused and as such, judgment of conviction and order of sentence passed by the court below deserves to be quashed and set-aside.

9. To the contrary, Mr. Kamal Kishore Sharma, learned Deputy Advocate General, while supporting the impugned judgment of conviction recorded by the court below vehemently argued that there is overwhelming evidence adduced on record by the prosecution, suggestive of the fact that on the date of the alleged commission of offence, both the appellants-accused had specifically gone to Kasol to buy Charas and as such, it cannot to be said that they have been falsely implicated. While referring to the cross-examination conducted upon PW9 Dhale Ram, learned Deputy Advocate General, strenuously argued that though this witness denied the story of the prosecution, but he was unable to dispute his signatures on memos of recovery and as such, court below rightly held the appellants-accused guilty of having committed offences punishable under Sections 20-25 and 29 of the Act.

10. After having heard learned counsel for the parties and perused evidence led on record by the prosecution vis-à-vis judgment of conviction and sentence awarded by the court below, this Court finds it difficult to agree with the contention of Mr. Nikhil Chugh, learned counsel appearing for the accused, that court below has failed to appreciate the evidence in its right perspective, rather this Court finds that court below has taken note of the each and every aspect of the matter and has rightly arrived at a conclusion that on the date of the alleged incident, intermediate quantity of charas came to be recovered from the scooter, being driven by the appellant-Gurvinder Singh.

11. Since it is not in dispute that scooter in question, which was not in the name of the any of the accused, was being driven by the accused and it was apprehended by the police, non-association, if any, of owner namely Tilak Raj in the investigation is irrelevant. Though in the case at hand, prosecution with a view to prove its case examined as many as 12 witnesses but statements of PW9 Dhale Ram, PW-11 C Naveen Kumar and PW-12 HC

Deepak Kumar are relevant to determine the correctness of impugned judgment of conviction passed by the court below.

12. PW9 Dhale Ram was associated as independent witness by PW-12 HC Deepak Kumar at the time of the recovery. Though aforesaid independent witness Dhale Ram put his signatures on memo Ext.PW9/B, but while deposing before the court below, denied the case of the prosecution and as such, was declared hostile. However, cross-examination conducted upon this witness suggests that he admitted memo regarding personal search of Police Ext.PW9/A as well as his signatures on the Ext.PW9/B. This witness also admitted that memo regarding identification of cannabis Ext.PW9/C, arrest memos Ext.PW9/D and Ext.PW9/E bear his signatures in red circle "A". He also admitted that sample of seal Ext.PW9/F was taken on piece of cloth and same also bears his signature in red circle "A". In his statement, this witness nowhere stated that he appended signature on the documents on account of pressure being created by the police. This witness also admitted his signatures on the parcels Ext.P1 and P2. However, he was unable to render explanation that if nothing had happened in his presence, then why did he sign the documents as detailed herein above and as such, court below rightly discarded his statement that no recovery was effected in his presence.

13. PW-11 Constable Naveen Kumar deposed that on 9.11.2014, police party headed by HC Deepak Kumar consisting of him, HC Deepak Kumar and HHC Lal Singh No. 219 was present in front of the Police Post Jari at a distance of ten meters on Bhunter Manikaran road. He deposed that at about 7:00 pm, one vespa scooter bearing No. PB-07-H-7372 came from Manikaran side, being driven by the accused Gurvinder Singh and along with pillion rider Kuldeep Singh. The driver of the scooter opened the dicky, which was underneath the handle in front direction and inside the same, one yellow coloured bundle/*gaathari*, was kept. He deposed that driver of the scooter was asked to get the aforesaid bundle searched, but he started making

excuses. I.O. HC Deepak then asked the name of the driver and pillion rider, who disclosed their names to be Gurvinder Singh and Kuldeep singh. This witness deposed that I.O. PW-12 HC Deepak Kumar asked him to bring some independent witnesses from MPCL gate. He deposed that he went there and brought PW9 Dhale Ram, who at that relevant time, was working as a security guard in MPCL. This witness deposed that I.O. associated him and PW9 Dhale Ram as witnesses and thereafter, he alongwith him and Dhale Ram gave their personal search to the accused, but nothing incriminating was found in their possession and in this regard, memo Ext.PW9/A was prepared, which bear his signatures in red circle "B". This witness also deposed that accused persons and witness namely Dhale Ram also appended their signatures on the memo. This witness deposed that thereafter, yellow coloured cloth bundle was taken out by the investigation Officer from the font dickey of the Scooter and was opened on the seat of the scooter. This witness deposed that inside the same, seven chapad of black colour substance were recovered, which was wrapped in transparent polythene wrappers. The Investigating Officer removed the wrappers and on smelling the same, the substance was found to be charas. This witness deposed that IO alongwith recovered substance, Scooter and accused came to Police Post Jari as the same was just at the distance of 10 meters from the spot, where the alleged contraband was weighed on electronic scale, which was found to be 722 grams. The recovered charas was put inside the yellow coloured cloth and the same was put inside a parcel of cloth, which was sealed with six seals of seal "T". This witness further deposed that wrappers were put inside a separate parcel of cloth, which was also sealed with six seals of seal "T". Impression of seal was taken on separate pieces of cloth, out of which one is Ext.PW9/F. This witness also deposed that I.O. also filled relevant columns of NCB-I forms in triplicate ExtPW1/C and thereafter, the seal after its use, was handed over to Dhale Ram. He deposed that I.O. prepared ruqua Mark X at

9:30 and handed over the same to him for registration of the case at PS Kullu and he, accordingly, handed over the same to Inspector/SHO Neel Chand at 11:00pm, who after filing of the case handed over the same to him next day at 7:30 am. He deposed that on 12.11.2014, he again remained associated in investigation of this case. Gagan Deep, who is brother in law of the accused Gurvinder Singh handed over one affidavit regarding purchase of Scooter, which was taken into possession through seizure memo Ext.PW-10/B, bearing his signature in red circle "B". Memo regarding handing over of seal to witness Dhale Ram is Ext.PW9/G, which bears his signatures in red circle "B". This witness also deposed that IO prepared memo regarding identification of cannabis Ext.PW9/C, which bears his signature in red circle "B". He has proved two parcels, Ext.P-1 and P-2 and bulk charas in Chapad shape Ext.P4., RC of the scooter Ext.PW11/B. Aforesaid witness was though subjected to lengthy cross-examination, but perusal of the same nowhere suggests that opposite party could extract something contrary to what he stated in his cross-examination.

14. Aforesaid version put forth by PW11 Constable Naveen Kumar came to be fully corroborated by PW-12 HC Deepak Kumar, who almost gave similar facts as was given by PW11 Naveen Kumar during his examination in the trial Court. Cross-examination conducted upon this witness also nowhere suggest that testimony of this witness could be shattered by the defence, rather version putforth by this witness, if read in conjunction, with PW11, clearly suggests that on the alleged date of the incident, both the accused were travelling on scooter bearing registration No. PB-07H-7372 and they were stopped for checking and intermediate quantity of charas was found from the dickey of the scooter in the presence of independent witness PW-9 Dhale Ram. Though PW9 Dhale Ram, denied the case of the prosecution that no recovery of contraband was effected in his presence, but it is ample clear from the statements made by PW11 and PW12 that PW9 Dhale Ram was not only

present at the time of recovery, but he also remained throughout with the police till the time, case was registered against the accused.

15. PW-12 HC Deepak Kumar, in his cross-examination, stated that documents were prepared in the room of ASI and it took two hours for him to prepare the parcels after scooter was stopped by him on the spot. Though aforesaid officer failed to place on record rapat with regard to departure of the police party from the police post, but it has specifically come in the statement of this witness that he had called PW9 Dhale Ram, who is an employee of MPCL and he was earlier known to him.

16. Having read statements of PW11 and PW12 juxtaposing each other, this court is convinced and satisfied that on the date of the alleged incident, intermediate quantity of charas i.e. 722 grams, came to be recovered from the dickey of scooter bearing registration No. PB-07H-7372 being driven by the accused. Similarly, statements made by PW14 Gajender Kumar, clearly reveals that police party, which had intercepted the scooter in question being driven by the accused before effecting personal search of the accused as well as of the vehicle being driven by them, not only gave their personal search, but also associated independent witness PW9 Dhale Ram. It is quite apparent from the statement made by the aforesaid witness that PW12 HC Deepak Kumar, after having effected recovery of the contraband from the dickey of the scooter in question drawn samples and sealed them with proper seal. It is also clear from the evidence available on record that intact seals were sent to SFSL for chemical analysis. Similarly, there is sufficient material adduced on record by the prosecution that remaining bulk of charas was kept in a sealed parcel and its seal remained intact throughout. The cross-examination conducted upon this witness, nowhere suggests that defence was able to prove that proper samples were not drawn after recovery and same were not sent in sealed parcel.

17. Another witness namely PW4 Constable Sanjay Kumar, deposed that he brought original DD 17 dated 9.11.2014 Ext.PW4/A. PW7 HC Balbir Sharma, PW8 Kirpa Ram, PW10 Gagan Deep are witnesses of record and as such, statements made by them need not to be taken note at this stage.

18. PW6 Inspector Neel Chand, SHO, PS Kullu, deposed that on 9.11.2014, one ruqua scribed by the HC Deepak Kumar, Police Post Jari, was received in PS Kullu through PW-11 Constable Naveen Kumar for registration of case and in pursuance to which, he registered FIR Ext.PW6/A, which bears his signature in red circle as Ext.PW6/B. He deposed that after preparing the case file, the same was handed over to aforesaid constable PW11 Naveen Kumar with direction to hand over the same to the investigator PW12 HC Deepak Kumar on the spot. This witness deposed that on 10.11.2014, at about 1:00pm, HC Depak Kumar handed over the one sealed parcel, containing 722 grams charas, which was duly sealed with six seals of "T" alongwith sample of seal and NCB-I form in triplicate and other relevant documents for the purpose of resealing and he resealed the parcel with three seal of 'H' and samples of seal were drawn on separate piece of cloth Ext.PW6/C. He deposed that columns No. 9 to 11 of the NCB-I form i.e. Ext.PW1/C were also filled by him and thereafter, aforesaid parcel, sample of seals, NCB-I form in triplicate, seizure memo were handed over to the MHC Gajender Pal with direction to keep the same in the Malkhana and to send the same to SFSL Junga. He further deposed that on 12.11.2014, he prepared the docket Ext.PW1/D and on the completion of investigation, the case file was handed over to him by HC Deepak for preparing the challan and after agreeing with the investigation he prepared the challan.

19. If the statement of this witness is examined vis-à-vis statement of other material prosecution witnesses i.e. PW11 and PW12, this Court sees no reason to agree with Mr. Nikhil Chugh, learned counsel for the petitioner that prosecution has not been able to prove its case beyond reasonable doubt,

rather this court finds from the evidence adduced on record by the prosecution that prosecution successfully proved on record that on the date of the alleged incident, both the accused were found carrying 722 grams of charas in the dickey of the scooter bearing registration No. PB-07H-7372. Similarly, evidence led on record by the prosecution clearly reveals that police after having completion of necessary codal formalities, sent the samples intact to SFSL Junga for chemical analysis. Though independent witness PW9 associated at the time of recovery not supported the case of the prosecution, but he was unable to dispute his signatures on the recovery memo, seizure memo and arrest memos and as such, court below right discarded his version that no recovery was effected in his presence. Though Mr. Chugh argued that there is no compliance of Section 57 of the Act, but this Court finds from the evidence led on record by the prosecution that PW-12 HC Deepak Kumar I.O. immediately after recovery of the contraband from the scooter in question being driven by the accused associated the independent witness and made full report of particular of arrest and seizure memo to PW6 Inspector Neel Chand, as is evident from statement of PW6 Neel Chand, SHO PS Kullu, who categorically deposed that on 9.11.2014, one ruqua scribed by HC Deepak Kumar was received in the Police Station, Kullu through Constable Naveen Kumar for registration of case and pursuant to which, he registered FIR Ext.PW6/A. Since PW-12 HC Deepak Kumar after recovery and arrest of the accused sent ruqua to his immediate higher officer i.e. SHO Neel Chand, PS. Kullu, it cannot be said that there is no compliance of Section 57 of the Act.

20. Having scanned entire evidence adduced on record by the prosecution, this Court finds no illegality and infirmity in the impugned judgment of conviction and order of sentence recorded by the court below, and as such, same is upheld. However, taking note of the fact that appellants-accused are first offenders coupled with the fact that they have already undergone imprisonment for more than four years, this Court deems it fit to

reduce the period of sentence from seven years to the period they have already undergone.

21. Consequently, the appeal is partly allowed and modified to the extent that the accused is sentenced to undergo imprisonment for the period they have already undergone subject to their depositing fine amount, which is enhanced by this Court from 70,000/- to 150,000/-, within a period of one week. The accused be set free forthwith, if not required in any other case. Release warrants be prepared accordingly. However, it is clarified that if fine amount as quantified by this Court is not deposited within a period of two weeks from the release of the appellants-accused from the jail, they would render themselves liable to serve the entire sentence of seven years awarded by the court below. State is directed to ensure the aforesaid compliance. Appeal is disposed of in the aforesaid terms.

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

Between:-

1. PARKASH CHAND
S/O SH. KHIALI RAM

2. SMT. SHAKINO DEVI
W/O SH. PARKASH CHAND
BOTH RESIDENTS OF
VILLAGE KHANGALTA,
TAPPA PAHLU,
TEHSIL BARSAR,
DISTRICT HAMIRPUR, H.P.

.....APPELLANTS

(BY SH. BALWANT KUKREJA, ADVOCATE)

AND

1. SH. SANJEEV KUMAR
S/O SH. BALRAJ,
R/O VILLAGE & P.O. MEHRE,
TEHSIL BARSAR,
DISTRICT HAMIRPUR, H.P.
DRIVER OF BUS NO. HP-21-5530.

2. SH. PARMINDER KUMAR ALIAS PK
S/O SH. BAMDEV,
R/O VILLAGE & P.O. MEHRE,
TEHSIL BARSAR,
DISTRICT HAMIRPUR, H.P.
OWNER OF BUS NO. HP-21-5530.

3. SH. RAMESH CHAND
S/O SH. BRAHAM DASS,
R/O VILLAGE NUEL,
PO KUSAR
TEHSIL BARSAR,
DISTRICT HAMIRPUR, HP
OWNER OF BUS NO. HP-21-5530.

4. THE NEW INDIA ASSURANCE
COMPANY LTD.,
DEV PAL CHOWK,
HAMIRPUR,HP
THROUGH ITS BRANCH MANAGER.

.....RESPONDENTS

(SHRI K.S. BANYAL, SENIOR ADVOCATE
WITH SHRI A.K. SHARMA, ADVOCATE
FOR R-1 TO R-3
SHRI B.M. CHAUHAN, SENIOR ADVOCATE
WITH SHRI AMIT HIMALVI, ADVOCATE,
FOR R-4)

FIRST APPEAL FROM ORDER
No. 333 of 2012

DECIDED ON: 03.09.2021

Employees Compensation Act, 1923- Section 30- Appeal- Deceased was working as bus conductor on monthly salary of Rs.2500/- along with daily diet money of Rs.100/- etc.- Ld. Commissioner dismissed the claim petition on the ground that accident occurred due to deceased's own negligence- Held- The restrictions placed in Section 3 of the Act will not be applicable in case of death of employee- Appeal allowed- Matter remanded back for fresh decision.

Cases referred:
R.B. Moondra and Co. v. Mst. Bhanwari and another, AIR 1970 Rajasthan 111;

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

J U D G M E N T

The petitioners, in the instant appeal, are aggrieved against the dismissal of their claim petition by the learned Commissioner Employee's Compensation, Barsar, District Hamirpur vide order dated 28.3.2012.

Parties hereinafter are referred to as they were before the learned Commissioner.

2. The claimants filed a petition under Section 22 of the Employee Compensation Act. They pleaded that Naresh Kumar was their son. He was working as a Conductor on bus No. HP-21-5530. The bus was owned by respondent No. 2-A (Ramesh Chand). Naresh Kumar was employed by respondent No. 2-A as conductor on the bus and was being paid a monthly salary of Rs. 2500/- along with daily diet money of Rs. 100/- etc. In the course of his employment with respondent No. 2-A, Naresh Kumar sustained grievous burn injuries on 1.8.2005. After the accident, he was brought to Zonal Hospital, Hamirpur and further referred to Indira Gandhi Medical College, Shimla, where he remained under treatment till 7.11.2005 when he

finally succumbed to his injuries. Compensation of Rupees five lacs or more was prayed by the parents of deceased Naresh Kumar.

3. On considering the entire material available on record, learned Commissioner held that Naresh Kumar died in the course of his employment as Conductor on bus bearing No. HP-21-5530. Learned Commissioner, however, dismissed the claim petition on the ground that the accident causing Naresh Kumar's death had occurred because of deceased's own negligence. It will be apt to extract the relevant part of the finding of learned Commissioner in this regard:

> "In view of the Provisions contained in proviso (b) (iii) to Section 3 of the Act ibid, the employer cannot be held liable to compensate for the personal injuries/death of the deceased, which injury/death occurs due to willful disregard to the safety precautions or is the result of his (deceased) own negligence. Hence, in view of the fact that the death of deceased occurred in the accident, which had resulted due to his own negligence, I am of the considered view that the petitioners have no cause of action to file the present petition."

4. In the instant appeal filed by the claimants against dismissal of their claim petition, the substantial question of law, which has been urged, is framed as under:

> Whether under the provisions of Section 3(1) proviso (b)(iii) of the Employee's Compensation Act, the compensation is not payable in case of death of an employee as a result of an accident arising out of or in the course of his employment but due to his own willful disregard to the safety precautions or because of his own negligence?

5. I have heard learned counsel for the parties on the above substantial question of law. It will be appropriate to first extract relevant portion of Section 3 of the Employee's Compensation Act:

> "3. Employer's liability for compensation.- (1) If personal injury is caused to a employee by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:
>
> Provided that the employer shall not be so liable –
>
> (a) in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding three days;
>
> (b) in respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to— (i) the employee having been at the time thereof under the influence of drink or drugs, or
>
> (ii) the wilful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees, or
>
> (iii) the wilful removal or disregard by the employee of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of employee."

From a plain reading of the above extracted portion of the Section, it becomes clear that the employer will not be liable to pay compensation in cases of injuries other than those resulting in death of an employee though arising out of and in the course of his employment where the

accident is directly attributable to the willful removal or disregard by the employee of any safeguard or other device which he knew to have been provided for the purpose of securing the safety of employees. It is thus evident that compensation is not admissible in case of injuries to the employees who had themselves been negligent or because of whose negligence the accident occurs even if such an accident arises out of and in the course of his employment. Section 3(1) proviso (b)(iii) however is not applicable to situations where accident involving negligence of the employee results in his death. In this regard, it will be apt to refer to a judgment rendered in ***AIR 1970 Rajasthan 111***, titled ***R.B. Moondra and Co.*** v. ***Mst. Bhanwari and another***. Paragraph-8 whereof runs as under:

> "(8.) It would appear from the above provision that if personal injury is caused to a workman by accident arising out of and in the course of his employment, the employer shall be liable to pay compensation except where the injury does not result in the total or partial disablement of the workman for a period exceeding three days and except in the case where injury results in death, the accident is directly attributable to the causes mentioned in Sub-clauses (i), (ii) and (iii) of proviso (b). In order to claim compensation the employee has to show not only that at the time of the accident he was in fact employed on duties of his employment, but further that the immediate act which led to the accident was within the sphere of his duties and not foreign to them. In case of death of an employee due to accident if it has arisen out of and in the course of his employment it is no defence to plead that there was wilful disobedience of any order or rule expressly given or framed for the purpose of securing the safety of the workman. Clause (b) of the proviso to Sub-section 1 (1) of Section 3 is

limited to those cases where injury has not resulted in death. This is quite evident from the language of the section itself and if any authority is needed I may refer to thomas v. Ocean Coal Co. Ltd. 1932 All ER 458 where on the following facts that the workman was a hitcher in a coal mine, his duties being, inter alia, to help in getting full trams into and empty trams out of the cages. His proper place of work was on the loading, or full tram side of the pit bottom, but he was expected to help, in cases of emergency, in dealing with empty trams on the other side of the pit. On April 17, 1931, he crossed the pit bottom to see to the working of empty trams and then ran back across the shaft bottom towards his proper working side to be ready to receive a cage when it landed. So to cross the shaft bottom, was expressly prohibited by a regulation made under the Coal Mines Act, 1911. Before the workman could get fully across the shaft bottom the descending cage struck and killed him. On a claim for compensation by his widow, it was held on the construction of English Workmen's Compensation Act of 1925 that:

"in considering whether the case came within Section 1 (2) of the workmen's Compensation Act, 1925, it must first be ascertained, disregarding the prohibition contained in the regulation whether the workman's death was due to an accident arising out of and in the course of his employment; if it did, the effect of the prohibition in removing the accident from that category could be annulled if the later conditions in the subsection as to the act being done by the workman for the purposes of and in connection with his employer's trade or business' were fulfilled; in the present case the accident certainly arose out of the workman's employment and it also arose in the course of that employment since he had been engaged to work on both sides of the pit and desired to expedite

> that work; his contravention of the regulation did not put him outside the sphere of the employment, and so his act was done for the purposes of and in connection with the employers' business; and, therefore, his widow was entitled to compensation. "

In case of death of an employee due to an accident arising out of and in the course of his employment, his negligence will not come in the way of grant of compensation to the claimants. The restrictions placed in Section 3 of the Act will not be applicable in case of death of employee.

Learned Commissioner has held the employer not liable to compensate for the death of his employee Naresh Kumar due to the finding returned by him in the award about accident's taking place on account of employee's willful disregard to safety precautions/his negligence. The conclusion drawn by the learned Commissioner is not in consonance with the Scheme of Section 3(1)proviso (b)(iii) of the Act. Hence, this appeal is allowed. The impugned judgment dated 28.3.2012 passed in Petition No. 03/2006, RBT No. 7/2011 is set aside. The matter is remanded for fresh decision to the learned Employee's Compensation, Barsar, District Hamirpur.

The parties through their learned counsel are directed to appear before learned Commissioner on *30.9.2021.* Record be returned forthwith. Considering the fact that the accident in question is of the year 2005, it is hoped and expected that learned Commissioner shall make all endeavours for deciding the matter, as expeditiously as possible, preferably within six months i.e. by 31.03.2022.

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

Between:

NATIONAL INSURANCE COMPANY LTD.,
DIVISIONAL OFFICE, HIMLAND HOTEL,

CIRCULAR ROAD, SHIMLA-1,
THROUGH ITS DIVISONAL MANAGER

....APPELLANT

(BY DR. LALIT SHARMA,
ADVOCATE)

AND

1. DHARMESH (MINOR) SON,

2. KUMARI RAMAN PREET
(MINOR) DAUGHTER,

3. SMT. PRIYANKA,
WIDOW OF SH. UJJAGAR SINGH,
S/O SH. SARADARA RAM,
ALSO MOTHER AND NATURAL
GUARDIAN OF MINOR
RESPONDENTS NO. 1 AND 2,

ALL R/O VILLAGE KISHANPURA,
PARGANA, DHARAMPUR,
TEHSIL BADDI,
DISTRICT SOLAN, H.P.

4. BHUPINDER SINGH,
S/O SH. PRATAP SINGH
(OWNER-CUM-DRIVER OF
TRUCK NO. HP-12F-8513),
R/O VILLAGE BERSAN, PARGANA
AND TEHSIL NALAGARH,
DISTRICT SOLAN, H.P.

....RESPONDENTS

(BY MR. DINESH BHANOT,
ADVOCATE, FOR R-1 TO R-3)

FIRST APPEAL FROM ORDER
NO. 263 of 2018
DECIDED ON: 24.09.2021

Motor Vehicles Act, 1988- Section 173- Deceased was doing agricultural work, selling mil and was earning Rs.5000/- per month- Motor Accident Claims Tribunal saddled the insurer Company to pay compensation to the tune of Rs.15,85,000/- along with interest @ 8% per annum from the date of filing of petition- Held- Ld. Tribunal has erred in awarding certain amounts under conventional heads- No amount on account of loss and love and affection can be awarded- Tribunal erred in making additional 50% on account of future prospects specially when deceased was not in Government Service- Award modified.

Cases referred:

Magma General Insurance Co. Ltd. V. Nanu Ram alias Chuhru Ram and Ors, (2018) 18 SCC 130,;
National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680;
Ranjana Prakash and Ors. V. Divisional manager and Ors (2011) 14 SCC 639;

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

JUDGMENT

Instant appeal filed under Section 173 of Motor Vehicles Act, 1988 (in short *"the Act"*), lays challenge to award dated 11.10.2017, passed by the learned Motor Accident Claims Tribunal-(II), Solan, District Solan, camp at Nalagarh, (in short "*the Tribunal*") in MAC Petition No.5-S/2 of 2016, titled *Dharmesh and Ors. v. Bhupinder Singh and Anr*, whereby the Tribunal below while allowing claim petition having been filed by the respondents-claimants (hereinafter referred to as "*the claimants*") under Section 166 of the Act, saddled the appellant-Insurance Company with liability to pay compensation to the tune of Rs. 15,85,000/- to the claimants alongwith interest @8% p.a.

from the date of filing of the petition till deposit of the award amount on account of death of late Sh. Ujjagar Singh.

2. Briefly stated facts, as emerge from the record, are that claimants No. 1 to 3, who happen to be children and widow of deceased Ujjagar Singh, preferred claim petition under Section 166 of the Act before the MACT below, seeking therein compensation to the tune of Rs. 21,00,000/- on account of death of Sh. Ujjagar Singh. Claimants averred in the petition that in the morning of 16.3.2015 at 10.45 AM, when the deceased Ujjagar Singh was walking on the road side at village Manpura New Shiva Biogenetic Factory, one truck bearing registration No. HP-12F-8513, being driven rashly and negligently by the owner cum driver, Sh. Bhupinder Singh hit him, as a consequence of which, he sustained serious injuries. Though, at the first instance, above named person was taken to the Government Hospital Nalagarh and thereafter, was referred to PGI Chandigarh, but unfortunately, while he was on his way to PGI, he succumbed to the injuries and his dead body was again brought back to CHC Nalagarh, for postmortem. Vide FIR Ext.PW2/A, case was registered against respondent No.4. Claimants claimed that deceased was doing agricultural work and besides that he was also selling milk and as such, was earning sum of Rs. 50,000/- per month. Claimants claimed that since the offending truck was owned by respondent No.4 and was ensured with Appellant-Insurance Company, they are liable to pay compensation to them being LRs of deceased Ujjagar Singh.

3. Aforesaid claim petition preferred by the Claimants came to be resisted by respondent No.4, who while taking preliminary objections of maintainability, cause of action and bad for non-joinder of necessary parties, denied the factum of accident of the offending truck on the relevant date, time and place. respondent No.4 also denied that he was driving the offending truck rashly and negligently. Appellant-Insurance Company beside raising preliminary objections of maintainability and collusiveness, claimed that

offending truck was being plied in violation of terms and conditions of the insurance policy and as such, is not liable to indemnify the owner. Appellant-Insurance Company also denied accident of offending truck with deceased on the relevant date, time and place and claimed that petition being false and frivolous deserves to be dismissed.

4. On the basis of aforesaid pleadings adduced on record by the respective parties, Tribunal below framed following issues:-

> *"1.Whether on the morning of 16.03.2015 around 10:45 a.m at place village Manpura, Tehsil Baddi, District Solan, on the public highway, respondent No.1 was driving vehicle/truck bearing registration No. HP-12F-8513 rashly and negligently which resulted in causing death of predecessor of the petitioners Ujjagar Singh a pedestrian when he was knocked down by the aforesaid truck, as alleged? OPP.*
> *2.Whether the petitioners being legal heirs/dependants are entitled for compensation, as prayed for? OPP.*
> *3.Whether petition of the petitioner is not maintainable? OPR.*
> *4.Whether the petition of the petitioner is bad for non-joinder of necessary parties. OPR-1*
> *5.Whether the aforesaid truck was being plied in violation of terms and conditions of the insurance policy? OPR-2*
> *6.Whether the respondent No.1 was driving the aforesaid truck without having valid driving licence? OPR-3.*
> *7.Relief."*

Learned court below on the basis of evidence led on record by the respective parties though held respondent No.4 and Appellant-Insurance Company, jointly and severely liable to pay sum of Rs.15,85,000/- alongwith interest @8% p.a., from the date of filing of the petition till deposit, but saddled Appellant-Insurance Company with liability to pay the aforesaid amount being insurer of respondent No.1. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying

therein to set-aside impugned award passed by the learned Tribunal below in as much as Appellant-Insurance Company has been saddled with liability to pay the compensation.

5. Having heard learned counsel for the parties and perused material available on record, this Court finds that primarily challenge to the award impugned in the instant proceedings has been laid on following two grounds; *1., Since claimants failed to place on record Legal Heirs certificate, there was no occasion, if any, for the Tribunal below to award compensation in favour of the claimants on account of death of Sh. Ujjagar Singh,* and*; 2. Learned Tribunal below fell in gross error while awarding excess amount of compensation while deciding issue No.2.*

6. As per the claimants, amount of compensation awarded in the conventional heads is in total violation of judgment passed by the Hon'ble Apex Court in ***National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680.*** Mr. Lalit Sharma, learned counsel representing the Appellant-Insurance Company vehemently argued that once no Legal Heir Certificate ever came to be rendered on record by the claimants, court below ought not have granted compensation in their favour being LRs of the deceased Ujjagar Singh. He further submitted that court below could not have awarded any amount on account of love and affection and amount awarded on account of loss of estate, funeral expenses and consortium is on higher side and as such, award needs to be modified in terms of law laid down by the Hon'ble Apex Court in Pranay Sethi's case supra. Lastly, Mr. Lalit Sharma, argued that since deceased was not in government service, court could not have granted addition of 50% on account of future prospects, rather addition on account of future prospects, could be made by an addition of 40% keeping in view the age of the deceased as well as his being self employed.

7. Mr. Dinesh Bhanot, learned counsel representing the respondents-claimants supported the impugned award and claimed that there

is no illegality and infirmity in the same and same is based upon the proper appreciation of the evidence as well as law laid down by the Hon'ble Apex Court in various judgments as have been taken note by the learned Tribunal below while passing the impugned judgment.

8. Claim petition having been filed by the claimants clearly suggests that claimants No. 1 and 2 are minor children of late Sh. Ujjagar Singh, whereas Smt. Priyanka is his widow. Claimants claimed in the claim petition that they being LRs of Deceased are entitled to compensation to the tune of Rs. 21,00,000/- In paras 18 to 20, claimants besides disclosing their relationship with the deceased have categorically claimed themselves to be class-I heirs of the deceased and as such, it is not understood that on what basis, it is being claimed by the Appellant-Insurance Company that since claimants failed to place on record Legal Heir Certificate, no amount could be awarded in their favour. Moreover, plea of Legal Heir Certificate raised at this stage never came to be raised by way of written statement filed by the Appellant-Insurance Company nor suggestion, if any, was put to the claimants. Otherwise also, claimants by making specific averment in the claim petition that they are legal heirs of the deceased had discharged their onus as far as they are entitled to the compensation on account of death of late Sh. Ujjagar Singh, being his LRs is concerned. Reply to paras 18 to 20 of the petition, wherein factum with regard to relationship of the claimants with the deceased as well as their entitlement to the compensation being his Legal Heir has been specifically pleaded by the claimants, nowhere suggests that specific denial, if any, ever came to be made on behalf of the Appellant-Insurance Company, rather Appellant-Insurance Company while denying the same for want of knowledge specifically pleaded that claimants be put to the strict proof to prove the contents of these paras. Besides above, as has been taken note herein above, no suggestion worth the name ever came to be put to the claimants or their witnesses with regard to their being LRs, if any, of

deceased Ujjagar Singh. This court is of the view that claimants while specifically pleading that they are legal Heirs of the deceased had discharged their onus and now, it was upon the Appellant-Insurance Company to rebut the same by leading cogent and convincing evidence, if it was not convinced that the claimants are the Legal Heirs of the deceased Ujjagar Singh. Hence, no interference in the impugned award is called for on the aforesaid ground.

9. Since there is no specific challenge laid to the findings rendered by the Tribunal below qua the rash and negligent driving of respondent No.4 as well as death of deceased Ujjagar Singh on account of his having suffered injuries in the alleged incident, there is no occasion for this court to deal with that aspect of the matter. Similarly, this court finds that no challenge has been laid to the loss of dependency calculated by the Tribunal below on the basis of monthly income i.e. 7000 pm, and as such, this court needs not to elaborate/touch upon that aspect at this stage. However, having carefully perused judgment rendered by the Hon'ble Apex Court in ***Pranay Sethi's case***, this court finds force in the submission of Dr. Lalit Sharma, learned counsel representing the Appellant-Insurance Company that Tribunal below has erred in awarding certain amounts under the conventional heads. The Hon'ble Apex Court in its judgment rendered in ***National Insurance Co. Ltd. V. Pranay Sethi and Ors, (2017) 16 SCC 680*** has held that no amount, if any, can be awarded under the head of loss of love and affection and as such, award made in this regard by the learned Tribunal below needs to be modified. Para 59 of ***Pranay Sethi's*** judgment reads as under:-

> ***"59. In view of the aforesaid analysis, we proceed to record our conclusions:-***
>
> ***59.1. The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a***

larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2 As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

59.3 While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4 In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of

computation. The established income means the income minus the tax component.

59.5 For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

59.6 The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

59.7 The age of the deceased should be the basis for applying the multiplier.

59.8 Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

10. As per the aforesaid judgment of Hon'ble Apex Court, 40% of addition is required to be made in the case of person, who was in private employment and if his age was less than the age of 40. In the case at hand, admittedly, deceased was not in government service, rather he was doing his private/agricultural work and as such, Tribunal below erred in making addition of 50% on account of future prospects. On this aforesaid count, award also deserves to be interfered

11. Similarly, this court finds that on account of funeral expenses and loss of estate, only sum of Rs. 15,000/- could be awarded, whereas in the instant case, Tribunal below has awarded sum of Rs. 1,00,000/- on account of loss of consortium and loss of estate and sum of Rs. 25000/- on account of funeral expenses. On account of loss of consortium, only sum of Rs. 40,000/- could be awarded to the wife of the deceased as espousal consortium. No sum on account of loss of affection to the minor children i.e. claimants No. 1 and 2 could be awarded and as such, on the aforesaid these counts, award needs to be modified accordingly.

12. While placing reliance upon latest judgment passed by the Hon'ble Apex Court in case titled ***The New India Assurance Co. Ltd. V. Smt. Somwati and Ors,*** *in* ***Civil appeal No. 3093 of 2020 (a/w connected matters),*** Mr. Dinesh Bhanot, learned counsel representing the claimants submitted that sum of Rs. 40,000/- each, is also required to be awarded in favour of claimants No. 1 and 2 being filial consortium. Otherwise also, Hon'ble Apex Court in its judgment rendered in case titled ***Magma General Insurance Co. Ltd. V. Nanu Ram alias Chuhru Ram and Ors, (2018) 18 SCC 130***, which has been also taken note of, in ***Somwati's case***, has laid down that consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium. Having taken note of the aforesaid judgment rendered by Three-Judge Bench of the Hon'ble Apex Court in ***Magma General Insurance's case (supra),*** the Hon'ble Apex Court in its latest judgment passed in ***Somwati's case*** (supra) has held as under :-

> ***"35. The Constitution Bench in Pranay Sethi has also not under conventional head included any compensation towards 'loss of love and affection' which have been now further reiterated by three-Judge Bench in United India Insurance Company Ltd. (supra). It is thus now authoritatively well settled that***

no compensation can be awarded under the head 'loss of love and affection'.

36. The word 'consortium' has been defined in Black's law Dictionary, 10th edition. The Black's law dictionary also simultaneously notices the filial consortium, parental consortium and spousal consortium in following manner:-

> ***"Consortium 1. The benefits that one person, esp. A spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations a claim for loss of consortium.***
>
> ***• Filial consortium A child's society, affection, and companionship given to a parent.***
>
> ***• Parental consortium A parent's society, affection and companionship given to a child.***
>
> ***• Spousal consortium A spouse's society, affection and companionship given to the other spouse."***

37. The Magma General Insurance Company Ltd. (Supra) as well as United India Insurance Company ltd.(Supra), Three-Judge Bench laid down that the consortium is not limited to spousal consortium and it also includes parental consortium as well as filial consortium. In paragraph 87 of United India Insurance Company Ltd. (supra), 'consortium' to all the three claimants was thus awarded. Paragraph 87 is quoted below:-

> ***"87. Insofar as the conventional heads are concerned, the deceased Satpal Singh left behind a widow and three children as his dependants. On the basis of the judgments in Pranay Sethi (supra) and Magma General (supra), the following amounts are awarded under the conventional heads:-***
>
> ***i) Loss of Estate: Rs. 15,000***

ii) Loss of Consortium:

a) Spousal Consortium: Rs.40,000

b) Parental Consortium: 40,000 x 3 = Rs. 1,20,000

iii) Funeral Expenses: Rs. 15,000"

38. Learned counsel for the appellant has submitted that Pranay Sethi has only referred to spousal consortium and no other consortium was referred to in the judgment of Pranay Sethi, hence, there is no justification for allowing the parental consortium and filial consortium. The Constitution Bench in Pranay Sethi has referred to amount of Rs.40,000/- to the 'loss of consortium' but the Constitution Bench had not addressed the issue as to whether consortium of Rs.40,000/- is only payable as spousal consortium. The judgment of Pranay Sethi cannot be read to mean that it lays down the proposition that the consortium is payable only to the wife.

39. The Three-Judge Bench in United India Insurance Company Ltd. (Supra) has categorically laid down that apart from spousal consortium, parental and filial consortium is payable. We feel ourselves bound by the above judgment of Three Judge Bench. We, thus, cannot accept the submission of the learned counsel for the appellant that the amount of consortium awarded to each of the claimants is not sustainable.

40. We, thus, found the impugned judgments of the High Court awarding consortium to each of the claimants in accordance with law which does not warrant any interference in this appeal. We, however, accept the submissions of learned counsel for the appellant that there is no justification for award of compensation under separate head 'loss of love and affection'. The appeal filed by the appellant deserves to be allowed insofar as the award of compensation under the head 'loss of love and affection."

13. At this stage, learned counsel for Appellant-Insurance Company vehemently argued that no amount, if any, can be awarded in the appeal filed by the Appellant-Insurance Company in favour of the claimants, especially when no cross appeals, praying therein for enhancement of compensation have been filed by the claimants. However, this Court is not in agreement with the aforesaid submissions having been made on behalf of the Appellant-Insurance Company. On the issue of power of appellate court to make an additional award, reference is made to **Ranjana Prakash and Ors. V. Divisional manager and Ors (2011) 14 SCC 639,** whereby it has been held that amount of compensation can be enhanced by an appellate court while exercising powers under Order 41 Rule 33 CPC, relevant para of the aforesaid judgment is reproduced herein below:

> ***"Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer."***

14. It is quite apparent from the aforesaid judgment rendered by the Hon'ble Apex Court that this Court while exercising power under Order 41 Rule 33 CPC can proceed to award compensation even in those cases, where no cross appeals have been filed. It is not in dispute that learned Tribunal below while passing impugned award has not awarded amount, if any, on account of loss of estate and espousal consortium as well as filial consortium to claimant No.1 to 3 and as such, award to that extent needs to be modified.

15. In view of the discussions made supra and the law laid down by Hon'ble Apex Court in the afore-cited judgments, this Court deems it fit to modify the award passed by learned Tribunal below as under:

	Head	***Amount in Rs.***
1	***Monthly income (per month)***	***7,000***
2	***Future prospects, 40% Addition (7,000+2800)***	***9,800***
3	***As deceased has left behind three legal heirs, 1/3rd of (i) and (ii) deducted as personal expenses of deceased i.e. 3200 (9800-3200)***	***6,600***
4	***Compensation after multiplier of 15 is applied (6600 x 12x 15)***	***11,88,000***
5	***Loss of consortium i.e. Rs. 40,000 each in favour of the claimants (40,000x3)***	***1,20,000***
6	***loss of estate (in favour of wife)***	***15,000***
7	***Funeral expenses***	***15,000***

8.	***Total compensation***	***13,61,400/-***

16. This Court, however, does not see any reason to interfere with the rate of interest awarded on the amount of compensation and multiplier applied, and as such, same are upheld.

17. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned award passed by learned Tribunal below is modified to aforesaid extent only. Accordingly, present appeal is disposed of, alongwith all pending applications, if any. Interim directions, if any, are vacated.

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

Between:-

1. KAURA DEVI
WIFE OF SANT RAM,
RESIDENT OF VILLAGE DADOUR,
POST OFFICE DHABAN,
TEHSIL BALH, DISTRICT MANDI,
HIMACHAL PRADESH

2. SANT RAM
SON OF BRIJU,
RESIDENT OF VILLAGE DADOUR,
POST OFFICE DHABAN,
TEHSIL BALH, DISTRICT MANDI,
HIMACHAL PRADESH

....APPELLANTS-PETITIONERS

(BY SH.VIJAY CHAUDHARY, ADVOCATE)

AND

1. JOGINDER SINGH
SON OF SHRI BALDEV SINGH,
RESIDENT OF VILLAGE DHANG
UPPERLI, POST OFFICE PALASI
KALAN, TEHSIL NALAGARH,
DISTRICT SOLAN,
HIMACHAL PRADESH
(OWNER OF TRUCK
NO.HP12C-9954)

2. MANI SINGH
SON OF SHRI BALDEV SINGH,
RESIDENT OF VILLAGE DHANG
UPPERLI, POST OFFICE PALASI
KALAN, TEHSIL NALAGARH,
DISTRICT SOLAN,
HIMACHAL PRADESH
(DRIVER OF TRUCK
NO.HP12C-9954)

(BY SH.OM CHAND SHARMA,
ADVOCATE)

3. ORIENTAL INSURANCE COMPANY
LIMITED, BRANCH OFFICE
MANDI, TOWN, DISTRICT MANDI,
HIMACHAL PRADESH
THROUGH ITS MANAGER

…RESPONDENTS

(BY DR.LALIT K. SHARMA,
ADVOCATE)

FIRST APPEAL FROM ORDER

NO.383 OF 2017
DECIDED ON:02.09.2021

Motor Vehicles Act, 1988- Section 173- Appeal for enhancement of compensation- Deceased 25 years of age at the time of accident- Wrong multiplier was applied- Appeal allowed- Compensation enhanced to Rs.14,14,168/-.

Cases referred:
Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130;
Munna Lal Jain and another vs. Vipin Kumar Sharma and others, (2015) 6 SCC 347;
National Insurance Co. Ltd. vs. Pranay Sethi, (2017) 16 SCC 680;
Royal Sundaram Alliance Insurance Company Limited vs. Mandala Yodagari Goud and others, (2019) 5 SCC 554;
Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121;

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

J U D G M E N T

This appeal has been preferred for enhancement of compensation awarded by the Motor Accident Claims Tribunal (III) (in short the 'MACT') Mandi, District Mandi, H.P., vide Award dated 02.12.2016 passed in Claim Petition No.23 of 2012, titled as *Kaura Devi & another vs. Joginder Singh & others.* The claim petition was preferred by the appellants on account of death of Sanjay Kumar, who was son of the appellants, in a motor accident, which had taken place on 08.06.2011 at Bated Pul, Tehsil Baddi, District Solan, H.P.

2. Learned counsel for the appellants has submitted that on behalf of the appellants, enhancement has been sought, on the ground that wrong

multiplier of 11 has been taken for calculation of quantum of compensation instead of 18 as the undisputed age of the deceased at the time of death was 25 years. It is stated that mistake has occurred for the reason that the MACT has applied multiplier by taking age of the claimant, whereas multiplier on the basis of age of deceased was to be applied. He has further stated that additional sum awarded for funeral expenses and loss of estate is also liable to be increased and parental consortium is also to be awarded in terms of judgments of the Supreme Court passed in ***Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121; Munna Lal Jain and another vs. Vipin Kumar Sharma and others, (2015) 6 SCC 347; National Insurance Co. Ltd. vs. Pranay Sethi, (2017) 16 SCC 680; Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130;*** and ***Royal Sundaram Alliance Insurance Company Limited vs. Mandala Yodagari Goud and others, (2019) 5 SCC 554.***

3. In view of pronouncements of the Supreme Court referred supra, claim set up by the appellants in the appeal is not disputed. Therefore, the appellants are entitled for compensation as under:-

1.	`6223/-x12x18 =	`12,44,168/-
2.	Funeral expenses=	`15,000/-
3.	Parental consortium=	`40,000/-
4.	Loss of estate=	`15,000/-
	Total=	**`14,14,168/-**

4. The apportionment of the compensation as determined by the MACT shall remain the same and appellant No.1 Kaura Devi and appellant No.2 Sant Ram shall be entitled for compensation in the ratio of 80:20.

5. In view of aforesaid findings, appellants are held entitled for compensation of `14,14,168/- alongwith interest @ 7.5% per annum from the date of filing of the claim petition till full and final realization from/payment by the respondents in terms of Award passed by the MACT alongwith costs of `5000/- already awarded by the MACT.

6. The enhanced amount of compensation shall be paid/deposited by respondent No.3-Oriental Insurance Company Limited within 45 days from today with information to the appellants failing which respondent No.3 shall be liable to pay interest @ 9% per annum on the enhanced amount instead of 7.5% per annum.

7. Appeal is allowed and impugned Award is modified in aforesaid terms.

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

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

1. FAO No.62 of 2018

Between:-

MS. SUMITRA @ SAVITRI,
W/O LATE SH. ISHWAR SINGH,
R/O CHAMAN NIWAS,
SANJAULI, SHIMLA-6, HP

……APPELLANT

(BY SH. SUNIL BANCHTA AND
SH. PANKAJ SAWANT, ADVOCATES)

AND

1. MS.VEENA DEVI,
W/O LATE SH. ISHWAR SINGH,
R/O KANWAR NIWAS, LOWER
SANGTI, NEAR GULAB SINGH HOUSE,
SANJAULI, SHIMLA-6, H.P.,
PERMANENT R/O VILLAGE & P.O.
GHOOND, TEHSIL THEOG,

DISTRICT SHIMLA, HP

.....RESPONDENT/APPLICANT

2. THE UNITED INDIA INSURANCE COMPANY, TIMBER HOUSE, SHIMLA, THROUGH ITS DIVISIONAL MANAGER, CARD ROAD, SHIMLA, HP S/O LT. SH. MUSTAQ ALI

.....RESPONDENT NO.2

(SH. PREM P. CHAUHAN, ADVOCATE, FOR R-1

NONE FOR R-2)

2. FAO No.35of 2021

Between:-

NATIONAL INSURANCE COMPANY LTD., DIVISIONAL OFFICE, SHIMLA (H.P.), THROUGH ITS ADMINISTRATIVE OFFICER (LEGAL), HIMLAND HOTEL, CIRCULAR ROAD, SHIMLA-HP

.....APPELLANT

(BY SH. ANIL TOMAR, ADVOCATE)

AND

1. MS. VEENA DEVI, W/O LT. SH. ISHWAR SINGH, R/O KANWAR NIWAS, LOWER SANGTI, NEAR GULAB SINGH HOUSE, SANJAULI, SHIMLA-6, H.P.

2. MS. SUMITRA @ SAVITRI, PRESENTLY WORKING AS OFFICER GRADE-2, HP STATE COOPERATIVE BANK, THE MALL, SHIMLA, HP

.....RESPONDENTS

(SH. PREM P. CHAUHAN, ADVOCATE, FOR R-1

SH. SUNIL BANCHTA AND SH. PANKAJ SAWANT,
ADVOCATES, FOR R-2)

FIRST APPEAL FROM ORDER No. 62 of 2018
ALONGWITH
FIRST APPEAL FROM ORDER No. 35 of 2021
DECIDED ON: 01.09.2021

Employees Compensation Act, 1923- Section 30 – Appeal - Deceased aged 63 years was working as driver on monthly salary of Rs.8000/- Total compensation was worked out at Rs. 4,19,688.80 – Held - The Commissioner is last authority on facts- The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial question of law involved in the instant appeal therefore, no interference with the findings of fact recorded by the Ld. Commissioner called for- Appeal dismissed- Insurance Company saddled with liability to pay the compensation.

Cases referred:

Jaya Biswal and others Versus Branch Manager, IFFCO Tokio General Insurance Company Limited and another, (2016) 11 SCC 201;

North East Karnataka Road Transport Corporation Versus Sujatha, (2019) 11 SCC 514;

T.S. Shylaja Versus Oriental Insurance Company and another, (2014) 2 SCC 587;

Ved Prakash Garg Vs. Premi Devi and others, (1997) AIR (SC) 3854;

TheseAppeals coming on for orders this day, the Courtdelivered the following:

J U D G M E N T

These two appeals arise out of the award dated 04.05.2017, passed by the learned Commissioner under the Employee's Compensation Act, awarding compensation to Smt. Veena Devi on account of death of her husband. FAO No.62 of 2018 has been preferred by the owner of the vehicle, whereas FAO No.35 of 2021 has been filed by the insurer of the vehicle. Being inter-connected, these appeals are taken up together for decision.

FAO No.35 of 2021

2. Facts:-

2(i). Smt. Veena Devi (hereinafter referred to as respondent No.1) filed a claim petition under Section 22 of the Employee's Compensation Act. She pleaded that she is widow of deceased Ishwar Singh. Her husband was employed as a driver by Ms. Sumitra (hereinafter referred to as respondent No.2). Ishwar Singh was driving Vehicle No.HP-03C-1907 on 25.03.2010, when it met with an accident causing his death. The vehicle was owned by respondent No.2. Ishwar Singh died during the course of his employment. He was 59 years of age at the time of accident. He was getting a salary of Rs.8000/- per month. In all, a compensation of Rs.15 Lakhs alongwith interest was claimed.

2(ii). Ms. Sumitra (respondent No.2) opposed the claim petition. Her stand was that Ishwar Singh was not driving her vehicle in the capacity of driver. He was her husband and was driving the vehicle as her husband on 25.03.2010. She also pleaded that there was no relationship of employer and employee between her and the deceased. Alternatively, her case was that the vehicle in question was insured with the National Insurance Company Limited (hereinafter referred to as the appellant). There was no breach of insurance policy, therefore, if at all the compensation is to be paid to the claimant/respondent No.1, liability has to be fastened upon the appellant.

2(iii). The Insurance Company (appellant) in its reply to the claim petition admitted that the vehicle in question was insured with it, but it denied that the deceased was engaged as driver by respondent No.2 and died during the course of such employment.

3. After considering the respective pleadings, evidence and contentions raised by learned counsel for the parties, the learned Commissioner came to the conclusion that the claimant/respondent No.1 was legally wedded wife of Ishwar Singh. Ishwar Singh was engaged as a driver by

respondent No.2. He died on 25.03.2010 while driving the Car bearing No.HP-03C-1907. The vehicle was owned by respondent No.2. There was relationship of employer and employee between the deceased and respondent No.2. The vehicle was insured with the appellant.

The learned Commissioner determined the age of deceased Ishwar Singh at the time of accident as 63 years. His monthly income was assessed at Rs.6000/-. In accordance with the provisions of the Employee's Compensation Act, as it existed prior to the amendment dated 25.03.2010, his monthly income was taken at Rs.4000/-. As per the provisions of Section 4(1)(a) of the Act, 50% of the monthly wages (Rs.2000/-) were multiplied with the corresponding relevant factor 106.52 keeping in view the age of the deceased at the time of accident. The payable compensation amount was worked out at Rs.2,13,040/-. The claimant was also held entitled to interest @ 12% per annum w.e.f. 25.04.2010 on this amount. The interest was accordingly calculated as Rs.2,06,648.8/-. The claimant, in all,was held entitled to total compensation of Rs.4,19,688.8/-. Liability to pay the compensation amount of Rs.2,13,040/- was fastened upon Ms. Sumitra (respondent No.2) and liability to pay the interest component of Rs.2,06,648.8/- was fastened upon the Insurance Company (present appellant).

4. Contentions:-

Learned counsel for the appellant-Insurance Company contended that there was no relationship of employer and employee between respondent No.2 and deceased Ishwar Singh. Ishwar Singh was residing with respondent No.2 as her husband. He was driving the ill-fated vehicle on the date of accident in that capacity. Once there was no relationship of employer and employee, then, the Insurance Company could not have been held liable to pay either the compensation or the interest determined in the impugned award.

To the similar effect is the submission made by learned counsel for Ms. Sumitra (respondent No.2). Learned counsel submitted that the claimant did not reside with her husband Ishwar Singh. It was respondent No.2, who was residing with Ishwar Singh. Both of them were living together as husband and wife. Ishwar Singh was not employed by respondent No.2 to drive her vehicle. The vehicle though was owned by respondent No.2, but it was being driven by Ishwar Singh as her husband on 25.03.2010, when the vehicle met with an accident causing his death.

Learned counsel for the claimant/respondent No.1 argued that the appeals filed by the Insurance Company and the owner of the vehicle are not maintainable in view of the provisions of Section 30 of the Act. No question of law is involved in these two appeals. The questions of fact being agitated by the insurer and the insured have been duly considered by the learned Commissioner after appreciating the entire evidence and material on record.

5. I have heardlearned counsel for the parties and gone through the case record. From the pleadings, evidence and respective contentions of the parties, following admitted factual position emerges:-

(a). Claimant (respondent No.1) was the lawfully wedded wife of deceased Ishwar Singh.

(b). There was some matrimonial discord between the claimant and her husband Ishwar Singh. They were not residing together. The claimant while appearing as PW4, admitted that she was paid some kind of maintenance amount by her husband Ishwar Singh.

(c). Ishwar Singh was aged around 63 years at the time of accident.Prior to his superannuation, he worked as a confirmed driver in Himachal Road Transport Corporation. Claimant/respondent No.1 is the recipient of his pension.

(d). Ishwar Singh was driving Vehicle No.HP-03C-1907 on 25.03.2010. This vehicle was owned by respondent No.2 and insured by the

appellant-Insurance Company. The vehicle met with an accident on 25.03.2010, resulting into Ishwar Singh's death.

5(i). It is the case of the claimant that her husband was in the employment of respondent No.2. He was working as her driver and getting paid Rs.8000/- per month in lieu of that. Claimant though has not produced any documentary evidence in that regard, but at the same time, respondent No.2 has admitted the fact that the deceased was driving her vehicle on 25.03.2010. Her stand is that the vehicle was being driven by the deceased as her husband. No evidence has been led by her to prove that she was married with him. Learned Commissioner was justified in observing that the Act is a beneficial legislation, whereunder onus to prove is only in the nature of preponderance of evidence and the case is not required to be proved beyond the shadow of reasonable doubt. In ***(2016) 11 SCC 201,*** titled ***Jaya Biswal and others Versus Branch Manager, IFFCO Tokio General Insurance Company Limited and another***, Hon'ble Apex Court held that Employee's Compensation Act is a welfare legislation enacted to secure compensation to poor workmen, who suffer from injuries at their place of work. This legislation meant to benefit the workers and their dependants in case of death of workman due to accident caused during and in the course of employment should be construed as such. Relevant paragraphs of the judgment read as under:-

> *"20. The EC Act is a welfare legislation enacted to secure compensation to the poor workmen who suffer from injuries at their place of work. This becomes clear from a perusal of the preamble of the Act which reads as under:*
>
> > *"An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident."*
>
> *This further becomes clear from a perusal of the Statement of Objects and Reasons, which reads as under:*

> *".....The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, alongwith the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible, from hardship arising from accidents.*
> *An additional advantage of legislation of this type is that, by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects to such accidents as do occur. The benefits so conferred on the workman added to the increased sense of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour.At the same time, a corresponding increase in the efficiency of the average workman may be expected."*
>
> *(emphasis supplied)*
>
> *21. Thus, the EC Act is a social welfare legislation meant to benefit the workers and their dependants in case of death of workman due to accident caused during and in the course of employment should be construed as such."*

5(ii). The statement of the claimant/respondent No.1 that the deceased was in employment with respondent No.2 was not rebutted on behalf of the opposing respondents by leading any cogent evidence. Claimant is the legally wedded wife of the deceased and recipient of his pension. Fact of accident of the vehicle, fact of deceased's driving that vehicle and respondent No.2's ownership of the vehicle are not in dispute. Under these circumstances, there is no escape from the conclusion that the deceased was working as a driver under Ms.Sumitra (respondent No.2) and he died while driving her Car bearing No.HP-03C-1907 on 25.03.2010.

5(iii). The insurer and the insured are agitating a finding of fact recorded by the learned Commissioner. It will be appropriate to extract Section

30 of the Employee's Compensation Act, whereunder these appeals have been filed:-

> *"30. Appeals.–(1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely:–*
>
> *(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;*
>
> *[(aa) an order awarding interest or penalty under section 4-A;]*
>
> *(b) an order refusing to allow redemption of a half-monthly payment;*
>
> *(c) an order providing for the distribution of compensation among the dependants of a deceased [employee], or disallowing any claim of a person alleging himself to be such dependant;*
>
> *(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or*
>
> *(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:*
>
> *Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:*
>
> *Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:*
>
> *[Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.]*
>
> *(2) The period of limitation for an appeal under this section shall be sixty days.*

(3) The provisions of section 5 of [the Limitation Act, 1963 (36 of 1963)], shall be applicable to appeals under this section."

In this regard, it will be appropriate to refer to ***(2014) 2 SCC 587,*** titled ***T.S. Shylaja Versus Oriental Insurance Company and another***, wherein the Hon'ble Apex Court held that Section 30 of the Employee's Compensation Act, 1923, though provides for an appeal from the orders passed by the Commissioner as enumerated in Clauses (a) to (e) of Sub-Section (1), however, the proviso to Section 30(1) makes it abundantly clear that no such appeal shall lie unless a substantial question of law is involved in the appeal. In the facts of that case, the deceased was employed as driver on a monthly salary of Rs.6000/- by his own brother, owner of the vehicle. The Commissioner held the claimant entitled to the compensation. The High Court reversed the finding. Hon'ble Apex Court held that the Commissioner having appraised the evidence adduced before him, recorded a finding of fact that the deceased was indeed employed as a driver by the owner even if the owner happened to be his brother. That finding could not be lightly interfered with or reversed by the High Court. Relevant paragraphs of the judgment read as under:-

"7. Section 30 of the Employees Compensation Act, 1923 no doubt provides for an appeal to the High Court from the orders passed by the Commissioner and enumerated in clauses (a) to (e) sub-Section (1) of Section 30. Proviso to Section 30(1), however, makes it abundantly clear that no such appeal shall lie unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b) unless the amount in dispute in the appeal is not less than three hundred rupees.

9. What is important is that in terms of the 1st proviso, no appeal is maintainable against any order passed by the Commissioner unless a substantial question of law is involved. This necessarily implies that the High Court would in the ordinary course formulate such a question or at least address the same in the

judgment especially when the High Court takes a view contrary to the view taken by the Commissioner.

10. *The Commissioner for Workmen's Compensation had, in the case at hand, appraised the evidence adduced before him and recorded a finding of fact that the deceased was indeed employed as a driver by the owner of the vehicle no matter the owner happened to be his brother. That finding could not be lightly interfered with or reversed by the High Court. The High Court overlooked the fact that the respondent-owner of the vehicle had appeared as a witness and clearly stated that the deceased was his younger brother, but was working as a paid driver under him. The Commissioner had, in this regard, observed:*

> *"After examining the judgment of the Andhra Pradesh High Court relied upon by 2nd opponent it is seen that the owner of the vehicle being the sole witness has been unsuccessful in establishing his case but in this proceeding the owner of the vehicle has appeared before this Court even though he is a relative of the deceased, and has submitted in his objections, even evidence that even though the deceased was his younger brother he was working as a driver under him, and has admitted that he was paying salary to him. The applicant in support of his case has submitted Hon'ble High Court judgment reported in ILR 2006 KAR 518. The Divisional Manager, United India Insurance Company Ltd. Vs. Yellappa Bheemappa Alagudi & Ors. which I have examined in depth which holds that there is no law that relatives cannot be in employer employee relationship. Therefore it is no possible to ignore the oral and documentary evidence in favour of the applicant and such evidence has to be weighed in favour of the applicant. For these reasons I hold that the deceased was working as driver under first opponent and driving Toyota Quails No.KA-02-C-423, that he died in accident on 03.09.2005, that he is a workman as defined in the Workmen's Compensation Act and it is held that he has caused accident in the course of employment in a negligent fashion which has resulted in his death.*

> *11. The only reason which the High Court has given to upset the above finding of the Commissioner is that the Commissioner could not blindly accept the oral evidence without analysing the documentary evidence on record. We fail to appreciate as to what was the documentary evidence which the High Court had failed to appreciate and what was the contradiction, if any, between such documents and the version given by the witnesses examined before the Commissioner. The High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of fact which the Commissioner was entitled to record. Suffice it to say that apart from appreciation of evidence adduced before the Commissioner the High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for the maintainability of any appeal under Section 30. Inasmuch as the High court remained oblivious of the basic requirement of law for the maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts it committed an error which needs to be corrected."*

In ***(2017) 1 SCC 45***, titled ***Golla Rajanna and others Versus Divisional Manager and another***, it was held that under the scheme of the Act, the Commissioner is the last authority on facts. Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation.

In ***North East Karnataka Road Transport Corporation Versus Sujatha, (2019) 11 SCC 514***, the Hon'ble Supreme Court held that the appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner is not like a Regular First Appeal akin to Section 96 of the Code of Civil Procedure, 1908 which can be heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case. Relevant paragraphs of the judgment are as under:-

"9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred, who was negligent in causing the accident, whether there existed any relationship of employee and employer, what was the age and monthly salary of the employee, how many are the dependents of the deceased employee, the extent of disability caused to the employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRs sue/s his employer to claim compensation under the Act.

10. The aforementioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once they are proved either way, the findings recorded thereon are regarded as the findings of fact.

11. The appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner lie only against the specific orders set out in clause (a) to (e) of Section 30 of the Act with a further rider contained in first proviso to the Section that the appeal must involve substantial question of law.

12. In other words, the appeal provided under Section 30 of the Act to the High Court against the order of the Commissioner is not like a Regular First Appeal akin to Section 96 of the Code of Civil Procedure, 1908 which can be heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case."

In the instant case, learned Commissioner decided the questions of facts. He held the deceased to be an employee of respondent No.2. The factual assertion made by respondent No.2 that deceased was her husband

and was driving her vehicle in that capacity was turned down. All other relevant facts have been admitted by the parties. It is the admitted case that the claimant was legally wedded wife of the deceased. It was established that deceased was driving the vehicle of respondent No.2 when it met with an accident causing his death. No cogent evidence or argument has been put forth to take a view different than the one taken by the learned Commissioner that deceased was driving the vehicle of respondent No.2 as her employee. No substantial question of law is involved in the instant appeal. Therefore, no interference with the findings of facts recorded by the learned Commissioner is called for that Ishwar Singh had died in the course of his employment under Ms. Sumitra (respondent No.2). The instant appeal filed by the Insurance Company, i.e. FAO No.35 of 2021, is accordingly dismissed.

FAO No.62 of 2018

The findings recorded and observations made while deciding FAO No.35 of 2021 are applicable to the instant appeal inasmuch as this appeal challenges the findings of learned Commissioner in respect to the relationship of employer and employee between the deceased Ishwar Singh and Ms. Sumitra (appellant herein).

Learned counsel for the appellant Ms. Sumitra has raised an additional issue. Learned counsel contended that the vehicle in question was duly insured with the Insurance Company (appellant in FAO No.35 of 2021). Learned Commissioner had determined Rs.2,13,040/- as the compensation amount and Rs.2,06,648.8/- towards the interest component on it. In terms of the impugned award, the liability to pay the compensation amount has been fastened upon the appellant (owner of the vehicle), whereas liability to pay the interest component has been fastened upon the Insurance Company (appellant in FAO No.35 of 2021). Learned counsel argued that when the vehicle was duly insured with the Insurance Company, then the liability to pay

the compensation amount also has to be fastened upon the Insurance Company.

Learned counsel for the appellant placed reliance upon ***(1997) AIR (SC) 3854,*** titled ***Ved Prakash Garg Vs. Premi Devi and others***, in particular para 19 thereof, which is extracted hereinafter:-

> *"19. As a result of the aforesaid discussion it must be held that the question posed for our consideration must be answered partly in the affirmative and partly in the negative. In other words the insurance company will be liable to meet the claim for compensation along with interest as imposed on the insured employer by the Workmen's Commissioner under the Compensation Act on the conjoint operation of Section 3 and Section 4-A Sub-section (3)(a) of the Compensation Act. So far as additional amount of compensation by way of penalty imposed on the insured employer by the Workmen's Commissioner u/s 4A(3)(b) is concerned, however, the insurance company would not remain liable to reimburse the said claim and it would be the liability of the insured employer alone."*

There can be no quarrel with the above statement of law that once the vehicle is duly insured and is being plied in accordance with the policy, then liability to pay the compensation amount has to be borne by the Insurance Company.It is not even the case of the Insurance Company that the vehicle was not being plied in accordance with the terms & conditions of the insurance policy. Under these circumstances, the liability to pay the compensation amount alongwith interest falls upon the Insurance Company. This submission of law is not even disputed by the learned counsel for Insurance Company (appellant in FAO No.35 of 2021).

Accordingly, the present appeal is allowed. The liability to pay the compensation amount alongwith interest component thereupon as determined in the impugned award shall be borne by the Insurance Company,

i.e. appellant in FAO No.35 of 2021. The appeal stands allowed in the above terms. The impugned award shall stand modified to that extent.

With the aforesaid observations, the appeals stand disposed of.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, A.C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA,J.

Between:-

SHRI RAMESHWAR SHARMA
S/O LATE SHRI G.S. SHARMA
R/O HOUSE NO. 444-B,
SECTOR 4, NEW SHIMLA

.....APPELLANT

(BY SH. AJAY KUMAR, SENIOR ADVOCATE
WITH SHRI GAUTAM SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL
SECRETARY (FINANCE)
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA 171002.

2. THE ACCOUNTANT GENERAL (A & E)
HIMACHAL PRADESH,
GORTON CASTLE,
THE MALL, SHIMLA.

3. THE HIGH COURT OF
HIMACHAL PRADESH
AT SHIMLA THROUGH
THE REGISTRAR GENERAL.

4. DISTRICT TREASURY OFFICER,
DISTRICT TREASURY,
SHIMLA.

.....RESPONDENTS

(SHRI ASHOK SHARMA,
ADVOCATE GENERAL WITH
SHRI RANJAN SHARMA,
SHRI VIKAS RATHORE,
ADDL. ADVOCATES GENERAL.
SHRI R.P. SINGH AND
SMT. SEEMA SHARMA,
DY. ADVOCATES GENERAL, FOR R-1 & R-4,
SHRI BALRAM SHARMA, ASGI, FOR R-2,
SHRI J.L. BHARDWAJ, ADVOCATE, FOR R-3)

LETTERS PATENT APPEAL
No. 14 of 2019
RESERVED ON: 25.8.2021
DELIVERED ON: 09.09.2021

CCS (Pension) Rules, 1972 – Fixation - Petition of the petitioner stood revised by the State as per Karnataka Model- Petitioner claims factor of 3.07 was to be applied- Held- CCS (Pension) Rules clearly define that for the purpose of pension, the emoluments means basis pension- Petition of petitioner has been correctly revised- Appeal dismissed.

This appeal coming on for pronouncement of judgment this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****, delivered the following:*

J U D G M E N T

The appellant retired as a District & Sessions Judge. He filed a writ petition seeking direction to the respondents to fix his pension by multiplying the pension amount of Rs. 18,632/- by a factor of 3.07 without

deducting dearness pay from Rs. 18,632/-. His writ petition was dismissed. Aggrieved, he has filed the instant appeal.

Parties are referred to hereinafter as they were before the learned writ Court.

2. Facts.

2(i) Petitioner superannuated as District and Sessions Judge on 31.5.2005. At the time of retirement, he was drawing basic pay of Rs 24,850/- per month in Super Time Scale of Rs. 22850-24850.

2(ii) Petitioner's pension was initially fixed at Rs. 12125/- w.e.f. 1.6.2005 by taking his average emoluments at Rs. 24250/- per month.

2(iii) On 8.8.2005, State of Himachal Pradesh merged 50% of the dearness relief equivalent to 50% of present pension of its employees and pensioners with their pension w.e.f. 1.4.2004.

2(iv) On 20.10.2005 respondent-State issued a letter for fixing pension of retired Judicial Officers as per Karnataka model in accordance with directions of Hon'ble Supreme Court.

2(v) In compliance to the communication dated 20.10.2005 respondent No. 3 moved the State for revising the petitioner's pension. Respondent No. 2 on 17.4.2006 revised petitioner's pension from Rs.12125/- to Rs. 18,263/- on the basis of average emoluments of Rs. 36525/- (Rs. 24,350 + 12,175/- D.P.) w.e.f. 1.6.2005.

2(vi) In view of computation of one increment granted to the petitioner at the time of release of selection grade/super time scale, his pension was again revised on 6.2.2007 by respondent No. 2 from Rs. 18,263/- to Rs. 18,632/- w.e.f. 1.6.2005 by taking his average emoluments as Rs. 37,275/- (Rs. 24,850+ 12,425 D.P.).

2(vii) Hon'ble Apex Court vide order dated 8.10.2012 passed in I.A. No. 5 of 2009 in I.A. No. 244 in W.P.(C) No. 1022/1989 accepted the prayer of Andhra Pradesh retired Judges association to revise the existing pension of

all past pensioners who had retired after 1.1.1996 but before 31.12.2005 by raising the same by a factor of 3.07 subject to minimum of 50% of revised pay scale of their respective post. On 14.7.2016, the Apex Court directed that but for States of Telegana and Andhra Pradesh, all States including State of Himachal Pradesh shall implement the order. In compliance thereto, the respondent-State issued general direction vide O.M. dated 11.1.2017. Under this O.M., the pension of Himachal Pradesh Judicial Officers retired between 1.7.1996 to 31.12.2005 was to be revised by raising the same by 3.07 times w.e.f. 1.1.2006.

2(viii) Pension of petitioner stood revised by the State as per Karnataka model from Rs. 12,125/- to Rs. 18,263/- and later to Rs. 18,632/-. Petitioner's case is that this figure of Rs. 18,632/- which should have been multiplied by 3.07 for fixing his revised pension as per government O.M. dated 11.1.2017. However, respondent No. 4 has multiplied Rs. 12,175/- by 3.07 times and thus fixed petitioner's pension at Rs. 37,378/-. This order was reviewed on 9.8.2017. The revised pension of the petitioner was fixed at Rs. 38,145/- i.e. (Rs. 12,425 X3.07=Rs. 38,145).

3. Petitioner filed a writ petition praying for a direction to the State to revise his pension by treating Rs. 18,632/- as his basic pension and to multiply it by 3.07 times. His prayer was turned down by the leaned Single Judge. Learned Single Judge did not find favour with the contentions of the petitioner. The pension of the petitioner was found to be fixed in accordance with the applicable rules, directions, orders and office memorandums. His writ petition was dismissed. Aggrieved, the petitioner has preferred the instant appeal.

4. Contentions.

We have heard Mr. Ajay Kumar, learned Senior Counsel for the appellant and Mr. Ashok Sharma, learned Advocate General and gone through the record.

Stand of petitioner.

4(i) Learned Senior Counsel for the petitioner submitted that the pension of the petitioner was Rs. 18,632/-. Factor of 3.07 was to be applied to this figure and not to Rs. 12,425/-.

4(ii) There was no reason to exclude 50% of D.P. from the existing pension of petitioner. His existing pension was fixed as per government order dated 20.10.2005 on Karnataka model in accordance with the Apex Court direction.

4(iii) In accordance with the respondent-State O.M. dated 11.1.2017, the existing pension i.e. Rs. 18,632/- was to be multiplied by 3.07 times.

4(iv) In view of the order passed by the Hon'ble Apex Court in I.A. Nos. 5/2009 and 339 & 336/2016 read with respondent government's order dated 11.1.2017, there should be no deduction from existing pension of the petitioner. Rules of State government with regard to quantum of pay and pension are not applicable to Judicial employees in so far as the same are in conflict with the directions of Hon'ble Supreme Court.

4(v) Once the basic pension of petitioner had become Rs. 18,632/- we.f. 1.6.2005 then it could not be reduced by 50% amount of D.P. for the purpose of multiplying by 3.07 times.Stand of respondents-State.

4(vi) Petitioner retired on 31.5.2005 as District and Sessions Judge and was drawing monthly salary of Rs. 24,850/- in super time scale of Rs. 22,850/- to Rs. 24,850/-. His pension was initially fixed as Rs. 12,125/- plus dearness pension w.e.f. 1.6.2005.

4(vii) Vide office memorandum dated 8.8.2005, the State of Himachal Pradesh ordered merger of 50% dearness relief with basic pension w.e.f.

1.4.2004. Pension of petitioner was revised to Rs. 18,638 (Rs. 12,425+Rs. 6213) due to merger of 50% D.P. Office memorandum dated 11.1.2017 was issued by the State to revise pension of Judicial Officers as per direction dated 14.7.2016 of Hon'ble Apex Court. Accordingly, the pension of petitioner was fixed at Rs. 37,378/- by multiplying the basic pension Rs. 12,175/- as existing on 1.1.2006 by 3.07 times. On 10.8.2017 petitioner's pension was revised to Rs. 12,425 X 3.07= Rs. 38,125/-. Petitioner's pension at Rs. 38,145/- was accordingly fixed. His basic pay of Rs. 12,425/- has been multiplied by 3.07 times and the amount so arrived has been fixed as revised basic pension w.e.f. 1.1.2006. According to the respondents petitioner's pension has been fixed in consonance with the direction of Hon'ble Apex Court as well as in accordance with the office memorandum. The entire position in the facts of instant case has been clarified by the respondent/State in following tabulation:

Fixation of Pension of Pre-2006 Judicial Officers

A	B	C
Consolidated Pension/Family Pension as on 1.1.2006 as per Govt. O.M. dated 7.12.2010	Pension at 50% of minimum revised pay Rs. 70290-1540-76450 a per Govt. O.M. dated 7.12.2010	Fixation of Pension by factor 3.07 as per Hon'ble Apex Court Order dated 14.07.2016 & Govt. instruction dated 11.01.2017
i. Basic pension 12425 ii.Dearness 6213 Pension iii. Dearness 4473 Relief @ 24% (on item 1&2 above)	Pension @ 50% of **35145** Minimum Pay Rs. 70290	Basic Pension Rs. 12425X3.07=**38145**

iv. Fitment Weightage 4970 @ 40% of the Basic Pension (at Sr. No. 1)		
Revised Pension 28081	**35145**	**38145**
NOTE-1 Dearness Pension is part of Dearness Relief converted into Dearness Pension. Hence same is not to be treated as part of Basic Pension for revision of Pension by factor 3.07. Moreover, Dearness pension is already included in Part B of formulation above.		
NOTE-2 Emoluments for purpose of fixation of pension as per Rule 33 of CCS (Pension) Rules, 1972, means Basic Pay as defined in Rule 9(21)(a)(i) of Fundamental Rules and Supplementary Rules.		
NOTE-3 In case total Pension Rs 18638 (Basic Pension=12425 plus DP=6213, which has effect of merger of 50% Dearness Relief as Dearness Pension) is revised by factor 3.07 then revised pension will be Rs. 52219 which will be much higher than the pension of serving District & Sessions Judge fixed at R. 38225 (i.e. 50% of Highest Pay of Rs. 76450) at the time of superannuation from service as of now.		

5. Observations.

5(i) Petitioner retired as District and Sessions Judge from Higher Judicial Services on 31.5.2005.

5(ii) Petitioner was drawing basic pay of Rs. 24,850/- per month in the super time scale of Rs. 22850-24850. His pension was fixed at Rs,. 12,125/- w.e.f. 1.6.2005 by taking his average monthly emoluments of Rs. 24,250/-.

5(iii) On 8.8.2005, State of Himachal Pradsh issued an office office memorandum. This was issued in compliance to the directions dated 17.1.2005 of the Hon'ble Supreme Court delivered in WP (C) 1022/1989, All India Judges Association and others v. Union of India & others on the Karnataka model. Vide office memorandum dated 8.8.2005 State of Himachal Pradesh ordered merger of dearness relief equal to 50% of pension with pension w.e.f. 1.4.2004. This was to be shown distinctly as Dearness Pension.

5(iv) State of Himachal Pradesh fixed pension of retired Judicial Officers as per Karnataka model vide office memorandum dated 20.10.2005. In terms of this memorandum, last pay drawn was to be taken as emoluments for the purpose of pension. The CCS (Pension) Rules 1972 as applicable in the State was to continue to apply for calculation of pension. Basic pension was to mean as under:

> *"(ii) The 'Basic Pension'/ 'Basic Family Pension' referred in (c) (I) (a) to (d) above means, the basic pension/ basic family pension of the pensioner concerned fixed immediately on retirement/death with reference to the emoluments/last pay reckoned for the purpose of calculation of Pension/Family Pension.*
>
> *(iii) Interim Relief of forty percent of basic pension/Family pension sanctioned vide notification No. Home-B(E)3-1/90-VI dated 18.12.1998.*
>
> *The consolidated revised pension calculated above shall not be less than 50% of the minimum of the revised pay of the post held by the Judicial Officer at the time of retirement who have put in full qualifying service at the time of retirement. In respect of Judicial Officers who have*

put in less than the full qualifying service, there shall be proportionate reduction."

Thus basic pension was to be the one fixed immediately on retirement with reference to last pay drawn for the purpose of calculation of pension/family pension. Accordingly, on 17.4.2006, a revised certificate was issued to the petitioner. His pension was revised from Rs. 12,125/- to Rs. 18,263/- on the basis of revised average emoluments i.e. Rs. 36,525/- (Rs. 24350+1275 D.P.). This revision was carried out on the basis of office memorandum dated 20.10.2005. One more increment admissible to the petitioner was added and his pension was revised once again on 6.2.2007 from Rs. 18,263/- to Rs. 18,632/- (Rs. 24850+12425 D.P.).

5(v) I.A. No. 5 of 2009 was moved in I.A. No. 244 in WP(C) 1022/1989 before the Hon'ble Apex Court with following prayers:-

"(i) the existing pensions of all past pensioners who retired after 1.1.1996 and the pensioners whose pensions were consolidated as per Karnataka model shall be raised by 3.07 times on par with the other pensioners subject to minimum of 50% of the revised pay scale of pay of their respective post;

(ii) and in the alternative, consolidation of the existing pensions of the above section of pensioners as per the methodology adopted by the Central Government in pursuance of recommendations of the VIth Central Pay Commission in para 4.1 of the O.M.F. No.38/37/08 P & PW(A) Government of India dated 1.9.2008."

While considering the prayer in the applications, the following order was issued on 8.10.2012:-

> *"IA No.5 of 2009 in I.A. No.244 in WP(c) No.1022/1989*
> *The applicants in this IA are judicial officers who retired after January 01, 1996, but prior to January 2006. They are aggrieved by the recommendation of Justice Padmanabhan Committee, as contained in paragraph 31 of its report. Paragraph 31 of the recommendations of the Committee, insofar as it is relevant, is as under:-*
>
> > *"Pare 31: The recommendations of the First National Judicial Pay Commission with respect to past pensioners are given in paragraph 23.18 which are as under: 1) The revised pension of the retired judicial officers should be 50% of the minimum of the post held at the time of retirement, as revised from time to time. Xx xx xx" Mr. P.P. Rao, learned senior advocate appearing for the applicants, pointed out that the Padmanabhan Committee, apparently due to oversight, fixed the revised pension of the concerned judicial officers at 50% of the minimum of the post held at the time of retirement, as revised from time to time. Consequently, as a result of the revision, the concerned judicial officers are getting as pension an amount which is lower than what they earlier received before revision. The grievance of the applicants appears to be justified and it is significant to note that both the High Court of Andhra Pradesh and the State Government of Andhra Pradesh, in their respective responses, have supported the case of the applicants. Mr. A.T.M. Sampath, learned*

amicus curiae, also submitted that there was evidently some error in the recommendation of the One Man Committee. We accordingly, accept the prayer of the applicants and allow this IA in terms of prayer clause (i) of the application. I.A. No.5 stands disposed of."

Subsequently, in I.A. 339 & 336/2016, following was observed by the apex Court on 14.7.2016:-

"After noting the above said order already passed by this Court on 8.10.2012 and also a G.O. issued by the State of Andhra Pradesh vide G.O. No.86 dated 19.7.2013 complying with the directions contained in the order dated 8.10.2012, we issued notice to all the State Governments as well as the High Courts in our order dated 28.4.2016 and called for their response. Only three states have responded by filing reply affidavit, namely, Orissa, *Himachal Pradesh and Tamil Nadu. While on behalf of State of Orissa, time of two weeks was sought for to file the Status Report, the State of Tamil Nadu after referring to the manner in which the pension is being dispensed to the retirees prior to 1.1.2006 ultimately submitted that the State will abide by the orders/directions to be issued by this Court. So far as the State of Himachal Pradesh is concerned, a peculiar stand is being taken to the effect that in the State of Himachal Pradesh a different pattern of pension is being adopted with reference to other State Government employees, which is being applied to Judicial Officers as well. Mr. Suryanarayana Singh, learned*

Additional Advocate General appearing for the State of Himachal Pradesh drew our attention to the said stand taken in the reply filed before us and sought for affirmation of the said position being followed by the State of Himachal Pradesh.

No other State Government has responded to our notice dated 28.4.2016 and filed any affidavit or reply. There is also no representation from any of the State Government opposing this application.

Having heard Mr. P.P. Rao, learned senior counsel for the applicant and Mr. Suryanarayana Singh, learned Additional Advocate General appearing for the State of Himachal Pradesh, at the very outset, we state that the issue as noted by us is already covered by the order of this Court dated 8.10.2012. Therefore, nothing more is to be ordered by us in this application except simply adopting the said order already issued. The prayer in this application is for a direction to the State Governments except the States of Andhra Pradesh and Telengana to secure time-bound implementation and compliance of the order dated 8.10.2012 passed by this Court in IA No.5 of 2009 in I.A. No.244 in WP(c) No.1022/1989. Since, by our order dated 8.10.2012, the prayer as made in the said I.A. No.5 of 2009 in I.A. No.244 in WP(c) No.1022/1989, as extracted in the earlier part of this order, has already been passed, based on which the States of Andhra Pradesh and Telengana have passed orders and issued G.O., namely, G.O. No.86 dated 19.7.2013, we direct that all the other State Governments should follow the suit and pass

appropriate notifications implementing the directions contained in our order dated 8.10.2012 in respect of their retirees between 1.1.1996 and 31.12.2005. Whatever arrears payable for the period from 1.1.2006 uptill this date shall be calculated and paid expeditiously and the future calculation of pension for future months should be made on that basis from the month of July, 2016. The arrears shall be paid within six months from the date of production of a copy of this order.

These I.As. shall stand allowed with the above directions."

5(vi) Pursuant to the order passed by the Hon'ble Apex Court, the State of Himachal Pradesh issued an office memorandum on 11.1.2017 for implementing the direction issued by the Apex Court on 8.10.2012. The relevant part of the office memorandum reads as under:

"Now, therefore, in compliance to directions dated 14-07-2016 of the Hon'ble Supreme Court of India passed in I.A. No. 339 & 336 in WP No. 1022/1989, the Governor, Himachal Pradesh is pleased to implement the order dated 08-10-2012 of the Hon'ble Apex Court, passed in IA No. 5 of 2009 in I.A. No. 244 in writ petition (C) No. 1022/1989 in respect of H.P. State Judicial Officers as under:-

(i) The Pensions of the Himachal Pradesh Judicial Officers retired between the period 01-07-1996 to 31.12.2005 as fixed in terms of Government letter No. Fin (Pen) A (3)-4/2005 dated 20th October 2005 will be revised by raising the same by 3.07 times, w.e.f. 01-01-2006.

Provided, above revised pension shall be subject to minimum of 50% of the revised pay scales applicable from 01-01-2006 corresponding to the prerevised pay scales from which such pensioners had retired/died in harness."

Respondent No. 4 issued order for multiplying the basic pension of the petitioner Rs. 12,175/- by a factor of 3.07. Revised pension of the petitioner was worked out at Rs. 37,378/-. It was later revised to Rs. 38,145/- by multiplying his basic pension Rs. 12,425/- by 3.07 times (taking into account an additional increment of the petitioner).

5(vii) Hon'ble Apex Court in its order dated 8.10.2012 has referred to the Karnataka Model. In the report of Second National Judicial Pay Commission (January 2020, pages 14,15) following pay structure for past pensioners was mentioned:

"The Karnataka model referred to in clause (I) of the prayer portion in I.A. No. 5/2009 was in respect of Judicial officers who retired or died while in service prior to 01.07.1996, as seen from the proceedings of the Government of Karnataka (Law Department) dated 04.02.2004. The relevant para in the proceedings of the Government of Karnataka dated 04.02.2004 is as follows:

PENSION STRUCTURE FOR THE PAST PENSIONERS:

(a) The revised pension/family pension of the Judicial Officers who have retired or died while in service prior to 01.07.1996 shall constitute the following:-

(i) Basic pension/family pension as on 01.07.1996.

(ii) DA as on 01.01.1996 sanctioned in GO No. FD (Spl) 35 PET 96 dated 8.5.1996.

(iii) The increase in pension/family pension sanctioned in GO No. FD (Spl) 22 PET 94 dated 29.6.1994 in respect of Judicial Officers who have retired prior to

1.1.1982 or died while in service prior to that date or after retirement.

(iv) Interim Relief of 40% of basic pension/family pension sanctioned in GO No. Law 1254 LAC 94 dated 22.4.1998.

The consolidated revised pension calculated above shall not be less than 50% of the minimum of the revised pay of the post held by the Judicial Officers at the time of retirement who have put in full qualifying service at the time of retirement. In respect of Judicial Officers who have put in less than the full qualifying service there shall be proportionate reduction.

(b) The Dearness Allowance shall be at the rates as are admissible to serving Judicial officers.

(c) The revision in pension shall come into effect from 01.07.1996 and will be applicable to Judicial officers who have retired or ceased to be in service due to death or retirement prior to 01.07.1996."

As per Karnataka Model revised pension comprises of various components. Basic pension/family pension, DA etc. are different components of revised pension. This model finds place in the proceedings of Government of Karnataka (Law department) dated 4.2.2004. It is pertinent to mention here that this date i.e. 4.2.2004 precedes the date of 1.4.2004 i.e. the date of merger of 50% of dearness allowance with basic pension by the State of Himachal Pradesh. Thus, the plea of the petitioner that basic pension was consolidated pension does not hold good.

Additionally in the order passed by the Hon'ble Apex Court on 8.10.2012 methodology referred to be adopted by Central government also excludes 50% merger of dearness relief for the purpose of fitment weightage. The office memorandum issued by Government of India in this regard on 1.9.2008 reads as under (relevant part only):-

"3.1 In these orders :

11. Existing pensioner or Existing Family pensioner means a pensioner who was drawing/entitled to pension/family pension on 31.12.2005.

12. *Existing pension means the basic pension inclusive of commuted portion, if any, due on 31.12.2005. It covers all classes of pension under the CCS (Pension) Rules, 1972 as also Disability Pension under the CCS (Extraordinary Pension) Rules and the corresponding rules applicable to Railway employees and Members of All India Services.*

13. Existing family pension means the basic family pension drawn on 31.12.2005 under the CCS (Pension) Rules and the corresponding rules applicable to Railway employees and Members of All India Services.

4.1 The pension/family pension of existing pre-2006 pensioners/family pensioner will be consolidated with effect from 1.1.2006 by adding together:-

The existing pension/family pension.

Dearness Pension, where applicable

Dearness Relief upto AICPI (IW) average index 536 (Base year 1982=100) i.e. @ 24% of Basic Pension/Basic family pension plus dearness pension as admissible vide this Department's O.M. No. 42/2/2006-P&PW(G) dated 5.4.2006

Fitment weightage @ 40% of the existing pension/family pension.

Where the existing pension in (i) above includes the effect of merger of 50% dearness relief w.e.f. 1.4.2004, the existing pension for the purpose of fitment weightage will be re-calculated after excluding the merged dearness relief of 50% from the pension.

The amount so arrived at will be regarded as consolidated pension/family pension with effect from 1.1.2006."

It is amply clear from the above that the 'existing pension' means the 'basic pension', as the 'consolidated pension' comprises of basic pension+Dearness pension+Dearness Relief+ Fitment weightage which is to be re-calculated after excluding the merged dearness relief of 50% from the pension. Therefore, the 'consolidated pension' and the 'basic pension' are two entirely different concepts and cannot be treated the same as contended by the petitioner. Further, CCS Pension Rules clearly define that for the purpose of pension, the emoluments mean 'basic pay'. Relevant part of Rule 33 is extracted hereafter:-

"33. Emoluments

The expression `emoluments' means basic pay as defined in Rule 9 (21) (a) (i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death ; and will also include non-practising allowance granted to medical officer in lieu of private practice."

Rule 3(o) of CCS Pension Rules defines the pension as under:-

> *"3(o) Pension includes gratuity except when the term pension is used in contradistinction to gratuity, but does not include dearness relief."*

The above makes it much more clear that 'pension' does not include dearness relief.

5(viii) The State of Himachal Pradesh issued office memorandum on 14.10.2009 revising pension of pre-2006 pensioners. The relevant provision of this office memorandum reads as under:

> *"4.1 The pension / family pension of existing pre-2006 pensioners/family pensioners will be consolidated with effect from 01-01-2006 by adding together:-*
>
> *(i) The existing pension/family pension*
>
> *(ii) Dearness Pension, where applicable*
>
> *(iii) Dearness Relief upto AICPI (IW) average index 536 (Base Year 1982=100) i.e. @24% of Basic Pension/Basic family pension plus dearness pension as admissible vide this department O.M. No. Fin(Pen)B(10)-6/98-I dated 23-6-2006.*
>
> *(iv) Fitment weightage @40% of the existing pension/family pension.*
>
> *Where the existing pension in (i) above includes the effect of merger of 50% of dearness relief w.e.f. 01-04-2004, the existing pension for the purpose of fitment weightage will be recalculated after excluding the merged dearness relief of 50% from the pension. The amount so arrived at will be*

regarded as consolidated pension/family pension with effect from 01-01-2006."

The above office memorandum also states the same. The State government has clarified that emoluments for the purpose of fixation of pension means basic pension. Thus, the ground taken by the petitioner that provision of office memorandum dated 11.1.2017 provides a simple straight jacket formula having no variable factor is not correct. As discussed above, there is a clear cut difference between basic pension and consolidated pension. Clarifications have been given by the State government and the Central government for fitment that 50% dearness relief is to be excluded where 50% dearness relief has been merged earlier with the pension. This clearly indicates that whenever pension is referred, it refers to basic pension only unless defined otherwise.

Pension of petitioner has been correctly revised at Rs. 38,145/- per month by taking his basic pension as Rs. 12,425/- and multiplying it by a factor of 3.07. We find no merit in this appeal. The same is accordingly dismissed. Pending miscellaneous application(s), if any, shall also stand disposed off.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, A.C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA,J.

Between:-

1. SUBHASH CHAND

2. PAWAN KUMAR

BOTH SONS OF LATE SHRI MILKHI RAM,
PETITIONER NO.2 THROUGH HIS GPA
PETITIONER NO.1

3. RAJINDER KUMAR

4. VIRENDER KUMAR,

BOTH SONS OF SHRI SUBHASH CHAND,
ALL RESIDENTS OF VILLAGE KHAROTA,
TEHSIL JAWALI, DISTRICT KANGRA (H.P.)

……APPELLANTS

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

AND

1. FINANCIAL COMMISSIONER (APPEALS),
HIMACHAL PRADESH,
SHIMLA-171 002 (H.P.)

2. DIVISIONAL COMMISSIONER,
KANGRA AT DHARAMSHALA (H.P.)

3. EX. HONY. CAPT. TARA CHAND,
S/O SHRI PIAR CHAND,
R/O MOHAL SAKOH, TEHSIL JAWALI,
DISTRICT KANGRA (H.P.)

……RESPONDENTS

(SH. ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. RANJAN SHARMA, MS. RITTA
GOSWAMI & SH. VIKAS RATHORE, ADDITIONAL
ADVOCATES GENERAL, FOR R-1 & R-2,

SH. RAJNISH MANIKTALA, SENIOR ADVOCATE
WITH SH. NARESH VERMA, ADVOCATE,
FOR R-3)

LETTERS PATENT APPEAL
No. 31 of 2019
DECIDED ON: 24.09.2021

H.P. Tenancy and Land Reforms Act, 1972- Sections 58, 104, 34- Resumption of land to army personnel- Held- Vestment of propriety rights in non-occupancy tenants is automatic except in case of landowners falling in the protected categories- Land owner serving in the Armed Forces falls in the protected category and as such he is allowed to resume tenancy land in accordance with Section 104 (8)(9) and Section 34 of the Act- Appeal dismissed.

This Appeal coming on for admission this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *delivered the following:*

J U D G M E N T

Because of 'merry-go-rounds' in the revenue Courts spanning over four decades in three rounds of litigation, respondent No.3, Landowner- an Ex-serviceman, has not been able to resume his land from the appellants-tenants, to which he is entitled under the provisions of Himachal Pradesh Tenancy and Land Reforms Act, 1974.

2. Facts:-

2(i). The land in question alongwith various other parcels of land was recorded in joint ownership of respondent No.3 and his brothers, sons of Sh. Piar Singh. A family partition took place, in which the suit land fell to the share of respondent No.3.

2(ii). Respondent No.3 joined Indian Army on 08.09.1953. Being in armed forces, he could not cultivate the land himself. Respondent No.3 inducted Sh. Milkhi Ram, predecessor-in-interest of the present appellants, as tenant over land comprised in Khasra No.102, measuring 14 kanals 7 marla, in Mohal Kharota and Mehar Singh & Rai Singh, sons of Sh. Ram Ditta as tenants over Khasra No.1725, measuring 0-21-59 hectares, situated in village Chalwara.

2(iii). Respondent No.3 instituted a suit under Section 58 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (in short 'Act') against the aforesaid Sh. Milkhi Ram for recovery of rent. The brothers of respondent No.3 were also impleaded as respondents in the suit. During the pendency of the suit, Milkhi Ram died and his legal heirs, i.e. the present appellants, were brought on record. The contention of respondent No.3 that he was owner of the suit land in terms of family partition, was supported by his brothers, who were also parties to the case. The suit was decreed by the Assistant Collector 1st Grade, Nurpur, District Kangra in favour of respondent No.3 (plaintiff therein) on 20.10.1986. This judgment has attained finality.

2(iv). Respondent No.3 retired from Army on 30.09.1985. On 18.10.1985, he applied for resumption of his land under tenancy. The subsequent litigation history may be noticed in following compartments.

First Round:-

2(iv)(a). The Land Reforms Officer Jawali/Tehsildar, vide his order dated 02.04.1990, allowed the resumption application of respondent No.3 upto 5 acres of land. He, however, held that under the rules, respondent No.3/landowner cannot resume more than 50% of the tenancy land from the tenants.

2(iv)(b). The order dated 02.04.1990 passed by the Land Reforms Officer, Jawali, was challenged by respondent No.3 before the Sub-Divisional Officer, Nurpur, District Kangra. Respondent No.3 contended that he was entitled to resume the entire land under tenancy. This appeal was dismissed on 20.01.1992.

2(iv)(c). The second appeal filed by respondent No.3 was accepted by the Divisional Commissioner, Kangra on 18.08.1994. The Divisional Commissioner remanded the case to the Court of Collector, Kangra, holding that the impugned order did not discuss the points raised before the Court.

Second Round:-

2(iv)(d). On remand, the Collector, Kangra, vide order dated 23.07.1997, quashed the order dated 02.04.1990, passed by the Land Reforms Officer. The matter was remanded to the Land Reforms Officer. The Collector directed the Land Reforms Officer to allow the resumption of land from the tenants for self-cultivation by excluding *gair mumkin* land.

2(iv)(e). The Land Reforms Officer vide order dated 17.04.1999, held that respondent No.3 was authorized to resume land for self-cultivation upto 5 acres. In all, an area of 0-75-35 hectares was allowed to be resumed by respondent No.3.

2(iv)(f). The present appellants (tenants) preferred an appeal against the order dated 17.04.1999 to the Collector. The appeal was decided on 24.04.2001. The order of Land Reforms Officer was set aside. The matter was again remanded to the Land Reforms Officer, Jawali for fresh decision after taking into consideration the land, which was already in the ownership of land owner and to complete the shortfall upto the limit of 5 acres for resumption of land.

2(iv)(g). Respondent No.3 challenged the order dated 24.04.2001 passed by the Collector, before the Divisional Commissioner. The Divisional Commissioner vide order dated 07.03.2005, upheld the order passed by the Collector on 24.04.2001. He held that the Land Reforms Officer, Jawali, in his order dated 17.04.1999, had not taken into consideration the land owned by respondent No.3 in other mohals.

Third Round:-

2(iv)(h). Pursuant to the order passed by the Collector on 24.04.2001, as upheld by the Divisional Commissioner on 07.03.2005, the matter reached the Land Reforms Officer for the third time. The Land Reforms Officer decided the case for the third time on 23.06.2006. He held that respondent No.3 was not entitled to resume any land from the tenants as he was already in possession of the land in excess of permissible limit of 5 acres. The

resumption application moved by respondent No.3 on 18.10.1985 was rejected.

2(iv)(i). Respondent No.3 did not succeed in appeal before the Collector, Kangra, who vide order dated 04.06.2007, upheld the order dated 23.06.2006.

2(iv)(j). Further appeal filed by respondent No.3 was accepted by the Divisional Commissioner on 16.11.2009. It was held that the ceiling of ownership of 5 acres in all is not relevant and is not applicable to respondent No.3, who is covered under Sections 34(1)(d)(dd) and 104(8) & (9) of the Act. The orders dated 04.06.2007 passed by the Collector and 23.06.2006 passed by the Land Reforms Officer, Jawali, were set aside. Respondent No.3 was allowed to resume land from each tenant upto 5 acres.

2(iv)(k). Aggrieved, the tenants, i.e. present appellants, filed revision petition before the Financial Commissioner. Taking stock of the entire litigation and applicable legal provisions, the Financial Commissioner vide order dated 22.01.2013, upheld the order dated 16.11.2009 passed by the Divisional Commissioner. Accordingly, the revision petition was rejected.

2(v). Aggrieved against the orders passed by the Divisional Commissioner on 16.11.2009 and by the Financial Commissioner on 21.02.2013, whereby respondent No.3 was allowed to resume land upto 5 acres from each tenant, writ petition was filed by the appellants. Learned Single Judge dismissed the writ petition on 14.06.2018. Not satisfied with the ever flowing litigation, the tenants have preferred the instant appeal against the judgment passed by the learned Single Judge.

3. Contentions:-

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

Learned counsel for the appellants contended that respondent No.3 cannot be allowed to resume 5 acres of land from the tenants. Learned counsel submitted that besides respondent No.3, there were other co-owners,

namely Amar Singh and Sahib Singh. Milkhi Ram (predecessors-in-interest of the appellants) was inducted as tenant over the land in question by all the co-owners. The other co-owners had not exercised their right of resumption of land. The right, title and interest of other two co-owners in the tenancy land to the extent of their shares as per provisions of Section 104 of the Act, had extinguished. Therefore, respondent No.3 could not be allowed to resume the tenancy land. Learned counsel also argued that the appellants had been conferred proprietary rights with respect to the land falling to the shares of Amar Singh and Sahib Singh. The corresponding entries were made in the revenue record. Therefore, there was no occasion for the authorities to allow respondent No.3 to resume 5 acres of land from the appellants.

Defending the impugned judgment, learned Senior Counsel for contesting respondent No.3 referred to the entire chequered history of the litigation. In particular, he brought the attention of the Court to the judgment dated 20.10.1986, passed by the Assistant Collector 1st Grade, Nurpur, in a suit filed by respondent No.3 under Section 58 of the Act, wherein respondent No.3 was held to be the exclusive owner over the land in question and entitled to claim rent from the present appellants. Learned Senior Counsel contended that respondent No.3, being an Ex-serviceman, was entitled to resume 5 acres of land from the tenants in accordance with provisions of Section 104(1), (8) (9) and Section 34(d)(dd) of the Act.

4. Observations:-

4(i)(a). Section 104 of the Act gives right to a tenant other than occupancy tenant to acquire interests of landowner. Besides conferring proprietary rights of tenancy lands upon non-occupancy tenants, the section also provides right to the landowner to resume the tenancy land before, the notified date, either 1.5 acres of irrigated or 3 acres of un-irrigated land from one or more than one tenants for his personal cultivation. On such resumption, right, title and

interest of the tenants over the tenancy land get extinguished. Section 104(1)(2) and (3) read as under:-

> *"104. Right of tenant other than occupancy tenant to acquire interests of landowner.- (1) Notwithstanding anything to the contrary contained in any law, contract, custom or usage for the time being in force, on and from the commencement of this Act, if the whole of the land of the landowner is under non-occupancy tenants, and if such a landowner has not exercised the right of resumption of tenancy land at any time since January 26, 1955, under any law as in force:-*
>
> *(i) such a landowner shall be entitled to resume before the date to be notified by the State Government in the official Gazette and in the manner prescribed, either one and a half acres of irrigated land or three acres of un-irrigated land under tenancy from one or more than one tenants for his personal cultivation and the right, title and interest (including contingent interest, if any) of the tenant or tenants, as the case may be, therefrom shall stand extinguished free from all encumbrances created by the tenant or tenants to that extent:*
>
> *Provided that if the tenant has taken loan from the State Government, a co-operative society or a bank for the improvement of tenancy land which the landowner has resumed under clause (i) or clause (ii) and has used such loan for the improvement of such land, then the landowner shall be liable to repay the outstanding amount of such loan and to the extent actually used for the said purpose and interest thereon to the State Government or to the Cooperative Society or a bank, as the case may be, proportionate to the improved land resumed by him;*

Provided further that the landowner shall not be entitled to resume from a tenant more than one half of the tenancy land;

(ii) in case the landowner holds less than one and a half acres of irrigated land or three acres of un-irrigated land in his personal cultivation, he shall be entitled to resume tenancy land only to make up the land under his personal cultivation to the extent of one and a half acres of irrigated land or three acres of un-irrigated land, as the case may be, subject to the other conditions laid down in this section;

(iii) the right, title and interest in the rest of the tenancy land of the landowner, who is entitled to resume land under clauses (i) and (ii) shall vest in the tenant free from all encumbrances with effect from the date to be notified by the State Government in the Official Gazette;

(iv) in case the land under the tenancy is partly irrigated and partly un-irrigated and the landowner intends to resume land of both these classes, he shall be entitled to do so in the ratio and manner to be prescribed;

(v) in the event of any dispute between the landowner and the tenant with regard to the selection of land for resumption, the first right of selection of the land shall be that of the tenant who may exercise his right in the prescribed manner and before the date to be notified by the State Government in this respect in the Official Gazette;

(vi) in case the tenant fails to exercise his right of selection of land by the date notified under clause (v), the Land Reforms Officer shall determine his share after giving the parties an opportunity of being beard. In such a case also, the tenant shall be given the first choice to select the land.

(2) Where the landowner does not cultivate the land resumed under sub-section (1) personally within one year from taking possession thereof, then such land shall vest in the State Government on payment of an amount at the rate of ninety-six times the land revenue plus rates and cesses and such land shall be disposed of by the State Government in such manner as may be prescribed. In such an event the first right to get such land shall be that of the tenant from whom the land was resumed by the landowner.

(3) All rights, title and interest (including a contingent interest, if any) of a landowner other than a landowner entitled to resume land under sub-section (1) shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the Official Gazette vest in the tenant free from all encumbrances:

Provided that if a tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy."

4(i)(b). As per Section 104(8) of the Act, except in the manner indicated under Section 104(9), the provisions of Section 104(1) to (6) will not apply to such tenancy lands, where the landowner is a serving member of the Armed Forces or is father of a person serving in Armed Forces upto the extent of inheritable share of such a member of the Armed Forces. As per Section 104(9), the provisions of Sub-section 104(1) to (6) will remain inapplicable to such tenancy lands during the period of service of these persons (landowners) in the Armed Forces. Thereafter, the landowners of this category can resume the land in accordance with and to the extent mentioned in Section 34. Provisions of Section 104(8) and (9) read as under:-

"(8) Save as otherwise provided in sub-section (9), nothing contained in sub-sections (1) to (6) shall apply to a tenancy of a landowner during the period mentioned for each category of such landowners in sub-section 9 who,-

(a) is a minor or unmarried woman, or if married, divorced or separated from husband or widow; or

(b) is permanently incapable of cultivating land by reason of any physical or mental infirmity; or

(c) is a serving member of the Armed Forces; or

(d) is the father of the person who is serving in the Armed Forces upto the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner.

(9) In the case of landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (1) to (6) shall not apply,-

(a) in case of a minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub-section (8) during their life time;

(b) in case of persons mentioned in clauses (c) and (d) of sub-section (8), during the period of their service in the Armed Forces subject to resumption of land by such persons to the extent mentioned in first proviso to clauses (d) and (dd) of sub-section (1) of section 34.

"Provided that nothing contained in this section shall apply to such land which either owned by or is vested in the Government under any law, whether before or after the commencement of this Act, and is leased out to any person."

4(i)(c). Proprietary rights of tenancy land where its landowner is a serving member of Armed Forces, cannot be conferred over non-occupancy tenants. Such landowner has right to resume the tenancy land in accordance with Section 104(1), (8) & (9) and Section 34 of the Act. The extent to which he can resume the land is indicated in Section 104(9) read with Section 34 of the Act. Section 34(dd) of the Act provides that where tenancy land comprises share of a landowner-member of the Armed Forces covered by Section 104(8), then such a landowner will be entitled to eject a tenant from such land upto a maximum of 5 acres. Sub-section (1) of Section 34 reads as under:-

> *"34. Grounds of ejectment of tenants.-(1) A tenant other than occupancy tenant shall not be liable to ejectment from his tenancy except on anyone or more of the following grounds, namely:-*
>
> *(a) that he has used the land comprised in the tenancy in a manner which renders it unfit for the purposes for which he holds it;*
>
> *(b) that he, where rent is payable in kind, has failed without sufficient cause to cultivate or arrange for cultivation of the land comprised in his tenancy in the manner or to the extent customary in the locality in which the land is situate;*
>
> *(c) that he sublets the holding or part thereof for profit without the consent of the land-owner:*
>
> *Provided that a member of the Armed Forces, an unmarried woman, or if married, divorced or separated from husband of a widow, a minor, a person suffering from physical or mental disability because of which he cannot cultivate the land himself, a person prosecuting studies in a recognized institution and a person under detention or imprisonment shall not be liable to ejectment because he sublets the holding or a part thereof without the consent of the land-owner;*

(d) that he holds his tenancy, from a person who created such tenancy within a period of six months before he became a member of the Armed Forces or while he was serving in the Armed Forces and wants to cultivate it himself on his ceasing to be member of the Armed Forces;

(dd) that he holds his tenancy on the land comprising the share of a member of the Armed Forces covered by clause (d) of sub-section (8) of section 104 and who wants to cultivate it himself on his ceasing to be a member of the Armed Forces:

Provided that such person or member of Armed Forces referred to in clauses (d) and (dd) above, as the case may be, shall be entitled to eject a tenant from such land upto a maximum of five acres, in the prescribed manner:

Provided further that a tenant so ejected shall be restored to possession of the land if the landowner after ejecting him does not within one year cultivate it personally:

Provided also that if a tenant holding land from persons mentioned in clauses (d) and (dd) of this sub-section is also a member of the Armed Forces, the provision of first proviso shall not apply and the tenancy shall remain and the ejectment from tenancy shall only be on the grounds given in clauses (a) to (c) of this sub-section.

(e) that the tenant as failed to pay rent within a period of six months after it falls due:

Provided that no tenant shall be ejected under this clause unless he has been afforded an opportunity to pay the arrears of rent within a further period of six months from the date of the decree, or order directing his ejectment, and he had failed to pay such arrears during that period……"

4(ii). Section 104(3) of the Act states that non-occupancy tenant shall acquire proprietary rights in respect of tenancy land except that which can be resumed by the landowner. Vestment of proprietary rights in the non-occupancy tenants is automatic except in case of landowners falling in the protected categories. In such cases, the vestment of land in tenants is deferred till the landowner continues to remain protected in terms of Section 104 of the Act. In other words, unless the landowner is entitled to resume the land, the vestment of proprietary rights in the non-occupancy tenant is automatic. Landowner serving in the Armed Forces falls in the protected category. He is allowed to resume tenancy land in accordance with Section 104(8) (9) and Section 34 of the Act. As per Section 34, a non-occupancy tenant can be ejected from tenancy land on the grounds indicated therein. The grounds for ejectment given in Section 34(d) & (dd) pertain to those tenancy lands, whose landowner is member of Armed Forces. In terms of Section 34 of the Act alongwith its provisos, such landowner, on ceasing to be a member of Armed Forces, is entitled to eject a tenant from his land upto a maximum of 5 acres.

In the instant case, the land under the tenancy of the appellants is exclusively owned by respondent No.3. This has been held to be so in the judgment dated 20.10.1986 passed by the Assistant Collector 1st Grade, Nurpur, District Kangra, decreeing the suit filed by respondent No.3 under Section 58 of the Act. He was held entitled to the arrears of rent with respect to the land in question from the appellants. In this suit, besides the brothers of respondent No.3, the appellants were also parties therein. All have accepted the judgment. The same has attained finality. There is no escape from the conclusion that respondent No.3 is the exclusive owner of the land in question.

Being in exclusive ownership of the land and being a member of the Armed Forces, the provisions of Section 104(1), (8) & (9) and 34(dd) of the

Act come into play. The appellants-tenants could not be conferred proprietary rights over the land owned by a member of Armed Forces. Respondent No.3-landowner had the right to resume land upto 5 acres from the appellants. He exercised his right to resume the tenancy land in 1985 after his retirement from the Army. His personal holding or land in his cultivation was not to be calculated in order to determine the extent of land to be allowed to be resumed by him. Respondent No.3 was entitled in law to resume maximum of 5 acres of land from the appellants-tenants irrespective of landholding in his own cultivation. The order passed by the Financial Commissioner on 22.01.2013 is in accordance with law and was rightly not interfered with by the learned Single Judge.

5. No other point was urged.

Therefore, for all the aforesaid reasons, we find no error in the judgment passed by the learned Single Judge. Consequently, the instant appeal lacks merit and is accordingly dismissed. Pending miscellaneous application is also disposed off.

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

Between:-

SHRI SURINDER PAL BAMBA, SON OF LATE SHRI DARYAI LAL BAMBA, PARTNER M/S. ALFA RESTAURANT, 14, THE MALL, SHIMLA, H.P.

.....PETITIONER

(BY MR. G.C. GUPTA, SENIOR ADVOCATE WITH MS. MEERA DEVI, ADVOCATE)

AND

1. SHRI JOGINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.
2. SHRI JATINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.
3. MS. SUSHMA KUTHIALA, WIFE OF SHRI JOGINDER LAL KUTHIALA;

ALL RESIDENTS OF 11, CANAL ROAD, JAMMU (J&K).

.....RESPONDENTS

(BY MR. SUNEET GOEL, ADVOCATE)

CIVIL REVISION No. 183 of 2017
DECIDED ON:07.09.2021

H.P. Urban Rent Control Act, 1987 - Section 24(5) - Matter was simultaneously listed for moving of appropriate application as well as RWs by the Rent Controller- Held- Ld. Rent Controller has erred in ordering the simultaneous listing of case for recording of RWs also for 29.02.2016, for which date, the case otherwise was listed for moving appropriate application- Petition partly allowed- Order modified.

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

O R D E R

By way of this revision petition filed under Section 24 (5) of the H.P. Urban Rent Control Act, 1987, the petitioner/tenant has challenged order dated 25.02.2016, passed by the Court of learned Rent Controller, Court No. 2, Shimla, vide which, while framing additional issues on the strength of the amended reply and while granting time to the petitioner herein to move appropriate application, the matter was in addition also fixed for recording the statement of respondent's witnesses (R.Ws.)

2. Mr. G.C. Gupta, learned Senior Counsel for the petitioner has argued that the petitioner has no grievance with the order dated 25.02.2016, except to the extent whereby while ordering the matter to be listed for 29.02.2016 for moving appropriate application, the case was simultaneously listed for recording statements of R.Ws also, because order of the learned Rent Controller to this extent, which in fact is a hand written order and was an afterthought, nullified the right conferred upon the petitioner to move an appropriate application. Learned Senior Counsel submits that the petitioner shall be satisfied in case this petition is disposed of with the direction that it will be after the filing of the appropriate application and the order passed upon the same that the learned Rent Controller may fix a date for recording the statement of the R.Ws.

3. Mr. Suneet Goel, learned Counsel for the respondents/ landlord has argued that the impugned order suffers from no infirmity because all that was mentioned in the same was that the case was listed for moving appropriate application or for recording statements of R.Ws.

4. I have heard learned Counsel for the parties and also gone through the impugned order.

5. This order was passed by learned Rent Controller on 25.02.2016, which stood assailed by way of present revision petition in the year 2017. Since then, this petition is hanging fire, and as a result thereof, the proceedings in the rent petition have not been able to proceed any further.

6. As this Court is satisfied that the learned Rent Controller has erred in ordering the simultaneous listing of case for recording of R.Ws also for 29.02.2016, for which date, the case otherwise was listed for moving appropriate application, the impugned order to this extent requires interference. When the learned Rent Controller had ordered the listing of the case for 25.02.2016 for the purpose of filing of an application by the party concerned, it is not understood as to on what basis it simultaneously ordered

the case to be listed on the same date for recording the statements of the R.Ws too. The matter should have been listed for recording of statements of the R.Ws only in the event of the application in issue being not filed on or before the date so fixed by the Court or in the event of the application being filed, then, after appropriate orders stood passed upon it. To this extent, the impugned order is not sustainable in the eyes of law and is liable to be set aside. Ordered accordingly.

7. This petition is thus partly allowed and order dated 25.02.2016 is ordered to be modified to the extent indicated hereinabove.

8. It is further ordered taking into consideration the fact that the rent petition, as the Court stands informed, pertains to the year 2000, appropriate application, as was allowed to be moved vide order dated 25.02.2016 by the learned Rent Controller, shall be filed by the petitioner, within a period of two weeks from today, if so advised and the same shall be disposed of by the learned Rent Controller on or before 30th October, 2021. In addition, learned Rent Controller shall also make an endeavour to adjudicate the main petition as expeditiously as possible. Parties through Counsel are directed to appear before learned Rent Controller on 13.09.2021.

The petition stands disposed of in above terms. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

1. VIJAY KUMAR SON OF BISHAN DASS, VILLAGE AND PO GAGRET, TEHSIL AMB, DISTRICT UNA, HP.
2. SHASHI KUMAR SON OF GOPAL CHAND, RESIDENT OF VILLAGE AND PO KUTHERA, HASWAL, TEHSIL AMB, DISTRICT UNA, HP.

3. VIJAY KUMAR SON OF SADHU SINGH, RESIDENT OF VILLAGE AND PO BADOH, TEHSIL & DISTRICT UNA, HP.

.....PETITIONERS

(BY M/S SUBHASH SHARMA, ADVOCATE)

AND

1. STATE OF HP THROUGH SECRETARY (I&PH) TO THE GOVT. OF HP, SHIMLA.
2. SUPERINTENDING ENGINEER, IPH CIRCLE, UNA, DISTRICT UNA, HP.
3. JIWAN SINGH SON OF ROSHAN LAL, VILLAGE OEL, TEHSIL AMB, DISTRICT UNA, HP.
4. MUKESH KUMAR SON OF HOSHIAR SINGH, RESIDENT OF VILLAGE GHANARI, TEHSIL AMB, DISTRICT UNA, H.P.

.....RESPONDENTS

(MR.ASHOK SHARMA, ADVOCATE GENEAL WITH M/S SUMESH RAJ AND ADARSH SHARMA, ADDITIONAL ADVOCATE GENERALS WITH M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENEALS, ADVOCATE FOR R-1 AND R-2; NONE FOR RESONDENTS NO. 3 AND 4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.243 OF 2019
DECIDED ON:02.09.2021

Constitution of India, 1950 - Article 226 - R&P Rules - Appointment for the post of Pump Operators- Selection Committee adopted the criteria as prescribed in the R and P Rules for determining the merit of the candidates, including that of the petitioner and the private respondents- Held- A candidate elder in age and who has obtained educational qualification earlier, has to be

given preference over others who are younger in age and have obtained educational qualifications later on- Selection Committee selected the candidates who were found more meritorious than the petitioners- petition dismissed being without any merit.

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

O R D E R

Mr. Rajesh Kumar, Assistant Engineer and Mr. Daljeet Singh, JOIT, I&PH, Una, are present in the Court in person with record requisitioned.

2. By way of this petition, the petitioners have prayed for the following reliefs:-

> *"(i) That directions may kindly be directed to select the applicants for the above said posts of Pump Operators on the strength of year of completion of the concerned courses, which entitles them to the above said post.*
> *(ii) Record of the case may kindly be summoned.*
> *(iii) Any other and further order which this Hon'ble Court deems fit and proper, be also passed."*

3. Case of the petitioners is that the respondent-department invited applications for making appointments against the posts of Pump Operators. The petitioners being eligible to be appointed as such were called upon to participate in the interview. Despite the petitioners successfully participating in the interview and despite the petitioners being fully eligible to be appointed against the posts in issue, the respondent-department selected and appointed the private respondents over and above the petitioners, who had completed their courses much later in point of time as compared to the petitioners. Appointment of the private respondents stands assailed *inter alia* on the ground that the respondent-department could not have had ignored the petitioners for appointment against the posts of Pump Operator as they were elder in age to private respondents and had gained eligibility earlier.

4. The petition is resisted by the department *inter alia* on the ground that the posts in issue were strictly filled up as per the Recruitment and Promotion Rules which *inter alia* contain the criteria which was to be adopted for the purpose of considering the eligible candidate for appointment, and in terms thereof, private respondents were more found meritorious than the petitioners, and accordingly, they were appointed against the posts in issue.

5. I have heard learned Counsel for the parties and gone through the pleadings as well as record of the case. In terms of the last order passed by the Court, record of the selection process has also been produced by the State.

6. The foundation of the case of the petitioners is that as they had passed ITI course in the concerned trade prior to the private respondents, therefore, they had a right to be appointed against the post in issue over and above the private respondents. This is what has been stated in paras-6 and 7 of the petition, wherein besides taking the stand that the petitioner had completed the Courses before the private respondents, it has also been mentioned by the petitioners that age of the participating candidates also ought to have been considered by the respondent-department. There is no challenge with regard to the selection process on the ground that the same was carried out by the department in violation of the Recruitment and Promotion Rules or the act of appointment of the private respondents as an act colourable exercise of power by the department or a malafide act.

7. A perusal of the Recruitment and Promotion Rules, copy whereof is appended with the reply as Annexure R-1, demonstrates that the post of Pump Operator is a non-selection post, which is to be filled in 50% by way of direct recruitment on contract basis and 50% by way of promotion. The essential qualifications in terms of the Recruitment and Promotion Rules for being eligible to be considered for appointment is Matriculation and certificate in trades of Electrician/Wireman/Diesel Mechanic/ Pump Operator/Motor

Mechanic/Pump Operator-cum-Mechanic from a recognized I.T.I. and knowledge of customs, manners and dialects of Himachal Pradesh are desirable qualifications. Rule 15-A(f) thereof further provides for constitution of a committee for selection of contractual appointees, and in terms thereof, the selection has to be made by assessing a candidate by distribution of marks as under:-

Sl. No.	Particulars	Marks	Remarks
1.	Essential Qualifications	30	As per percentage of marks in Matriculation
2.	Tech/Professional Qualification	50	As per percentage of marks in ITI course.
3.	Customs, Manners & Dialect of H.P. etc.	10	
4.	Viva-Voce	10	

8. Record which has been produced by the State demonstrates that the Selection Committee adopted the criteria as prescribed in the Recruitment and Promotion Rules for determining the merit of the candidates, including that of the petitioners and the private respondents.

9. In terms of the record, petitioner No. 1 Vijay Kumar (OBC Category) obtained 58 marks out of 100. Petitioner No. 2 Shashi Kumar (OBC Category) obtained 65.75 marks out of 100. Petitioner No. 3 Vijay Kumar (General Category) obtained 67.25 marks out of 100. Record further reveals that the last candidate selected from OBC category had secured 69.25 marks out of 100. Meaning thereby that the marks obtained by petitioners No. 1 and 2 were less than the marks obtained by the last candidate selected of their respective category.

10. Similarly, as per record, last candidate from the General category had secured 70.50 marks out of 100, whereas petitioner No. 3 had obtained 67.25 marks out of 100, i.e. less marks than the last candidate selected of that particular category.

11. Incidentally, private respondent No. 3 Jiwan Singh, whose selection has been challenged by the petitioners through this petition neither belongs to OBC category nor to General category but he belongs to Scheduled Caste category and is stated to have secured 69.50 marks out of 100 in terms of the evaluation made by the Selection Committee. This Court fails to understand as to what locus the petitioners otherwise had to challenge the appointment of respondent No. 3, who neither belongs to OBC category nor to General category. Similarly, respondent No. 4 Mukesh Kumar, who belongs to OBC category has been awarded 69.50 marks out of 100 by the Selection Committee, i.e. more marks than the petitioners No. 1 and 2 belonging to that particular category. Thus, it is apparent and evident from the record that in the assessment of the merit of the candidates which was made by the Selection Committee, the selected candidates were found more meritorious than the petitioners.

12. Now coming to the grounds on which appointment of the private respondents has been assailed by the petitioners, all that this Court can observe is this that the grounds are completely flimsy and borne out from the figment of imagination of the petitioners. As mentioned hereinabove also, the petitioners have assailed the appointment of the private respondents only on the ground that the respondent-department has ignored the age factor and the factum of the petitioners having obtained educational qualifications prior in time than the private respondents. While going through the Recruitment and Promotion Rules, a close scrutiny of the same demonstrates that there is no provision in the same that while selecting the candidates against the post in issue, a candidate elder in age and who has obtained educational qualification

earlier, has to be given preference over others who are younger in age and have obtained educational qualifications later on. This demonstrates that the grounds, which have been taken in the petition, are without any lawful basis.

That being so, in view of discussion held hereinabove, this Court does not finds any merit in the present petition and the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand dismissed accordingly.

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

Between:-

LALIT KUMAR S/O SH. HARAI SINGH VILLAGE AND POST OFFICE GUMMA, TEHSIL JOGINDERNAGAR, DISTRICT MANDI (HP)

.....PETITIONER

(BY MR. DEVENDER K. SHARMA, ADVOCATE)

AND

1. HIMACHAL PRADESH UNIVERSITY, SUMMER HILL, SHIMLA-4 THROUGH ITS REGISTRAR
2. SELECTION COMMITTEE, INFORMATION SCIENTIST (LIBRARY) UNDER INFLIBNET PROGRAMME, THROUGH ITS CONVENER.
3. EXECUTIVE COUNCIL, HIMACHAL PRADESH UNIVERSITY, SUMMER HILL, SHIMLA-4 THROUGH ITS SECRETARY.
4. MS. SHEBA PARMAR D/O SH. M.S. PARMAR, PINE VILLA, NEAR SHIV MANDIR, SUMMBER HILL, SHIMLA-1.

.....RESPONDENTS

(MR. SURENDER VERMA, ADVOCATE FOR RESPONDENTS No. 1 TO 3;
MRS. RANJANA PARMAR, SENIOR ADOVCATE WITH MR. KARAN SINGH PARMAR, ADVOCATE FOR RESPONDENT NO. 4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.553 OF 2020
RESERVED ON:05.08.2021
DECIDED ON: 03.09.2021

Constitution of India, 1950- Article 226- Appointment for the post of Information Scientist (Library) Ordinance 3.3(a)(1) of Himachal Pradesh University- Objection qua qualification- Held- There is no illegality in the degrees of M.A. (English) and MCA obtained by respondent No. 4 from the respondent University especially as these degree were not obtained by simultaneously joining the courses as alleged by the petitioner being devoid of any merit- Petition dismissed.

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

J U D G E M E N T

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

Respondent-University vide advertisement No. 03/2011 advertised various posts including one post of Information Scientist (Library) in the pay scale of `2200-4400 (UGC). Last date for submission of the applications for the post in issue was 25.11.2011. Essential qualifications prescribed for the post in issue were as under:-

"a) B.E. (Computer) or
b) Master degree in Computer Application (MCA) or

c) Master's degree in Library and Information Science (M. Lib. I.Sc.) and Post Graduate diploma in Computer Application (PGDCA) or

d) Bachelor's degree in Library and Information Science (B.Lib. or B.Lib. I.Sc.) with three years experience in the field and post Graduate Diploma in Computer Application (PGDCA)"

All degrees/diplomas shall be from recognized University/Institution with minimum 55% marks. Copy of the essential qualification prescribed by recruitment branch of respondent university is annexed herewith as annexure A/1 for the kind perusal.

2. According to the petitioner, he being eligible applied for the post in issue and was invited for interview, which was held on 17.10.2012. According to him, information gained by him under the Right to Information Act demonstrated that the committee of the University submitted its recommendations on 17.10.2012 and recommended the name of respondent No. 4 for being appointed against the post of Information Scientist (Library) without verifying the validity and genuineness of the documents submitted by the said respondent. Respondents No. 1 to 3 did not announce the result of the post till 27.01.2016 for the reasons best known to them. The Executive Council of the respondent-University in its meeting held on 27.01.2016 accepted the recommendations of respondent No. 2 whereby said selection committee had recommended the name of respondent No. 4 for appointment against the post in issue. Copy of the relevant proceedings is appended with the petition as Annexure A-4.

3. When the petitioner came to know about the acceptance of the recommendations of appointing respondent No. 4, he inquired about his comparative merit vis-a-vis respondent No. 4.

4. His case is that respondent No. 4 has obtained degrees in three courses within a span of five years, which according to him, is not permissible.

5. Thus, as per the petitioner, name of respondent No. 4 has been recommended by the respondent-University by ignoring the provisions of the Act and Ordinances of the Himachal Pradesh University, especially Ordinance 3.3(a)(1), in terms whereof, no student shall be allowed to join two full time regular Degree courses of study simultaneously. According to the petitioner, respondent No. 4 could not have completed her M.A. (English) and Master's of Computer Applications simultaneously, and besides this, the time period for doing B.Tech. degree is also overlapping, which she had obtained from IGNOU. On these bases, the petitioner has prayed that the recommendations made by respondent No. 2 vide Annexure A-3, wherein the name of respondent No. 4 has been recommended for appointment against the post of Information Scientist (Library), be set aside and respondent No. 2 be directed to issue appointment letter in favour of the petitioner.

6. In response to the averments made in the petition, the stand of respondents No. 1 to 3 is that respondent No. 4 completed her B.A. in April, 2003, thereafter, she joined M.A. (English) in July, 2003 and she appeared in the 4th Semester exams thereof in June, 2005. Respondent No. 4 completed her M.A. (English) in November, 2006 as a private candidate, and thereafter, she improved her scores in June, 2007, in terms of provisions of Ordinance 6.23 of the First Ordinance of the Himachal Pradesh University. Respondent No. 4 joined Master's of Computer Applications (MCA) course, which is of three years duration, in June, 2005 and she completed the same in June, 2008 from the IGNOU. Respondent No. 4 completed her Bachelor's of Information Technology (BIT) course in December, 2006 from IGNOU as a correspondence student. As per respondents No. 1 to 3, respondent No. 4 did not complete two degree courses simultaneously as alleged except BIT correspondence course from IGNOU, for which there was no restriction from the respondent-University.

7. By way of rejoinder, the petitioner has reiterated his stand and rebutted the stand of the respondent-University.

8. I have heard learned Counsel for the parties and also gone through the record of the case including the documents which were placed on record from time to time by the parties.

9. The main allegation of the petitioner is with regard to the private respondent gaining qualifications simultaneously, which as per the petitioner, could not have been gained by her. A perusal of the record of the case demonstrates that the private respondent did her 10+2 from the Himachal Pradesh Board of School Education in March 2000. Thereafter, she completed her Graduation in April 2003. It is not in dispute that the petitioner joined M.A. (English) after completing her Graduation in the year 2003. Duration of the M.A. (English) Degree course was of two years. In the year 2005, i.e. after the duration of Post Graduation course was over, respondent No. 4 joined Master's of Computer Applications course, which she passed out in the year 2008. In this background, when this case was listed before this Court on 29.07.2021, the Court passed the following order:-

> *"Heard further.*
>
> *The contention of learned Counsel of the petitioner is that as the private respondent has passed her M.A. in English in the year 2007 only, therefore, by no stretch of imagination, she could have passed her MCA in the year 2008 because she cannot do two Post Graduation courses simultaneously. He has relied upon "1st Ordinance of Himachal Pradesh University in general and Ordinance 3.3(a) in particular", which provides that no student shall be allowed to join two full time degree courses simultaneously.*
>
> *Prima facie, in the considered view of the Court, the term 'simultaneously' as contained in ordinance 3.3(a) of the*

respondent-University, will imply that a candidate cannot take admission in two full time regular degree courses at the same time or in the same academic year(s), but from the contents of said ordinance, it cannot be deciphered that there is a bar that a candidate, who takes admission in one Post Graduation course, cannot take admission in another Post Graduation course without first clearing the course, which has been earlier joined by the candidate, though the period of the course is otherwise over. This observation the Court is making for the reasons that it is not in dispute that after the private respondent completed her Graduation in the year 2003, she joined her Post Graduation Course, i.e. M.A. in English, in the year 2003, duration of which was two years and she joined MCA course in the year 2005, i.e. after the duration of M.A. course was otherwise over.

In this backdrop, a query was put to learned Counsel representing the respondent-University that where is the bar contained in the ordinance or otherwise by the respondent-University to the effect that a person who has joined a particular Post Graduation course, cannot join another course without fully completing the first course within the duration concerned.

Learned Counsel for the respondent-University submits that he may be granted some time to assist the Court on this issue.

As prayed for, list for continuation on 03.08.2021 on which date, some responsible officer from the respondent-University shall remain present in the Court with relevant Statute/Ordinance/Regulation etc. to assist the Court.

10. This was followed by passing of following order by the Court on 03.08.2021:-

> *"In response to order dated 29.07.2021, learned counsel for the respondents-University, on instructions received from Additional Controller of Examination, informs the Court that there is no bar upon a candidate joining another Post Graduation Course in case term of the earlier Post Graduation Course being undertaken by the candidate is over, through he may not have successfully cleared the same, provided seeking admission in another course is on the strength of his/her graduation qualification. Statement of learned counsel for the respondents/ University is taken on record. He is instructed to file an affidavit of the competent authority to this effect. As prayed for, list for consideration on 05.08.2021."*

11. The affidavit filed by Additional Controller of Examination of the respondent-University dated 4th August, 2021, is quoted herein below:-

> *"…. <u>Compliance affidavit in sequel to the order dated 03.08.2021 passed by the Hon'ble Court</u>*
>
> *I Dr. Ashok Kumar Tiwari S/o Sh. Deo Nath Tiwari aged 58 years, R/o Flat No. 6, Block-B Kufta Dhar, Shimla-3, presently working as Additional Controller of Examinations Himachal Pradesh University, being competent officer do hereby solemnly affirms and declares as under:-*
>
> *1. That the above said matter was listed before the Hon'ble court for hearing on dated 29.07.2021, and during the course of arguments a specific query was put to the counsel representing university "that where is the bar contained in the ordinance or otherwise by the respondent University to the effect that a person who has joined a particular Post Graduation course, cannot join another course without fully completing the first course within the duration concerned".*
>
> *2. That in pursuance to the order passed by the Hon'ble court, the provision contained in the First Ordinance of Himachal Pradesh University in general and ordinance 3.3(a) which is relevant is examined at length.*

3. That after examination of the abovementioned relevant provision it is submitted that there is no such bar in the ordinance and a student can join another Post Graduate course without completing previous post graduate course after ensuing regular appearance in all the semester in the stipulated duration of the course.

4. That on dated 03.08.2021 the said matter was again listed before the Hon'ble Court, and the counsel representing the respondent University on instructions apprized the Hon'ble Court that there is no such bar contained in the ordinance or otherwise by the respondent University to the effect that a person who joined a particular Post Graduation course, cannot join another course without fully completing the first course within the duration concerned. That the Hon'ble Court after taken the statement of the counsel for University on record further directed the University to file an affidavit on the competent authority to this effect.

That the contents of the abovementioned affidavit contained in para 1 to 4 are correct and true to the best of my personal knowledge as derived from the record and nothing material has been concealed therefrom."

12. At this stage, this Court would like to dwell upon the eligibility criteria spelled out in the advertisement for the post in issue. In terms of Annexure A-1, essential qualifications prescribed for the post of Information Scientist (Library) *inter alia* were (a) B.E. (Computer) or (b) Master's degree in Computer Applications (MCA) or (c) Master's degree in Library and Information Science (M. Lib.or M. Lib. I. Sc.) and Post Graduate Diploma in Computer Applications (PGDCA).

13. It is not in dispute that respondent No. 4 has been recommended for appointment against the post in issue on the strength of Master's Degree obtained by her in Computer Applications. The allegation of the petitioner that the private respondent has done her M.A. (English) and Master's of Computer Applications simultaneously, is not sustainable. Ordinance 3.3(a) (1) of the Himachal Pradesh University, being relied upon by the petitioner, is as under:-

> *"3.3(a):1. No student shall be allowed to join two full time regular degree courses of study simultaneously. However, student shall be allowed to join the following certificates/ diplomas/postgraduate diplomas/advanced postgraduate diploma courses, alongwith regular courses including Ph.D. i) Certificate/diploma courses in Foreign Languages (German, French and Russian)/PGDPM & LW. ii) Certificate in Computer Application. iii) Certificate in Computer Programming. iv) Any other part time certificate/diploma/post-graduate diploma/advanced post-graduate diploma degree courses may be introduced by the University or through ICDEOL in future."*

14. A perusal of the same demonstrates that in terms of the said Ordinance, no student can join two full time regular degree courses simultaneously. In the considered view of this Court, this means that in the same academic year, no student can join two full time regular degree courses. It is not the case of the petitioner that respondent No. 4 joined two regular full time degree courses, i.e. M.A. (English) and Master's of Computer Applications simultaneously. Respondent No. 4 joined M.A. (English) course in the year 2003 and Master's of Computer Applications course in the year 2005.

15. The Post Graduation in M.A. (English) is of two years duration. There is no bar that a candidate who has joined a Post Graduation course cannot join another Post Graduation course, after the duration of the first Post Graduation course is over until a candidate successfully clears the earlier course. This means that one candidate who has joined one particular Post Graduation course, irrespective of the fact whether such candidate has successfully passed the first course or not, can join another Post Graduation course after the duration of first Post Graduation course is over and not before it. This is more so for the reasons that admission in Post Graduation courses,

especially Master Degree courses, is gained by a candidate on the strength of the Bachelor degree courses.

16. In the compliance affidavit, which has been filed by the Additional Controller of Examinations of the respondent-University, the stand of the respondent-University is that there is no bar contained in the Ordinance or otherwise that a person who joins a particular Post Graduation course, cannot join another Post Graduation course, without fully completing the first course within the duration concerned.

17. In this view of the matter, the objection which has been raised by the petitioner with regard to the qualifications obtained by respondent No. 4 from Himachal Pradesh University in M.A (English) and Master's of Computer Applications, is not sustainable in law.

18. Now coming to the qualifications, which respondent No. 4 has obtained from IGNOU. The stand of the respondent-University is that there is no bar as per Ordinances of the University that a candidate pursuing regular Degree courses from Himachal Pradesh University cannot simultaneously join another course with IGNOU. Be that as it may, as it is not in dispute that eligibility of respondent No. 4 does not depends upon said qualification gained by her from Indira Gandhi National Open University (IGNOU), but the same has been determined on the basis of qualification of Master's of Computer Applications (MCA), which she gained from Himachal Pradesh University, the issue as to whether the petitioner could have had simultaneously undertaken one course from IGNOU simultaneously or not loses its relevance and significance.

19. Accordingly, in view of the discussion held hereinabove, as this court finds that there is no illegality in the degrees of M.A. (English) and Master's of Computer Applications obtained by respondent No. 4 from the respondent-University, especially as these degrees were not obtained by simultaneously joining the courses as alleged by the petitioner, this petition,

being devoid of any merit, is dismissed. Interim order(s), if any, stand vacated. No order as to costs. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

SHRIRAM GENERAL INSURANCE COMPANY LTD. HAVING ITS BRANCH MANAGER, V&PO GUTKAR, DISTRICT MANDI, H.P. THROUGH SH. AMANDEEP SHARMA LEGAL OFFICER AND AUTHORIZED SIGNATORY, SCO-178 1ST FLOOR, SEC. 38-C CHANDIGARH.

.....APPELLANT

(BY MR. VIRENDER SHARMA, ADVOCATE)

AND

1. SMT. REENA DEVI AGE 33 YEARS WD/O LT. SH. SHYAM LAL
2. SH. YUGAL THAKUR AGED 11 YEARS S/O LT. SH. SHYAM LAL
3. JATIN AGED 12 YEARS S/O LT. SH. SHYAM LAL
   ALL R/O VILL. PATHKAN, PO DEHAR, TEHSIL SUNDER NAGAR, DISTT MANDI, HP.
4. SMT. SATISH KUMAR S/O SH. TRAHU RAM R/O VILLAGE KHATEHAR, PO BARMANA, TEHSIL SADAR, DISTT BILASPUR, HP.

.....RESPONDENTS

(BY MR. G.R. PALSRA, ADVOCATE FOR RESPONDENTS NO. 1 TO 3;
NONE FOR RESPONDENT NO. 4.)

FIRST APPEAL FROM ORDER
No. 287 OF 2020
DECIDED ON: 02.09.2021

Employees Compensation Act, 1923 - Section 30 - Deceased aged 36 years, driver by profession died during course of employment, earning wages of Rs.10000/- per month- Compensation was worked out at Rs.9,47,800/- along with interest at the rate of 12% per annum- Held- Ld. Commissioner has erred in holding that monthly wages of deceased @ Rs.10000/- per month and the same is held to be Rs.8000/- per month- Appeal allowed- Order modified to pay compensation of Rs.7,58,240/- alongwith interest @12% per annum.

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

J U D G E M E N T

By way of this appeal filed under Section 30 (1) of the Employee's Compensation Act, the appellant herein has assailed award dated 26.12.2019 passed by learned Commissioner, Court No. 1, Sunder Nagar, District Mandi, H.P. under the Employee's Compensation Act in claim petition No. 1 of 2017, titled as Reena Devi and others vs. Sh. Satish Kumar and another, whereby the appellant-Insurance Company has been directed to pay compensation to the tune of `9,47,800/- alongwith interest at the rate of 12% per annum from 04.02.2017.

2. Brief facts necessary for the adjudication of the present appeal are that an application was filed under Section 3 of the Employee's Compensation Act claiming grant of compensation *inter alia* on the grounds that Shyam Lal, husband of the claimant Reena Devi and father of claimants Yugal Thakur and Jatin, was engaged as a driver by Shri Satish Kumar on Truck bearing registration No. HP-24C-2475. This truck was duly ensured by respondent No. 2 vide policy No. 105051/31/16/003954 w.e.f. 27.03.2016 to

26.03.2017. Sh. Shyam Lal, in the course of his employment, on 04.01.2017, at around 6:30 a.m., suffered a massive heart attack which resulted in his death. The deceased was on duty as on the date of his death and he died during the course of his employment. According to the claimants, the respondents despite having knowledge of the deceased dying during the course of his employment did not compensate them in terms of the provisions of the Employee's Compensation Act, 1923. Accordingly, they filed the petition for compensation under the provisions of the Employee's Compensation Act. Deceased was 36 years old and was earning wages @ `10,000/- per month, which included the diet money. Death of the deceased occurred, as mentioned hereinabove, on 04.01.2017, at around 6:30 a.m., while the deceased, during the course of his employment, was plying the truck in question towards Hamirpur and suffered severe chest pain, resulting in his death. It is the case of the claimants that initially when the deceased suffered pain in his chest, he went to Regional Hospital, Hamirpur, and got first aid there. Thereafter, he returned back to his Truck where immediately he suffered another attack and when the police brought him to the Regional Hospital, Hamirpur, the Medical Officer declared him dead. It is on these bases that compensation was claimed by the claimants.

3. The petition was resisted by respondent No. 1, the owner of the Truck, on the ground that salary of the deceased was not `10,000/- per month as claimed but the deceased was earning an amount of `8000/- per month, which included the daily diet allowance. It was not denied by the owner of the Truck that the deceased died during the course of his employment. It was further the stand of the owner that the Truck in issue, which was being plied by the deceased, was duly insured with the respondent-Insurance Company.

4. The claim petition was resisted by the Insurance Company *inter alia* on the ground that the deceased did not die during the course of employment nor was there any relationship of employer and employee between

the owner of the vehicle and the deceased. It was further the stand of the Insurance Company that the vehicle was being plied in violation of the insurance policy as the driver was not possessing a valid licence to drive the vehicle in question at the time of his death.

5. On the basis of pleadings of the parties, following issues were framed by the learned Commissioner:-

> "*1. Whether Shyam Lal (deceased) was employee of respondent No. 1, as alleged? …OPA*
>
> *2. Whether he died during the course of his employment? …OPA*
>
> *3. Whether the petitioners are entitled for compensation, as alleged?*
>
> *4. Whether there exists no relationship of employer and employee between deceased and respondent No. 1? OPR-2*
>
> *5. Whether petition is not maintainable? OPR-2*
>
> *6. Whether deceased was not having any valid and effective driving licence? …OPR-2*
>
> *7. Relief."*

6. On the strength of the pleadings as well as evidence led to prove their respective stand by the parties, the issues so framed were answered by the learned Commissioner as under:-

> "Issue No. 1: Yes.
>
> Issue No. 2: Yes.
>
> Issue No. 3: Yes.
>
> Issue No. 4: No.
>
> Issue No. 5: No.
>
> Issue No. 6: No.

Relief : Application is allowed as per operative part of the judgment."

7. The Claim petition was thus allowed by the learned Commissioner as under:-

> *"17. On the basis of observations made while deciding issues No. 1 to 6 above, present application is allowed and respondent No. 2 is directed to pay compensation to applicants to the tune of Rs. 9,47,800/- (Rupees Nine Lacs Forty Seven Thousand Eight Hundred Only) along with simple interest at the rateof Rs. 12% per annum from the date when it became due i.e. 04.02.2017 till realization of whole amount. The applicants are entitled to above compensation amount in equal shares. The share of the applicant No. 1 be deposited in her bank account or in the Court. The share of minor applicants No. 2 and 3 be deposited in nationalized bank in the shape of FDRs. Apart from above respondent No. 1 is also directed to pay a sum of Rs. 5000/- as funeral expenses to applicant No. 1. Application stands disposed off accordingly. It after due completion be consigned to record room."*

8. Feeling aggrieved, the appellant/Insurance-Company has filed this appeal, which was admitted by this Court on 22.03.2021, on the following substantial question of law:-

> "*1) Whether the findings returned by learned Commissioner qua the monthly income of deceased are perverse being contrary to the record as well as statutory provisions?"*

9. Mr. Virender Sharma, learned Counsel for the appellant-Insurance Company has argued that the findings which have been returned by the learned Commissioner with regard to monthly wages of the deceased are perverse findings as no evidence was led by the claimants to demonstrate that monthly wages of the deceased were `10,000/-. He has drawn the attention of the Court even to the reply filed by respondent No. 1 and on the strength of the same, he submits that the employer of the deceased had taken a specific stand that monthly salary of the deceased was only `8000/- which included the daily diet. According to appellant, the findings to the contrary returned by learned Commissioner are not sustainable in the eyes of law as the bald contention of the claimants that the monthly salary of the deceased was `10,000/- was not substantiated by leading any cogent evidence. In addition, learned Counsel for the appellant has also submitted that the award is not sustainable in the eyes of law because the learned Commissioner erred in not appreciating that the deceased died on account of heart attack and the same cannot be attributed with the course of employment of the deceased. Leaned Counsel has also argued that the relationship of employer and employee was also not proved on record, and therefore also, the judgment is bad in law.

10. Mr. G.R. Palsra, learned Counsel for the respondents/ claimants has submitted that as owner of the vehicle has not denied that the deceased was engaged as a Driver and it is also not in dispute that the Truck, on which, the deceased was engaged as a Driver, was duly insured with the appellant-Insurance Company, it does not lie in the mouth of the Insurance Company to take the stand that there was no relationship of employer and employee between the owner of the vehicle and the deceased. He also submitted that even if the claimants have not been able to demonstrate that the monthly wages of the deceased were `10,000/- as mentioned in the plaint, the onus was upon the owner and the Insurance Company to have had demonstrated

that the salary of the deceased was not so because they were disputing the same. Learned Counsel also argued that as the deceased suffered heard attack in the course of his employment when he suffered heart attack, therefore, the conclusion drawn by the learned Commissioner that he died during the course of his employment is the correct conclusion. Accordingly, a prayer has been made for dismissal of the appeal.

11. I have heard learned Counsel for the parties and gone through the judgment passed by the learned Commissioner as well as record of the case.

12. As already mentioned hereinabove, this appeal was admitted by this Court on 22.03.2021 on the substantial question of law quoted hereinabove. *De hors* this, this Court, will answer other issues also raised by learned Counsel for the appellant. According to the appellant, the claimants have not established on record the relationship of master and servant between the Truck owner and the deceased. A perusal of the judgment passed by the learned Commissioner demonstrates that the first issue, which was framed by the learned Commissioner, was to the effect that as to whether Shyam Lal (deceased) was an employee of respondent No. 1 as alleged and this issue was answered by the learned Commissioner in affirmative. While answering the issue in affirmative, learned Commissioner took into consideration the specific stand of respondent No. 1 that deceased was his employee. When the relationship of the deceased as an employee has not been disputed by the owner of the vehicle, the onus shifts upon the appellant-Insurance Company to prove to the contrary which it failed to do because not even an iota of evidence has been led on record by the Insurance Company to demonstrate that deceased was not the employee of the owner of the vehicle. Similarly, as it is not in dispute that the deceased was in the course of his employment on the day when he suffered heart attack and died, therefore, the conclusion, which has been derived by the learned Commissioner that death of the deceased

occurred during the course of his employment, is also the correct conclusion. These findings therefore in the considered view of the Court call for no interference.

13. Now coming to the substantial question of law, a perusal of the pleadings demonstrates that the factum of the monthly wages of the deceased being `10,000/- as claimed by the claimants, has been denied by the employer. According to him, the deceased was being paid `8000/- per month, which also included daily diet money. It is settled law that the income of the deceased as claimed in a petition filed under Section 3 of the Employee's Compensation Act, if not disputed by the employer, has to be presumed as claimed. In the present case, income of the deceased has indeed been disputed by the employer. Therefore, the findings returned by the learned Commissioner to the effect that deceased Shyam Lal was receiving `10,000/- per month as wages, when the employer has stated that deceased was getting only `8000/- per month, including the diet money, and no evidence to the contrary was produced on record by the claimants to demonstrate that deceased was receiving `10,000/- per month as wages at the time of his death are perverse findings. Learned Commissioner has erred in holding that the deceased was earning monthly wages @ `10,000/-. To this extent, the finding returned by learned Commissioner are bad and are liable to be set aside as the deceased was earning `8000/- per month in terms of the stand of the employer.

14. Accordingly, this appeal is partially allowed by holding that the monthly wages of the deceased were `8000/- and not `10,000/- per month as assessed by the learned Commissioner. The judgment therefore stands modified to the extent that the conclusion as has been arrived at by the learned Commissioner shall now be modified by taking the monthly wages of the deceased as `8000/- and not `10,000/-. In this background, the appellant-

Insurance Company is directed to pay compensation to the claimants as under:-

50% of the monthly wages of the deceased, i.e. `4000x189.56= `7,58,240/- along with interest at the rate of 12% per annum.

The appeal stands disposed of in above terms. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

GHANSHYAM DASS DECEASED THROUGH LRS:-

1 (a) (i) NIRMALA DEVI,
WIFE OF LATE SH. GHANSHYAM DASS,

1 (a) (ii) GURDARSHAN SINGH S/O LAGE GHANSHYAM DASS,

1 (a) (iii) KULDEEP SINGH, S/O LAGE GHANSHYAM DASS,

1(a) (iv) YASHWANT SINGH, S/O LAGE GHANSHYAM DASS,

ALL RESIDENT OF VILLAGE SAULAR,
TEHSIL BANJAR, DISTT. KULLU,
175123

1 (a) (v) MAHESHWARI D/O S/O LAGE GHANSHYAM DASS,
W/O VINOD KUMAR,
R/O VILL. ANI, TEHSIL ANI,
DISTT. KULLU, H.P.

1 b) SH. YAGYA CHAND,
SON OF LATE SH. UTTAM SINGH,
R/O VILLAGE AND POST OFFICE, BHUNTAR,
PHATI SHILIHAR, KOTHI KOTKANDI,
TEHSIL AND DISTT. KULLU, HIMACHAL PRADESH.

….APPELLANTS

(BY R.L. SOOD, SR. ADVOCATE WITH MR. ARJUN LALL, ADVOCATE)

AND

2. a) KULWANT SINGH,
S/O LATE SH. HARBANS SINGH,
R/O PARLA BHUNTER,
DISTRICT KULLU, H.P.

c) AVATAR SINGH,
S/O LATE SH. HARBANS SINGH,
R/O PARLA BHUNTER, DISTRICT,
KULLU, H.P.

2. a) PREM SINGH,
S/O LATE SH. KEWAL RAM,
R/O SHOP KIPER CHOWKI,
P.O. AND SUB TEHSIL VALI CHOWKI,
DISTT. MANDI, H.P.

c) BALBIR SINGH,
S/O SH. KEWAL RAM,
R/O VILLAGE NAGVAIR,
P.O. CHECHAR, TEHSIL BANJAR,
DISTT. KULLU, H.P.

c) LUDAR SINGH,
S/O LATE SH. KEWAL RAM,
R/O VILLAGE SADHUKHOLA,
P.O. CHECHAR, TEHSIL BANJAR,
DISTT. KULLU, H.P.

d) TILAK RAJ,
S/O SH. KEWAL RAM,
R/O VILLAGE SADHUKHOLA,

P.O. CHECHAR,
TEHSIL BANJAR, DISTT. KULLU,
H.P.

3. a) SH. KESHAV RAM,
S/O SH. DHARAM DASS,
VILLAGE DALI, PO PANJAI,
DISTRICT MANDI, H.P.

3 b) SMT. SMT. TIKMU DEVI,
W/O SH. DORA SINGH,
R/O VILLAGE MALARI,
PO PANJAI, DISTRICT MANDI, H.P.

3 c) SMT. DALU DEVI,
W/O SH. SARVDYAL SINGH,
VILLAGE CHHAMAN,
PO BHARAYAN,
DISTRICT KULLU, H.P.

4. SARDAR SANTOKH SINGH TANEJA,
S/O S. ARJUN SINGH,
CHAIRMAN COMMITTEE,
GURUDWARAGRANTH SAHIB BHUNTER,
DISTT. KULLU, H.P.

5. JOGINDER SINGH MAJAHAN,
S/O S. NAND SINGH, VICE CHAIRMAN,

6. JOGINDER SINGH PASRICHA,
S/O BADR SINGH, SECRETARY,

7. MANJEET SINGH CHAWLA,
S/O S. SOHAN SINGH CASHIER.

8. TEJA SINGH, SON OF BHAGAT SINGH,
MEMBER.

9. SARDAR JAGDISH CHAND,
S/O BHAJNEEK SINGH, MEMBER.

10. S. LAKHBIR SINGH,
S/O S. SHOAN SINGH,

ALL MEMBERS OF THE AFORESAID COMMITTEE,
GURUDWARA GRANCH SAHIB,
BHUNTER, DISTT. KULLU, H.P.

....RESPONDENTS

(BY SH. J.S. BHOGAL, SR. ADVOCATE WITH MR. T.S. BHOGAL, FOR R-4, MR BHUPENDER GUPTA, SR. ADVOCATE WITH MR. JANESH GUPTA, ADVOCATE FOR R-5 TO 10)

REGULAR SECOND APPEAL
No. 129 of 1997
Reserved on:10.08.2021
Delivered on:03.09.2021.

Code of Civil Procedure, 1908 - Section 100 - RSA - **Sikh Gurudwaras Act, 1925**- Section 38- Indian Succession Act, 1925 - Section 63- Suit for seeking declaration qua the appointment of Kardar of the Guru Granth Sahib, Bhunter with consequential relief of injunction- Held- Deputy Commissioner, Kullu, is appointed as Caretaker and receiver of the suit property till the relevant statutory process is completed- Appeal allowed- Suit of plaintiff dismissed being barred by law.

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

J U D G M E N T

The plaintiff, instituted Civil Suit No. 216 of 1989, before the learned Senior Sub Judge, Lahaul & Spiti, who was then exercising the powers of Sub Judge 1st Class, Kullu, H.P., and, in the afore civil suit, the plaintiff had espoused for the grant, of the hereinafter extracted decree, against the contesting defendants:-

> "It is therefore prayed that a decree for declaration to the effect that defendant No.1 is not legally appointed Kardar or Bahtamam of Guru Granth Sahib Bhunter and the transfers of the property of Guru Granth Sahib by Shri Uttam Singh defendant No.1 in favour of defendants No. 2 and 3 and other if any is void, and inoperative and are also not legal and for the interest and legal necessity of Guru Granth Sahib and as a consequential relief the defendants be restrained from raising any sort of construction over the suit land i.e. khasra No. 511/920-939 in any manner through a decree for permanent prohibitory injunction and in case the defendants succeed in raising construction during the pendency of the suit then a decree for possession after demolition of the structure raised thereon by the defendants with costs of the suit be passed in favour of the plaintiff and against the defendants in the interest of justice".

The learned trial Court through a verdict, made thereons, on 18.6.1993, dismissed the plaintiff's suit. The reason for its dismissing the plaintiff's suit, became comprised in the factum, of one Maghi executing a valid Will in favour of defendant No.1, wherethrough, she appointed him as Kardar of the suit property. Moreover, the further reason which prevailed, upon, the learned trial Court, to make a verdict of dismissal upon the suit (supra), became comprised in the factum, that the disputed purported Gurudwara rather not carrying any of the imperative elements, for its being construable, as a Gurudwara, inasmuch as, there being no Granthi nor any Pathi therein(s), besides in the purported Gurudwara no langar(s) being organized, nor there being thereins or in the premises of the said Gurudwara, the imperative Nishan Sahib. Consequently, the learned trial Judge concluded, that the suit

property, since its inception, though became purchased by one Ishwar Singh, in the name of Guru Granth Sahib, however, for lack of the afore elements rather significatory, of the sacred book, if kept inside the Gurudawara rather being open to the public, to hence make collective worship thereto. Therefore, the holy Guru Granth Sahib, though in whose name the suit property is reflected in the revenue record, as owner thereof, yet, with the elements supra of public worship thereof, for the reasons supra, being amiss, thereupon, the "holy book" being construable to be kept only for the personal worship of the afore Ishwar Singh, and, thereafter for the personal worship of his surviving spouse(s), and, or for the successively validly appointed Kardars.

2. As aforestated, since the Will of Maghi became declared by the learned trial Judge, to be a validly executed testamentary disposition, and, also when defendant No.1 was construed to be a legatee or Kardar, of the suit property, hence the learned trial Judge concluded, that the contesting defendant No.1 alone, rather holds the right to ensure the protection of the property owned by Shri Guru Granth Sahib, and, also holds an exclusive right to perform personal worship, of, the "sacred book".

3. The aggrieved plaintiff instituted, against the afore verdict of dismissal, of, civil suit (supra), a Civil Appeal thereagainst before the learned Additional District Judge, Kullu, District Kullu, H.P., and, the learned first appellate Court, through its verdict, made on 6.6.1997,upon, Civil Appeal No. 43 of 1993, allowed the plaintiff's appeal, and, decreed the plaintiff's suit rather in the hereinafter extracted manner:-

> "In view of my findings on point No.1, above, the present appeal succeeds and the same is accepted. The judgment and decree passed by the learned trial court are set aside and quashed. The suit of the plaintiff for the relief sought in the plaint is decreed without there being any cost. Let decree sheet be prepared accordingly. File of the trial court be sent back with a copy of

this judgment, whereafter the appeal file be consigned to record room after due completion".

4. The defendants became aggrieved from the verdict (supra), as made, by the learned first appellate Court, and, hence are led to constitute thereagainst, the instant second appeal before this Court.

5. The instant second appeal, upon, coming up before this Court, on 30.6.1997, it became admitted, on the hereinafter extracted substantial questions of law:-

1. That whether in the circumstances of the case the judgment and decree of Addl. Distt. Judge Kullu is liable to be set aside and that of the Senior sub Judge to be restored.

2. That whether the appellate court has mis-read and mis-interpreted the evidence and documents on record particularly Ex, Dx, Ex D2, to D6 and ADW1/A.

3. That whether the lower appellate court has mis-conjecture the document on record.

4. Whether the judgment and decree of lower appellate court is based on extraneous consideration not on record, unnecessary and vague repetition which are not even in the proceedings.

Moreover, through an affirmative order, made on 28.8.2017, upon, CMP No. 3963 of 2017, this Court had also formulated, the embodied therein(s), the hereinafter extracted substantial questions of law,:-

1. Whether the property in question was ever dedicated to establish a Sikh Gurdwara for public worship, if so its effect?

2. Whether the Guru Granth Sahib, was placed in the property for private worship as opposed to public worship?

3. Whether the alleged Gurdwara in question, fulfilled the mandatory criteria to be declared/treated as a Gurdwara for Public Worship confirming to the mandatory requirements of The Sikh Gurdwaras Act, 1925?

4. Whether the mandatory provisions prescribed under the various provisions of The Sikh Gurdwaras Act, 1925 were followed in the present case, warranting the property to be declared as a Sikh Gurdwara for public worship?

5. Whether the mandatory provisions of Section 38 of the Sikh Gurdwaras Act, 1925 have been followed in the present case?

6. Whether both the Courts below lacked inherent jurisdiction in the matter?

7. Whether the will of late Smt. Magi was not proved and whether in the absence of the challenge to the same the Ld. Lower Appellate Court could upset the positive findings recorded by the Ld. Trial Court holding that the

will was proved and that Uttam Singh was the beneficiary thereof?

8. Whether the correctness of the appointment of Uttam Singh as Kardar of the Guru Granth Sahib Bhunter, could not have been gone into by the Ld. Lower Appellate court, as the same was Resjudicata between the parties?

9. Whether the suit of the plaintiff was in any case barred by limitation, which factor has been ignored by the Ld. Lower Appellate Court?

6. The plaintiff had averred, that they are worshipers of Shri Guru Granth Sahib, Bhunter, and, in the afore capacity, they became purveyed an apt leverage, to ensure the preservation of the suit property, as, occurs, in the revenue record, to be owned by Shri Guru Granth Sahib. Moreover, the plaintiff(s) also averred in the suit, that previously one Sardar Santokh Singh, used to manage the affairs of the suit property or Gurudwara. However, the afore Sardar Santokh Singh, left District Kullu, during the riots of 1984, and, thereafter no other Kardar became lawfully appointed, vis-a-vis, the afore stated Gurudwara, and, defendant No.1 Uttam Singh, after the departure of Santokh Singh, started claiming himself to be a Kardar of the above stated Shri Guru Granth Sahib. Moreover, it is averred, that defendant No.1 never became appointed as Kardar of Guru Granth Sahib, hence by any lawful authority. The defendant No.1 in the afore purported capacity of Kardar of Shri Guru Granth Sahib, Bhunter, rather in connivance with the revenue officials, and, in the absence of Sardar Santokh Singh, leased out some portion of the suit property, to defendants No. 2 and 3. The request as made by the plaintiff to defendants No. 2 and 3, not to interfere in the apposite

possession of Guru Granth Sahib, over the afore suit property, upon remaining unheeded, led the plaintiff(s) to institute civil suit supra, claiming therein the afore extracted reliefs.

7. The contesting defendant No.1, instituted a written statement to the plaint, and, contended therein, that he was the lawfully appointed Kardar of Guru Granth Sahib. The afore claim, as made by co-defendant No.1, became rested upon an order made, on 30.3.1990, by the Commissioner Mandi Division, upon, appeal No. 88 of 1988. However, the resting of any claim by co-defendant No. 1, upon, the afore drawn verdict, is a feeble endeavour hence for his staking any valid claim, with respect to his being, the, lawfully appointed Kardar of Guru Granth Sahib. The reason(s) being that, though the Commissioner Mandi Division, did not interfere, with the order of remand, as, made by the Collector, to the revenue officer concerned, to after verification of the factum of possession of the contesting claimants, and, after deciding the controversy with respect to the contesting litigants' claim, for Kardarship of the afore Guru Granth Sahib. However, since the learned Commissioner also in his order of 30.3.1990, pronounced that the verdict of the civil court, of, competent jurisdiction, would predominate the verdict drawn by the revenue officer concerned. Therefore, as stated supra, the verdict, if any, as made with respect to any of the contesting litigants, being the lawfully appointed Kardar(s) of Guru Granth Sahib, is inconsequential, as, any conclusve decision in respect thereof, can be validly made, only by the Civil Court concerned, which decision for reasons drawn hereinafter, rather cannot be made even in the extantly drawn proceedings.

8. Moreover, defendant No.1 has also rested his claim for his becoming appointed, the lawful Kardar of Guru Granth Sahib, on anvil of Will, borne in Ext. AW4/A, hence becoming validly executed by one Magi, and wherethrough, he became constituted, as the legatee of the suit property or as Kardar of Guru Granth Sahib. Though as aforestated, the learned trial Judge

has upheld the validity of Ext. AW4/A. However, the learned first appellate court, contrarily pronounced that, the exhibit supra became not proven to be validly executed, by one Magi. In other words, he concluded that the mandatory provisions, as cast in Section 63 of the Indian Succession Act, hence enjoining valid proof of the Will (supra) rather only through one of the marginal witness thereto, upon, his stepping into witness box, hence proving (a) that the deceased testatrix concerned, in his presence, signing or affixing her mark(s) on the Will, (b) and, his likewise making his impression(s) or signatures thereon, in the presence of the deceased testatrix, rather evidently becoming completely breached. Reiteratedly, and, preeminently rather for want of the attesting witness concerned, hence stepping into the witness box, and, his making the afore statutory testifications, the afore inference became drawn. Since the afore made reason by the learned First Appellate Court, in its hence declaring Ext. AW4/A, to be invalid, also becomes construed by this Court, to be completely valid. Therefore, the dependence, if any, as made thereon(s) by co-defendant No.1, qua his therethrough, being the lawfully appointed Kardar of Guru Granth Sahib, also cannot obviously become accepted by this Court. Moreover, the further reason to dispel the findings rendered by the learned civil Court, vis-a-vis, the validity, of, Will (supra), is comprised in the factum, that though it is a registered Will, and certified copy thereof, become proven from the official records, by the Record Keeper concerned, upon, the latter stepping into the witness box, and, though a rebuttable presumption of truth, is attached, to the afore manner of proof of certified/photocopy(ies) of original(s). Nonetheless, the predominant factum, for will (supra) rather being inferred to become rather clinchingly proven, when rather becomes comprised in, through one of the marginal witnesses' thereto, stepping into the witness box, and, his making candid affirmative testification, vis-à-vis, statutory underlinings (supra), whereas, for wants of adduction of evidence (supra), the will (supra) acquires the vice of voidness.

Therefore, this court concludes, that the afore exhibit, became aptly concluded by the learned first appellate Court, to be not validly proven, to hence become validly executed.

9. The plaintiff's dependence upon Ext. AW2/A, however, become accepted by the learned First appellate Court. Consequently, the learned first appellate Court concluded, that the suit property assumed the colour of public religious trust, though it became purchased by one Ishwar Singh, in the name of Guru Granth Sahib, yet does not bestow, any legal authorization, upon, one Ishwar Singh, and, subsequently, upon his successively appointed Kardar(s), rather to the ouster of the worshipers of sikh religion, and, apart from the afore Ishwar Singh, and, his successively appointed Kardar, to rather bar them from making public worship of Guru Granth Sahib, within the hallowed precincts, hence purportedly designated, as a sikh gurudwara. Imperatively hence it became concluded, that the suit property, since its inception, and, thereafter(s) too, dehors appointment(s) of Kardars, to manage the Sikh Gurudwara, it assumed the colour of a public religious trust, and/or the requisite *animus-dedicandi rather* appertaining to a public place of worship, conspicuously per-se preeminently surging forth, and, also inhering in the suit property. Therefore, the entire sikh congregation became facilitated, to ensure in a Gurudwara hence kept Sh. Guru Grant Sahib, the makings of collective worship thereto(s)**.**

10. However, for testing the validity of the afore made conclusion, this Court is required to peruse the provisions, as contained, in The Indian Trusts Act, 1882, in consonance wherewith trustnama, borne in Ext. AW2/A, as, becomes relied upon by the learned first appellate Court, for making the conclusion supra, hence became executed by one Maghi. However, since a saving clause occurs therein, and, becomes extracted hereinafter:-

> "**Savings**.—But nothing herein contained affects the rules of Muhammadan law as to waqf, or the mutual relations of the

> members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day."

and, with its rather making trite underlings, that the apposite delineated provisions thereof, are not applicable to public or private religions or charitable endowment(s), especially when the afore came into being, before the coming into force of apposite governing therewith statutory enactment. The counsel are at ad idem, that the apposite hence governing the endowments (supra), is the Religious Endowments Act, 1963. Therefore, when the imperative inference rather emerging from an incisive reading, of the hereinabove extracted saving clause, as, borne in the 1882 Act (supra), is, that this Court also becoming required to gather, from a perusal, of Ext. AW2/A, whether the trustnama (supra) became executed before 1963. The year 1963 is significant, as in the afore year the Religious Endowment Act, 1963 came into force, and, when only prior thereto(s), rather created public/private endowments hence became protected by the saving clause afore, or in other words, only qua apposite endowment(s) created before 1963, hence become protected against the application thereon(s) rather of the Second Chapter borne in the Act of 1882 (supra). Since, a reading of the trustnama borne in Ext. AW2/A, makes it vividly apparent, that the date of execution of the afore trustnama, was subsequent to 1963. Thereupon, since the afore saving clause, makes inapplicable hence the mandate of Chapter-2 thereof, only upon, the apposite trust(s) becoming created before 1963. Consequently, when evidently Ex.AW2/A rather became executed subsequent to the enactment supra, in 1963, thereupon obviously, the mandate carried in the Second Chapter of the Act, of 1882 (supra) becomes attracted hence for

fathoming the validity of Ext. AW2/A. Consequently, the validity of Ex.AW2/A is to be tested on anvil of evident satiation being made, vis-a-vis, the 2nd Chapter carried in the 1882 Act (supra). Therefore, the apposite compliances, vis-a-vis, the mandate(s) of the statutory provision, as become carried in Section 10 of the Indian Trust Act, Section whereof is extracted hereinafter, is required to be proven, vis-a-vis, trustnama Ex.AW2/A:

> "10. Who may be trustee.—Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract. No one bound to accept trust.—No one is bound to accept a trust. Acceptance of trust.—A trust is accepted by any words or acts of the trustee indicating with reasonable certainty of such acceptance. Disclaimer of trust.—Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust property from vesting in him. A disclaimer by one of two or more co-trustees vests the trust property in the other or others and makes him or them sole trustee or trustees from the date of the creation of the trust."

The conspicuous necessity for a valid trust rather being validly created, is comprised, in the proven existence of apposite entrustment(s) to the trustees, by author thereof, and, also the trustees are to clinchingly proven to either expressly or impliedly hence accept, the apposite entrustments, as become conveyed through the apposite trustnama. However, a reading of the cross-examination of PW-1 reveals that, the trustees constituted thereunder, never accepted the entrustment, to them, of the suit property. Therefore, since proof of acceptance of the apposite entrustment, either express or implied rather by the trustees , is a statutory *sine-qua-none,* for a valid trust, hence coming

into being. As a corollary, since in the cross-examination of PW-1, an articulation exists, vis-à-vis, lack of knowledge of the trustees concerned qua existence of any trust. Thereupon, no valid dependence can be made by the plaintiff concerned, for claiming through the said exhibit, hence any right for managing, and, looking after the affairs of the suit property owned by Guru Granth Sahib, nor the plaintiff concerned or the trustees concerned, on anvil thereof, can prima facie, oust the claim of co-defendant No.1, in his staking any claim, even if invalid, to as Kardar/Manager, hence manage, and, look after the affairs of the suit property, purchased by one Ishwar Singh, in the name of Guru Granth Sahib.

12. Be that as it may, the author of the trust, one Maghi was also required to prove to be validly owning the suit property. The suit property, is unrebuttably disclosed in the apposite ownership column of the jamabandi, appertaining to the suit property, rather to be owned by Guru Granth Sahib. Necessarily, hence neither Ishwar Singh nor Maghi were ever owners of the suit property, nor any of the afore, could create a valid trust hence for managing, and, looking after the affairs of the suit property, owned by Guru Granth Sahib. In sequel, the decision as made by the learned first appellate Court, upon, the trustnama (supra), inasmuch, as, it being valid, and/or therethrough(s) a valid trust being created, is grossly amiss and misplaced. Even otherwise for reasons hereinafter, the entire controversy (supra) was redressable, through the apposite statutory availments, which however remaining unrecoursed, and, hence obviously cannot become rested by this Court.

13. Though through Ext. PX, exhibit whereof comprises a resolution, passed by the author(s) concerned, with the purported consent of a Kardar one Maghi, the surviving spouse of Ishwar Singh, and, wherethrough a committee became constituted of persons named therein, rather for managing and looking after the affairs of the suit property, owned by Guru Granth

Sahib, hence the plaintiffs rear the suit claim. However, since as aforestated, the learned Divisional Commissioner Mandi, had though affirmed, the order of remand, as, made by the Deputy Commissioner, Mandi, to the Assistant Collector 1st Grade concerned, hence to verify the factum of possession of the suit property, by person(s) concerned, and, to also decide the rival claims of the contesting litigant(s), to the office of Kardar of the suit property, rather owned by the Guru Granth Sahib. Moreover, even if the Divisional Commissioner Mandi, had assigned predominance to the apposite verdict, vis-à-vis, the afore factum, and, as becomes pronounced by the Civil Court of competent jurisdiction. Nonetheless when the decision, as made by the Assistant Collector concerned, upon, the afore controversy rather remains unadduced. As a sequitur, the making of Ext. PX, and, therethroughs the apposite committee, being constituted, rather for managing and looking after the affairs of the suit property, rather owned by Guru Granth Sahib, appears to be an attempt, on behalf of all concerned, to during pendency of the afore sub-judice controversy, before the Assistant Collector concerned, to untenably assume, the role of managing, and, looking after the affairs of the suit property, owned by the Guru Granth Sahib, and, also appears to be obviously hit by the doctrine of *res-sub-judice*. Therefore, Ext. PX is legally inconsequential, for determining the suit claim. Since, the making of a decision (supra) by the revenue officer concerned, would then foist empowerment in the Civil Court concerned, to, test its validity, and, nor when the controversy appertaining to Kardarship is subjudice before him. Moreover, when any action for granting the suit claim, becomes taken by all concerned, rather before a decision being made by the revenue authority concerned, thereupon too, the afore becomes legally unenforceable, unless material surges forth, and, displays that the Assistant Collector 1st Grade, after declining the apposite rival claims, vis-a-vis, Kardarship of the suit property, rather owned by Guru Granth Sahib, had permitted the litigant(s) concerned,

to constitute a committee hence for managing, and, looking after the affairs of the suit property, owned by Guru Granth Sahib. Necessarily, and, obviously rather thereupto, no committee for managing, and, looking after the affairs of the suit property, could have been constituted, through Ext. PX, nor hence Ext. PX assumes any validity, conspicuously, when no order (supra) has been placed on record. Moreover, for reasons hereinafter, unless the statutory mechanism qua therewith became recoursed, recoursings whereof are evidently amiss, thereupon too, no managing committee could ever become validly constituted for any requisite purpose.

14. Contrarily, however, as propounded by the Hon'ble Apex Court, in a judgment, carried in 2007 (7) SCC 482, titled A. A. Gopalakrishan vs. Cochin Devaswom Board and others, the relevant paragraph 10 whereof, becomes extracted hereinafter:-

> "The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees /archakas/shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguaring the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating of crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

It becomes incumbent upon this Court, to safeguard and protect the suit property, only upto the stage, till as hereinafter declared, the relevant statutory recoursings, if yet permissible, are completely recoursed, at the instance of the litigant concerned. Consequently, this Court proceeds to appoint the Deputy Commissioner, Kullu, as caretaker, and, receiver of the suit property, owned by Guru Granth Sahib, upto the relevant statutory processes, if yet permissible, being completed/concluded. The contesting litigants are directed to within two weeks hand over the suit khasra property to the D.C. Kullu. The contesting litigants are also directed to alongwith theirs handing over the entire suit property to the D.C. Kullu, hence, append therewith the completest signatured apposite inventories. Subsequently, the D. C. Kullu shall with the assistance of Sikh scholars, to be chosen by him, hence ensure the maintenance, and, dedicated upkeep of the hallowed precincts rather whereins the sacred book, is installed. He shall also ensure the regular dedicated observances of all rituals appertaining to the Sikh Religion.. Moreover, he shall keep regular audited accounts qua salaries, and, also qua the revenue earned from suit property. In addition, he shall with the assistance of Sikh Sevadars/scholars, shall ensure the future renovations of the shrine, from the incomes realised from the suit property. Necessarily, all licenses/lessees concerned, shall henceforth attorn to the D.C. Kullu.

15. Though, the learned counsel appearing for the aggrieved defendant(s), contended with much vigor, before this Court, that since the Apex Court, in judgment, reported in 2003 (11) SCC 377, titled Shiromani Gurdwara Parbandhak Committee vs. Mahant Harnam Singh C. (DEAD), M.N. Singh & others, hence in paragraphs 14 and 15, paragraphs whereof are extracted hereinafter:-

> "14. The sine qua non for an institution to be treated as a Sikh gurdwara, as observed in the said case, is that there should be

> established a Guru Granth Sahib, and the worship of the same by the congregation, and a Nishan Sahib. There may be other rooms of the institution made for other purposes but the crucial test is the existence of a Guru Granth Sahib and the worship thereof by the congregation and Nishan Sahib.
>
> 15. Unless the claim falls within one or the other of the categories enumerated in sub-section (2) of Section 16, the institution cannot be declared to be a Sikh gurdwara."

has expostulated, the indispensable para meters, for any sikh religious institution(s) being nomenclatured as "Gurudwara". The trite principle(s), as, become enunciated therein, for Sikh religious institution(s), being construable as "Gurudwara", are comprised in (a) the apposite allowed precincts being proven to therein carry, the provenly established therein, Guru Granth Sahib (b) the worship of the same by the Sikh congregation, (c) and cogent evidence being adduced, qua existence of Nishan Sahib, within the precincts of the shrine concerned.

16. Though, the learned counsel for the defendant(s) contended, that the afore imperative para meters, are not satiated by the shrine concerned, and, obviously contends, that the Guru Granth Sahib, was meant only for the personal worship of one Ishwar Singh, and, thereafter by his surviving spouse, and, subsequently by the purportedly validly appointed Kardar, which he has argued to be one Uttam Singh. Therefore, the suit property hence owned by Guru Granth Sahib, is, contended by him, to be neither carrying thereins, the, essential rubric appertaining to any dedication thereof to the public, for the latter hence making worship thereto, in a congregation, nor the afore holy book, can be permitted to be installed, inside the Gurudwara concerned, and, nor hence becomes amenable for public congregation(s) through, theirs assembling inside the gurudwara, hence make obeisance to the holy book,

rather within any hallowed precincts. However, the afore made argument, is completely amiss, as the defendant No.1, admits in his cross-examination, vis-à-vis, Bhajan(s) and Kirtan(s) being performed in the presence, of the holy Guru Granth Sahib, rather, inside the apposite holy shrine. Moreover, he also admits in his cross-examination, that a granthi occupies a seat inside the holy place, wherein also Sh. Guru Granth Sahib, is installed or kept. Furthermore he also admits that photocopy of Ext. PW4/A, appertains to the Gurudwara concerned. Therefore, within the ambit of expostulation of law (supra) as, become constituted in the verdict supra, Sh. Guru Granth Sahib is construable to be installed or kept inside the holy premises, of the Gurudwara concerned, and, besides thereto a firm inference, can be erected, that the Sikh congregation, does collectively pay obeisance, to, the holy book, rather kept or installed hence inside the apposite purported Gurudwara.

17. As aforestated, the very factum of the suit property being owned by Guru Granth Sahib, dehors one Ishwar Singh, purchasing it in the name of Guru Granth Sahib, and, though he assumed in the afore capacity, the role of Kardar, of the suit property, and, thereafter his spouse also assumed the role (supra), is per-se manifestive, that at its very inception, the suit property rather with an *aminus-dedicandi,* did become dedicated for public worship)s, inasmuch as, it being open for deification rather by the followers of the Sikh religion. Even the assumption by one Ishwar Singh, and, thereafter by his surviving spouse, one Maghi, the respective role(s) of Kardar of the suit property, rather for the best management, and, care taking of the suit property, owned by Guru Granth Sahib, also does not negate the afore drawn inference. However, the afore inference may become scuttled, upon, evidence surging forth, and its displaying that the Kardarship supra, was not only, for, managing and taking care, of, the suit property owned by Guru Granth Sahib, but also was to ensure that each of the afore, rather solitarily making, to the proven exclusion of the followers of the sikh religion, hence worship of Guru

Granth Sahib, given its being evidently kept inside their respective personal homesteads/dwellings. However, the afore evidence is amiss. Therefore, a conclusion become arrived, that at the inception of its apposite dedication, obviously the apparent *aminus-dedicandi* hence of the suit property, to Shri Guru Granth Sahib, through its purchase, by one Ishwar Singh, in the name of Shri Guru Granth Sahib, rather making its imminent display, and, that one Ishwar Singh, in the afore capacity, *suo-motu* assuming the role of Kardar, nor thereafter the Kardars concerned, rather not ebbing the effect, of the afore conclusion, that the holy book being meant for public worship by the followers of, the, sikh religion.

18. Be that as it may, with the enactment of Punjab Reorganization Act 1966, certain properties, as mentioned in Section 5 thereof, became transferred from Punjab to Himachal Pradesh, and, one amongst the territories, which became transferred from Punjab to Himachal Pradesh, is Kullu District, wherein the suit property occurs. However, since Section 88 of the Punjab Reorganization Act, 1966, provisions whereof are extracted hereinafter:-

> "88. **Territorial extent of laws**. The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Punjab shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

makes clear graphic displays, that dehors the transfer(s) of the territory(ies) mentioned in Section 5 thereof, from Punjab to Himachal Pradesh, rather not effecting any change in the territories, to which any law in force immediately

before the apposite Act is made applicable, besides its making clear echoings, that statutory references in any such law, to the State of Punjab, until otherwise provided, by the competent legislature, or competent authority, being construed, as covering all those territories within that State immediately hence before the appointed date. Consequently, the tenacity, of, maintainability of the extant civil suit, before the civil court concerned, has to be tested, on anvil of The Sikh Gurudwara Act 1925. However, though the suit property supra, became amenable at its inception, to, the mandate of statute (supra), given at the phase (supra), it becoming comprised in the State of Punjab. Nonetheless, since the afore statutory provisions neither became recoursed at the phase supra by one Ishwar Singh nor by any congregation of sikh religion, nor hence any time thereafters, thereupon the import(s) thereof, i.e. Statute (supra) qua, maintainability of the extant civil suit, can not be fully gauged therefroms.

19. However, since Section 88 of the Act (supra) makes applicable, dehors the transfer of the apposite territory, hence existing, prior to the coming into being, of, the Punjab Reorganization Act, in the State of Punjab to Himachal Pradesh through Section 5 thereof, make applicable to even the transferred territory concerned, all the laws in force in the erstwhile state of Punjab, unless the State of Himachal Pradesh or any other competent authority, evidently makes the relevant laws inapplicable to the State of Himachal Pradesh. However, the H.P. State legislative Assembly, has evidently not made inapplicable to the apposite territory of Himachal Pradesh, all the provisions, as, borne in The Sikh Gurudwara Act 1925, nor any other competent authority, is stated by the counsel for the contesting defendants, and, by the counsel for the plaintiff, to hence make inapplicable to the transferred territory concerned, hence, the mandate of the Sikh Gurdwara Act. Therefore, this Court concludes, that though operation of Section 88, of, the Punjab Reorganization Act, the Sikh Gurdwara Act, is applicable to

District Kullu, especially since it became transferred, by the State of Punjab, to the State of Himachal Pradesh. Consequently, at this stage, it becomes imperative to extract the provisions of Section 3, of, the Sikh Gurdwara Act, 1925, provisions whereof read as under:-

> "**3. List of property of scheduled Gurdwara to be forwarded to the State Government.**- (1) Any Sikh or any present office-holder of a gurdwara specified in schedule I [or, added thereto by the Amending Act, may forward to the State Government through the appropriate Secretary to Government so as to reach the Secretary within ninety day of the commencement of this Act, or, in the case of the extended territories, within one hundred and eighty days of the commencement of the Amending Act, as the case may be], a list, signed and verified by himself, of all rights, titles or interests in immovable properties situated in Punjab inclusive of the gurdwara and in all monetary, endowments yielding recurring income or profit received in Punjab which he claims to belong, within his knowledge, to the gurdwara; the name of the person in possession of any such right, title or interest, and if any such person is insane or a minor, the name of his legal or natural guardian, or if there is no such guardian, the name of the person with whom the insane person or minor resides or is residing, or if there is no such person, the name of the person actually or constructively in possession of such right, title or interest on behalf of the insane person or minor, and if any such right title or interest is alleged to be in possession of the gurdwara through any person, the name of such person, shall be stated in the list; and the list shall be in such form and shall contain such further particulars as may be prescribed.

[*Explanation.*- For the purposes of this section and all other succeeding sections; the expression "Punjab" shall mean the State of Punjab as formed by section 11 of the States Reorganization Act, 1956.]

(2) Declaration of scheduled gurdwara and publication of list forwarded under sub-section (1) in a consolidated list. - On receiving a list duly forwarded under the provisions of sub-section (1) the [State] Government shall, as soon as may be, publish a notification declaring that the gurdwara to which it relates is a Sikh Gurdwara and, after the expiry of the period provided in sub-section (1) for forwarding lists shall, as soon as may be, publish by notification a consolidated list in which all rights, titles and interests in any such properties as are described in sub-section (1) which have been included in any list duly forwarded, shall be included, and shall also cause the consolidated list to be published, in such manner as may be prescribed, at the headquarters of the district and of the tahsil and in the revenue estate where the gurdwara is situated, and at the headquarters of every district and of every tahsil and in every revenue estate in which any of the immovable properties mentioned in the consolidated list is situated and shall also give such other notice thereof as may be prescribed.

(3) Notices of claims to property entered in the consolidated list to be sent to persons shown as in possession. - The [State] Government shall also, as soon as may be; send by registered post a notice of the claim to any right, title or interest included in the consolidated list to each of the persons named therein as being in possession of such right, title or interest either on his own behalf or on behalf of an insane person or minor or on

behalf of the gurdwara, provided that no such notice need be sent if the person named as being in possession is the person who forwarded the list in which the right, title or interest was claimed.

(4) Effect of publication of declaration and consolidated list under sub-section (2). - The publication of a declaration and of a consolidated list under the provisions of sub-section (2) shall be conclusive proof that the provisions of sub-sections (1), (2) and (3) with respect of such publication have been duly complied with and that the gurdwara is a Sikh Gurdwara, and the provisions of Part II shall apply to such gurdwara with effect from the date of the publication of the notification declaring it to be a Sikh Gurdwara."

The statutory provisions supra embody the completest provisions with respect to enlisting of Gurudwara(s) concerned, as scheduled Gurudwara(s). It also contains provision(s) with respect to, after invitation of, objections to the petition, as became preferred, to the government concerned, for the espoused declaration being made, hence for the enlistment of the Gurudwara concerned, in the apposite schedule, rather along with its property, rather thereupon(s), the statutory declaration becomes assigned the completest validity. Prima facie sub-section (5) of Section 7, ascribes the completest conclusivity, to the published statutory notification, hence declaring any Sikh Shrine, to be hence validly enlisted in the apposite schedule, and, also assigns conclusivity to valid adoption(s), of the contemplated statutory procedure(s), for its enlistment. However, since Section 8 of the Act (Supra) occurs after Section 7 thereof, and, through reserve a right in the persons concerned, to contest the validity of the prior thereto made statutory declaration. Necessarily, when rather the mandate of Section 8 of the Act (supra) remained unrecoursed, therefore Section 8 does not come to the

forefront, and, does assign conclusivity hence to the prior thereto made statutory declarations. Emphassisingly, the afore allusions are merely academic, and, obviously do not rest the controversy at hand, given none of the statutory processes (surpa) becoming ever recoursed.

20. Be that as it may, at the time purchase of the suit property, by one Ishwar Singh, in the name of Guru Granth Sahib, conspicuously when it occurs in District Kullu, H.P., and whereat, at the relevant time of purchase supra, the trite territory fell, in the erstwhile Punjab, and to which, the provisions, of The Sikh Gurudwara Act 1925, rather were applicable, neither evidently the afore Ishwar Singh, nor Sikh worshipers numbering 50 or more, nor thereafter any sikh worshipers, of the disputed sikh shrine, hence numbering 50 or more, rather proceeded to, cast a petition under Section 3 or under Section 7,of the Afore Act, seeking therethrough, a declaration for the sikh shrine being declared as a sikh gurudwara. Since the Sikh Gurudwara Act 1925 is a special statute rather governing the mode of enlistment of the sikh shrine, in the apposite schedule, and, also regulates the makings of declaration, of ,any shikh shrine, hence as a sikh gurudwara besides regulates the appointments concerned to the Sikh Shrine concerned. Therefore, it acquires complete force, vis-à-vis, the facet supra, and, no legal mechanism than, the ones contemplated in statutory provisions thereof, becomes amenable for becoming recoursed, rather for the relevant purpose, by the plaintiff. Consequently neither the plaintiff and nor the defendant can at this stage make any dependence, upon provisions supra. However, Section 29 of The Sikh Gurudwara Act 1925, provisions whereof, are, extracted hereinafter also do require, an allusion being made thereto, provisions whereof become extracted hereinafter:-

> "29**. Exclusion of jurisdiction of the courts.** Notwithstanding anything contained in any other law or enactment for the time beingin force no suit shall be instituted and no court shall

> entertain or continue any suit or proceeding, in so far as such suit or proceeding involves-
>
> (1) any claim to, or prayer for the restoration of any person to an office in a Notified Sikh Gurudwara or any prayer for the restoration or establishment of any system of management of a Notified Sikh Gurdwara other than a system of management established under the provisions of Part III;
>
> (2) any claim to, or prayer for the restoration of any person to an office in or any prayer for the restoration or establishment of any system of management of, any gurdwara in respect of which a notification has been published in accordance with the provisions of sub-section (3)of Section 7 unless and until it has been decided under the provisions of Section 16 that such gurdwara should not be declared to be a Sikh Gurdwara."

though section (supra), completely bars the exercisings of jurisdictions, by the civil Court concerned, inasmuch as, for entertaining any suit, appertaining to establishment of a system, for managing of Gurudwara, nor any claim or prayer is amenable to be made before any civil court concerned, and, appertaining to registration of any person, to any office, nor any prayer for registration of management of any Gurudwara, in respect whereof a notification, has been published, in accordance with the provisions, of sub-section 3 of Section 7, can be validly made before the Civil Court concerned, unless and until, the Arbitral mechanism contemplated in the Act (supra), inasmuch as in Section 16 of the Act, rather makes a decision that the Gurudwara should not be declared to be a sikh gurudwara.

21. However, a reading of the afore extracted provisions, as carried in Section 7, and, Section 29, does make imminent disclosure(s), that Section 7 is applicable, only upon, the provisions enshrined therein, besides the

provisions occurring in the prior thereto section(s), becoming complied with. However, since as aforestated, neither one Ishwar Singh during his life time, nor thereafters hence the apposite Sikh congregation(s), numbering 50, or more hence recoursed the provisions, as carried in Chapter-2, nor when thereafter(s), the proceedings, under Section 16 of the Act, with respect to the strived for declaration, became commenced nor became terminated, with respect to the apposite shrine being not amenable for being or being amenable for being declared as a sikh gurudwara. Significantly, when Section 29 thereof, rather conditionally bars the jurisdiction of the civil Court, only, upon, and, uptil the mandate pronounced in Section 16 of the Act (supra) becoming completely terminated. However, since as stated (supra) the afore mandate remained un-recoursed Therefore, operation of afore Section 29, vis-a-vis, therethroughs, the jurisdiction of the civil court concerned, becoming ousted, especially in respect of matters, mentioned therein, cannot be accepted, to, fall within the domain of section supra. However, yet the afore drawn inference, vis-a-vis, the suit property at its inception, hence assuming, the trait of animus-dedicandi, does assume the fullest vigor, as, it dehors the statutory declaration rather facilitates public worship, of, the holy book, hence within the apposite hallowed precincts, and, for ensuring collective worships, thereto(s) this Court has appointed the D.C., Kullu, as, Court Receiver, of the suit property.

22. Be that as it may, Section 38 of the Sikh Gurudwara Act 1925, occurring in Chapter-IV of Special Statue, (supra), contains relevant conditional civil Court jurisdiction vesting provision, provision(s) whereof, are extracted hereinafter:-

> " 38. Recourse to ordinary courts in cases where action has not been taken under Part I with a view to application of provisions of Part III to gurdwara.- (1) Notwithstanding anything contained in this Act or any other Act or enactment in force, any two or

more persons having interest in any gurdwara in respect of which no notification declaring the gurdwara to be a Sikh Gurdwara has been published under the provisions of this Act may, after the expiry of one year from the commencement of this Act [or, in the case of the extended territories, from the commencement of the Amending Act, as the case may be] or of such further period as the [State] Government may have fixed under the provisions of sub-section (1) of Section 7, and after having obtained the consent of the Deputy Commissioner of the district in which such gurdwara is situated institute a suit, whether contentious or not, in the principal court of original jurisdiction or in any other court empowered in that behalf by the [State] Government within the local limits of whose jurisdiction the gurdwara is situated praying for any of the reliefs specified in section 92 of the Code of Civil Procedure, 1908(5 of 1908), and may in such suit pray that the provisions of Part III may be applied to such gurdwara.

(2) The court in which a suit is instituted under the provisions of sub-section (1) shall decide whether the gurdwara is or is not a gurdwara as described in sub-section (2) of Section 16, and if the court decides that it is such a gurdwara and is also of opinion that, having regard to all the circumstances, the gurdwara is one to the management of which the provisions of Part III should be applied, the court shall by public advertisement and in such other manner as it may in each case direct, call upon any person having interest in the gurdwara to appear and show cause why the provisions of Part III should not be so applied, and shall in its order fix a date not less than one month from the date of the order on which any person appearing shall be heard.

(3) Upon the date fixed under the provisions of sub-section (2) or on any subsequent date to which the hearing may be adjourned, the court shall proceed to hear the person or persons, if any, appearing and if the court is satisfied that the provisions of Part III can be applied to the management of the gurdwara without prejudice to any existing order or decree relating to the gurdwara and conferring on any person or declaring any person to be entitled to any right, in respect of the administration or management thereof, the court shall pass a decree that the said provisions shall apply to the management of the gurdwara.

(4) Upon such decree being passed and subject to any order that may be passed on appeal against or in revision of the decree the provisions of Part III shall apply to such gurdwara as if it had been declared by notification under the provisions of this Act to be a Sikh Gurdwara.

(5) When under the provisions of sub-section (3) the provisions of Part III have by decree been applied to the management of a gurdwara any hereditary office-holder of such gurdwara who within twelve months after the date of the decree has resigned office or been removed from office otherwise than in accordance with the provisions of section 134 or under the provisions of section 142 or a presumptive successor of such office-holder, may within ninety days from the date of the resignation or removal, as the case may be of such office-holder, present a petition to the Court which passed the decree claiming to be awarded compensation on the ground that he has suffered or will suffer pecuniary loss owing to a change in the management of such gurdwara and the court may, notwithstanding the fact that such office-holder has voluntarily resigned, pass a decree

awarding him compensation as if such office-holder had been unlawfully removed from his office.

(6) The provisions of sections 22, 23, 24 and 25 shall so far as may be, apply to proceedings under the provisions of sub-section (5) and to proceedings arising therefrom, as if the court was a tribunal."

The provisions supra, when commence with a non obstante clause, obviously hence override, the prior thereto provisions, as carried in Chapters 2 and 3 of the Act (supra), also operate(s) as an exception thereto(s). Therefore, therethroughs, the apposite jurisdiction of the civil court(s) rather becomes conditionally preserved, even when the statutory provisions prior thereto, appertaining to, the, Sikh shrine being or not being a sikh gurudwara, hence remained unrecoursed. However, the statutory conditional vestment of jurisdiction, in the civil Courts, by Section 38 supra, is rested upon the statutory leave, of the Deputy Commissioner concerned, being asked, and, it being also granted, imperatively prior to the institution of the suit. However, when the afore statutory leave became evidently niether asked for, nor when it became granted. In nutshell, for breach of the mandate of Section 38 of the Act, this Court concludes,that the instant civil suit is grossly misconstituted, and, also is not maintainable, besides obviously the civil court, had no jurisdiction, to try and maintain it, without the prior thereto statutorily mandated leave, envisaged in Section 38 of the Act (supra), being asked for, and it being accorded, by the Deputy Commissioner of District Kullu, H.P.

23. In view of the afore observation, there is merit in the instant appeal, and, the same is accordingly allowed. The judgment(s) and decree(s) impugned before this Court is set aside. The substantial questions of law are accordingly answered. The suit of the plaintiff(s) is dismissed, it being barred by law. However, the impugned verdict of 6.6.1997, rendered by the learned Additional District Judge, Kullu, District Kullu, H.P. is modified to the extent

that the Deputy Commissioner, Kullu, is appointed as caretaker, and, receiver of the suit property, owned by Guru Granth Sahib, upto the relevant statutory process, if now permissible, being completed/concluded. The contesting litigants are also directed to alongwith theirs handing over the entire suit property to the D.C. Kullu, hence, append therewith the completest signatured apposite inventories. Subsequently, the D. C. Kullu shall with the assistance of Sikh scholars, to be chosen by him, hence ensure the maintenance, and, dedicated upkeep of the hallowed precincts rather whereins the sacred book, is installed. He shall also ensure the regular dedicated observances of all rituals appertaining to the Sikh Religion. Moreover, he shall keep regular audited accounts qua salaries, and, also qua the revenue earned from the suit property. In addition, he shall with the assistance of Sikh Sevadars/scholars, shall ensure the future renovations of the shrine, from the incomes realised from the suit property. Necessarily, all licenses/lessees concerned, shall henceforth attorn to the D.C. Kullu. All pending applications, if any, also stand disposed of.

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

Between:-

BHAGI RATH (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:-

(A) SMT. DAYAWANTI, WIDOW OF SHRI BHAGIRATH.

(B) SHRI SURESH SHARMA, SON OF SHRI BHAGIRATH.

(C) SMT. UMA SHARMA, DAUGHTER OF SHRI BHAGIRATH.

ALL RESIDENTS OF VILLAGE CHAMROL, P.O SHALAGHAT- DOCHI, TEHSIL ARKI, DISTRICT SOLAN, H.P.

…….. APPELLANTS

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE WITH MR. JANESH GUPTA, ADVOCATE)

AND

1. SHRI NANAK CHAND SON OF SHRI SAINU, R/O VILLAGE CHAMROL, P.O SHALAGHAT, TEHSIL ARKI, DISTRICT SOLAN.H.P.

2. SHRI HET RAM SON OF SHRI SAINU (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:-

(A) SH. AMAR DEV, SON OF LATE SHRI HET RAM.

(B) SMT. ANITA, DAUGHTER OF LATE SHRI HET RAM.

(C) MS. GODAVARI, DAUGHTER OF LATE SHRI HET RAM.

(D) SMT. KRISHNA ALIAS SULEKHA, DAUGHTER OF LATE SHRI HET RAM.

ALL RESIDENTS OF VILLAGE CHAMROL, P.O SHALAGHAT, TEHSIL ASKRI, DISTRICT SOLAN. .P.

.....RESPONDENTS

(BY. G.D VERMA, SR. ADVOCATE WITH MR. B.C VERMA, ADVOCATE)

REGULAR SECOND APPEAL
NO. 63 OF 2007
RESERVED ON: 12.8.2021
DECIDED ON: 20.8.2021

Code of Civil Procedure, 1908 - Order IX Rule 9 - Suit for permanent prohibitory injunction and for possession and subsequent appeal thereto dismissed - Similar suit filed by the plaintiff on earlier occasion suffered on 12.01.2000 the ill fate of its dismissal in default- Plaintiff not opted to recourse to the provision of Order IX Rule 9 CPC for restoring the earlier civil suit to its original number- Held- Bar of estoppels against the plaintiff in instituting the present suit- Appeal dismissed.

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

J U D G M E N T

The predecessor-in-interest of the appellants herein (for short the plaintiff) instituted a Civil Suit bearing No. 24/1 of 2000 before the learned Civil Judge (Jr. Div) Arki, District Solan, H.P. In the afore suit the plaintiff claims the making of a decree of permanent prohibitory injunction, and, for possession, vis-à-vis, land comprised in khata-khatauni No. 12/12, Khasra No. 64, measuring 1-13 bighas, situated in Village Chhamrol, Pargana Rohanj, Tehsil Arki, District Solan, H.P (for short 'the suit land"), and against the defendants/respondents (for short "the defendants").

2. The learned Civil Judge concerned on 23.7.2005, upon, Civil Suit No. 24/1 of 2000, made a verdict of dismissal. The plaintiff being aggrieved by the verdict of dismissal, hence recorded by the learned trial Court, preferred

Case No. 14-A/FTC/13 of 05/06, before the learned Addl. District Judge (Presiding Officer Fast Track Court) Solan, District Solan, H.P. Upon the afore Civil Appeal, the learned first Appellate Court, made a verdict rather affirming the verdict (supra) as made by the learned trial Court. Consequently, the plaintiff being aggrieved therefrom, is, led to institute there-against the instant Regular Second Appeal before this Court.

3. When the instant appeal came up for admission before this Court, this Court had admitted the appeal on 4.3.2008, on the here-in-after extracted substantial questions of law No.1 to 3:-

> "1. Whether the Lower Appellate Court has committed grave procedural illegality and irregularity in confining its findings only to the question of maintainability of the suit as formulated under Point No.1 without deciding the merits of the case when points No.2 and 3 were specifically formulated?
>
> 2. Whether both the Courts below have fell in grave procedural error and committed illegality and irregularity in holding that the suit filed by the plaintiff-appellant was barred by the provisions of Order 2 Rule 2, Order 9 Rule 9 and Order 23 Rule 1 of the Code of Civil Procedure, are not the findings returned by both the Courts below erroneous, illegal and perverse when cause of action and the relief claimed in both the suits were not same?
>
> 3. Whether the trial Court has committed grave error of law and jurisdiction in not appointing the Local Commissioner when the dispute between the parties was boundary dispute especially when the trial court rejected the demarcation reports proved on record by the plaintiff-appellant?"

4. The relief(s) as encapsulated in the relief cause of the plaint become extracted hereinafter:-

> "It is therefore, prayed that the defendant may kindly be restrained from dispossessing the plaintiff from the suit land and from diverting the filthy water of their houses into the

suit land by granting decree for permanent prohibitory injunction.

(ii) The defendant No.1 may also kindly be directed to handover back the possession of 4 biswansi of land shown in the annexed tatima as mark 64/1 by granting decree of possession in favour of the plaintiff. Any other relief which this Court deem fit may kindly be awarded."

5. The plaintiff in proving the afore aspired relief, and, concomitantly also for the relief supra becoming granted to them, hence made reliance(s) respectively upon Ex. PW-4/A prepared on 19.7.1996, and, upon Ex. DW-1/C, prepared on 29.1.1998. Both the afore alluded exhibits are the demarcation reports prepared by the demarcating Officer, and, both reveal therein that a part of the suit land becoming encroached, upon by the defendants. The making of the afore alluded exhibits was respectively visible prior to the institution of instant suit.

6. The plaintiff had earlier to the institution of Civil suit No. 24-1 of 2000, rather instituted a suit carried in Ex. DW-1/E, before the learned Civil Judge (1st Class) Arki. The afore Civil Suit suffered, on 12.1.2000, the ill fate of its dismissal in default. A reading of Ex. DW-1/E, discloses that the suit khasra numbers as carried therein are completely analogous to the khasra numbers as carried in the instant plaint, and, further more, the memo of parties carried therein are also completely similar to the memo of parties, as, carried in the instant suit. The effect, of the afore dismissal in default of the earlier suit inter-se parties hence holding the completest analogity vis-à-vis the parties at hand, and, also the effect of all causes of action, and, suit khasra numbers carried therein, also being completely identical to the suit khasra numbers in the extant suit, and, given that despite dismissal of the earlier suit in default, and, yet the order dismissing the suit in default, as made on 12.1.2000, becoming not attempted to be set aside, through an application cast by the aggrieved plaintiff, under, the provisions of Order 9

Rule 9 of Code of Civil Procedure, provisions whereof stand extracted hereinafter, is that it does constrain, this Court to conclude, that the plaintiff's extant suit, rather becoming hit by the vice of statutory estoppels(s).

> "Order IX rule 9 OF CODE OF CIVIL PROCEDURE: Decree against plaintiff by default bars fresh suit- (i) Where a suit is wholly on partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and, if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall made an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.
>
> (2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

7. Further more the afore alluded demarcation reports, carrying the afore echoings therein, were respectively prepared in the year 1996 and in the year 1998, hence their preparations did occur either to the institution of the former suit by the plaintiff before the Civil Judge concerned, or and, during the pendency of the earlier suit. However, despite the existence of the afore made demarcation report(s) at the afore stages, yet the plaintiff did not choose to make any reliance(s) upon them. Omission (supra) on the part of the plaintiff, to, make reliance(s) upon the demarcation reports (supra) as became respectively prepared earlier to the institution of the former suit or during the pendency of the earlier suit, does constrain this Court, to, attract against the

errant plaintiff, the mandate enshrined in Order 2 Rule 2 of Code of Civil Procedure, provisions whereof stand extracted hereinafter:-

> " ORDER II RULE 2 OF CODE OF CIVIL PROCEDURE:
>
> 2. Suit to include the whole claim- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> Explanation- For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

8. Imperatively since the earlier suit of the plaintiff, did contain, causes of action hence similar to the one as become voiced in the instant suit, besides when the memo of parties as carried in the earlier suit is completely analogous, vis-à-vis memo of parties, as carried in the extant suit. Therefore, a dire necessity became cast upon the plaintiff to ensure, that they include in the earlier suit, the factum of demarcations' reports (supra) hence becoming prepared, and to also take to prove the demarcation reports (supra), rather in the earlier drawn proceedings by them. However, they omitted to do so, and,

besides when also rather against the dismissal of their earlier suit, in default, they failed to recourse the mandate of Order 9 Rule 9 CPC, for restoring the earlier Civil Suit to its original number. Therefore, the cumulative effects of the afore omissions, is that the afore statutory provision(s) rather creating bar of estoppels, against the plaintiff rather instituting the instant suit, hence visibly becoming aroused. Moreover, when the salutary purpose behind the afore statutory provisions, is to ebb the menace of repetitive institutions of suit, on same and similar causes of action, and, vis-à-vis, similar suit property, and, when there is completest similarity of litigants in both the earlier, and, in the subsequent suit, besides with both detailing similar khasra numbers. Therefore, reiteratedly the estopping mandates (supra) do completely emerge, and sequels a firm inference that the instant suit is hit by the afore erupting statutory estoppels.

9. Be that as it may, the learned counsel for the plaintiff, has contended with much vigour before this Court, that for settling the lis inter-se the parties at contest, it became incumbent upon the learned Courts below to yet appoint a Local Commissioner. However, the afore made submission, could become well founded only when the instant suit, is not hit by the afore vices. Since the grant of equitable relief of injunction, and, of possession would be validly founded only upon apposite therewith displays, being made in the apposite rather validly drawn demarcation reports concerned. However, when the afore vices work against the plaintiff, consequently they carry the ensuing effect, that the indispensable norm rather governing the grant of equitable relief of injunction, in as much as equity hence becoming not breached by the plaintiff, rather visibly becoming completely breached by the plaintiff. Consequently, the afore statutory omission(s), as, are made to undone through this Court accepting the contention of the learned counsel for the plaintiff, and thereupon this Court proceeding to appoint a local Commissioner, for conducting fresh demarcation(s) of the contiguous estates of the contesting

litigants, would ensure rather, the ill-sequel of this Court, militating against the afore statutory estoppels, evidently working against the instant suit, as becomes reared by the plaintiff. Therefore, this Court refrains from its breaching the principle of statutory estoppels, as work against the plaintiff's extant suit.

10. Though the learned counsel for the plaintiff, has yet continued to argue, that the defendants being injuncted from interfering in the suit land. However, without there being any real potentiality of threat, to the suit land, and, as would arise from actual or threatened invasions, on to his property hence being made by the defendants, and, as would become well succored, only upon, in the earlier instituted suit hence the plaintiff making valid dependences upon the demarcation reports (supra), whereas, rather his evident omission (supra) rendering his nowat reliance(s), upon them, to be grossly inapt. Therefore, this Court finds that there is only a surmisal or imaginative threat etched in the mind of the plaintiff, that there is a potentiality of invasion on to the suit land by the defendants. The afore imaginative endangerment hence etched in the mind of the plaintiff, would cause the ill effect of the plaintiff's prayer for injunction against the defendants, being vindicated, even when there is no actual or proven threatened invasion upon the suit land hence by the defendants. Moreover, this Court cannot render any injunction against the defendants, without the afore parameters rather regulating its rendition hence being proved. Moreso, the cause of action for its making is averred to spur rather in the year 2006, in quick spontaneity whereof, the earlier suit became dismissed for default, hence with all consequential legal effect(s) (supra). On afore anchor this Court also refrains to make the apposite injunction against the plaintiff, as thereupon the effect supra of estoppel working against the extant suit would become impermissibly undone. Only upon proven occurrences of any real and proven potential endangerments of invasions on the suit land by the

defendants, would make a valid cause of action hence generate vis-à-vis the plaintiff and not earlier nor any omnibus injunction rather without the afore norms being proved, can become validly rendered.

11. In view of the above, the instant Regular Second Appeal is dismissed, and, the substantial questions of law are answered accordingly. The impugned judgments are maintained and affirmed. Records be sent back.

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

Between:-

1. BIDHI CHAND
2. RATTAN CHAND
3. KEHAR SINGH
4. SUNKA RAM

SONS OF SHANKAR DASS R/O VILLAGE GUHAL, TAPPA MAJHOG SULTANI, TEHSIL AND DISTRICT HAMIRPUR, HIMACHAL PRADESH.

…….. APPELLANTS.

(BY SH. M.L SHARMA, ADVOCATE)

AND

3. STATE OF HIMACHAL PRADESH THROUGH DISTRICT COLLECTOR, HAMIRPUR, DISTRICT HAMIRPUR, HP.

…..RESPONDENT

(BY. MR. ASHWANI SHARMA &
MR. HEMANT VAID, ADDITIONAL
ADVOCATE GENERALS WITH
MR. VIKRANT CHANDEL AND

MR. GAURAV SHARMA,
DEPUTY ADVOCATE GENERALS).

REGULAR SECOND APPEAL
NO. 322 OF 2004
RESERVED ON:19.8.2021
DECIDED ON :27.8.2021

Punjab Village Common Lands (Regulation) Act, 1961- Vestment of Shamlat Deh - Suit for permanent prohibitory injunction - Decree pronounced against the defendants- Appeal partly allowed, however, the cross-objections were dismissed- Held- Suit land in shamlat consequently vest in the estate right holders whose name(s) occur in the list of Bartandaran, the right to use it, in the manner as enshrined in the apposite Wajib Ul Urz - No evidence that the name of the plaintiff is there in the list of Bartandarans - The plaintiff cannot claim exclusively of enjoying the suit land through the ouster of the other estate right holder in the Mohal concerned nor obviously any apposite injunction can be rendered - Appeal dismissed. (Para 9 & 10)

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

J U D G M E N T

The plaintiffs/appellants instituted a Civil Suit bearing No. 145 of 1993 before the learned Senior Sub Judge, Hamirpur. In the afore drawn suit, the plaintiffs claimed, for a decree of permanent prohibitory injunction being pronounced against the defendants, and, vis-à-vis, the suit khasra numbers. The afore Civil Suit became decreed by the learned trial Court. However, the decreeing of the plaintiffs' suit, by the learned trial Court, was made subject to the plaintiffs becoming evicted from the suit land, in accordance with law.

2. The aggrieved defendant No.1/respondent herein carried there-against Civil Appeal No. 184 of 1998 before the learned District Judge, Hamirpur. Moreover the aggrieved plaintiffs also within the afore Civil Appeal

preferred cross-objections No. 04 of 1999. Both the Civil Appeal and Cross-objections (supra) became cumulatively decided through a common verdict made thereons on 6.5.2004. Through the afore made verdict, the learned District Judge rejected the cross-objections, and, partly allowed the appeal of the aggrieved defendant to the extent, that the plaintiffs and proforma defendant No.2, being made amenable for eviction from the suit land, through recoursings by the defendant of the procedure constituted under law.

3. The plaintiffs become aggrieved from the verdict recorded by the learned first appellate Court, and, are led to institute there-against the instant appeal before this Court.

4. When the appeal came up for admission before this Court, this Court had admitted the same, on the here-in-after extracted substantial questions of law:-

> 1. Whether the suit land could not have vested in the Panchayat and consequently in the State of Himachal Pradesh in view of the provisions of Sections 2 (g) and 4 of the Punjab Village Common Lands (Regulation) Act, 1961.
>
> 2. Whether the suit land could not have been defined as Shamlat Deh because it was in possession of the plaintiffs/predecessor-in-interest of the plaintiffs on the coming into force of the Punjab Village Common Lands (Regulation) Act, 1961."

5. A perusal of the jamabandi appertaining to the year 1954-1955, does vividly disclose, that therein a reference is made to mutation No. 68. A reading of the afore mutation No. 68 also does unveil, that the suit land was sanctioned as Nautor, vis-à-vis, one Shankar Dass, hence through an order made on 12.2.1954, by the Deputy Commissioner Kangra. However, though through the afore made order, the suit land became granted as Nautor, to one Shankar Dass, yet the tenure of the relevant grant became limited only for a period of five years. Upon expiry of afore tenure of the grant of the suit land,

as made to the afore Shankar Dass, the defendants concerned through making hence on 12.12.1963 mutation No. 76, rather cancelled the grant of land, as made, by way of Nautor to the afore Shankar Dass.

6. Further more, through mutation No. 78 attested on 30.6.1964, the suit land became vested in the Gram Panchayat concerned. Subsequent to the making of mutation No. 78 hence on 30.6.1964, obviously in tandem therewith rather corresponding entries are made in the jamabandi(s) appertaining to the suit land. The plaintiffs for theirs ensuring, the decreeing of their suit, were enjoined to place on record the Nautor allotment rules, as were prevalent in contemporanity to the grant of suit land, being made in favour of Shankar Dass, hence through an order made by the Deputy Commissioner concerned on 12.2.1954, and, the afore rules also making candid bespeaking(s), that there occur no provisions therein, hence, reducing or curtailing the grant of land by way of Nautor to one Shankar Dass. Since only upon adduction of afore relevant rules, the plaintiffs could succeed in convincing this Court, that the restriction of the tenure of the apposite grant up to five years by the Deputy Commissioner, through his making an order of 12.2.1954, was invalid to the extent, that it breached the afore relevant rules, whereas, the tenure of the apposite allotment was not required to be curtailed rather the apposite grant to him was in perpetuity.

7. However, the afore relevant rules never came to be placed on record by the plaintiffs. Therefore, this Court concludes that the limited tenure of grant of land by way of Nautor, by the Deputy Commissioner, through his order made on 12.2.1954, was a valid order. Further more, this Court also concludes that on expiry of the afore tenure of grant, the rescission thereof, as made through mutation No.76, is valid, and, thereafters its being vested in the Panchayat through mutation No. 78, is also valid.

8. Since the grant of land to one Shankar Dass, by way of Nautor, does evidently comprise Shamlat land. Therefore, when in concurrence with

Section 4 of the Punjab Village Common Lands (Regulations) Act, 1961, as was in force at the time, of, the respective drawings of mutations No. 76 and 78, and, respectively wherethroughs the grant became rescinded, and, the land became vested in the Panchayat Deh. Consequently, the plaintiffs cannot claim that the afore orders are invalid. The only claim which could become raised, was that within the corners of a saving clause occurring in the statute (supra), rather the suit land was save-able from vestment. However, the afore plea become neither averred nor any evidence in consonance therewith became adduced. Thereupon, no benefit of the apposite saving clause can became conferred upon the plaintiffs.

9. Be that as it may, since the description of the suit land as carried in the apposite column of the jamabandi, is Shamlat land. Consequently, the afore description of the suit land, in the revenue records, does vest, in the estate right holders, whose name(s) occur in the list of Bartandaran, the right to use it, in the manner as enshrined in the apposite Wajib Ul Urz . Though the plaintiffs could claim exclusivity of user of the suit land. However, cogent evidence was required to the adduced by them, and, its displaying, that in the list of Bartandarans, as, appertaining to the suit land, only their name occurs, and, that the names of other estate right holders, do not occur therein. The adduction of the afore evidence could lead this Court, to dehors, its validating mutations (supra), to, may be render a decree of injunction against the defendants. However, even the afore evidence is grossly amiss. Therefore, the plaintiffs cannot claim exclusivity of enjoying the suit land through the ouster of the other estate right holder in the Mohal concerned nor obviously any apposite injunction can be rendered. Further more, the effect of the plaintiffs not adducing the afore evidence, is that their name did not occur in the list of bartandarans, as, appertaining to the suit land concerned.

10. The afore made inference constrains this Court, to form a further sequel, that the plaintiffs, could not dehors, the afore valid order for vestment of the suit land, in the Panchayat concerned, hence claim any right of possession or user of the suit land by them, much less, to the exclusion of other legitimate estate right holders concerned. There is no merit in the appeal, and, the same is accordingly dismissed, and, the impugned verdict is maintained and affirmed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly. No costs.

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

Between:-

SH. BUDHI RAM JUSTA
S/O LATE SHRI PANNU RAM,
R/O JUSTA NIWAS, NEAR CEMETRY
GATE, SANJAULI, SHIMLA-6, HP.

....PETITIONER

(BY SH. RAVINDER SINGH CHANDEL, ADVOCATE)

AND

SH. R.K. SONI,
S/O LATE SH. LACHHMAN DAS,
R/O SONI NIWS, SANJAULI,
SHIMLA-6.

..RESPONDENT

*(*MR. ASHOK SOOD, SENIOR ADVOCATE
WITH MR. ABHISHEK BANTA, ADVOCATE.*)*

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO. 144 OF 2021
Reserved on: 17.09.2021
Decided on: 24.09.2021

Code of Civil Procedure, 1908 - Order 21 Rules 23, 54 – Execution - Pension account of petitioner attached as well, his immovable properties- Challenged on the ground that opportunity of being heard not given- Held- Petitioner failed to file objection under Order 21 Rule 23 before the Execution Court and straightway approached the High Court without any legal foundation for the same- No infirmity or illegality committed by Executing Court- Petition dismissed with cost. (Paras 16 & 17)

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

O R D E R

By way of instant petition, petitioner has assailed the orders dated 26.12.2019 and 05.04.2021, Annexures P-3 and P-5 passed by the executing Court i.e. learned Civil Judge, Court No.7, Shimla in Execution Petition No. 33-X/2018.

2. The grievance of petitioner against the order dated 26.12.2019, Annexure P-3 is that under the garb of said order, the pension account of the petitioner has been attached. In so far as the order dated 05.04.2021 is concerned, his grievance is that on one hand, his pension account has been attached and on the other, his immovable properties have been ordered to be attached by the executing Court. Petitioner has further alleged that he has not been offered reasonable and sufficient opportunity to file objection to the execution petition.

3. Respondent has contested the claim of the petitioner by filing reply. It has been stated that the petitioner has suppressed material facts and is estopped from invoking the supervisory jurisdiction of this Court. As per respondent, the executing Court has not committed any illegality or irregularity.

4. Respondent has further contended that petitioner had opted to be proceeded against *ex-parte* in the civil suit filed against him by the respondent

for recovery of Rs.65,874/- as arrears of rent. The decree in civil suit No. 39-1/2018/16 was passed in favour of the respondent with *pendente-lite* and future interest. Since some part of the claim of the respondent was rejected, he had to file the appeal, which was allowed.

5. Respondent claims to have filed execution petition after the petitioner failed to obey the decree, which has attained finality. According to respondent, the petitioner was afforded sufficient opportunity even by the executing Court, but he failed to file any objections and as such he has no right to file the present petition, which according to the respondent is nothing but abuse of process of law.

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

7. The decree, pending for execution before learned executing court, reads as under: -

> *"This Civil Suit coming on this 16th day of July, 2018, for final disposal before me, Vatsala Chaudhary, Civil Judge, Court No. (7), Shimla, H.P. in the presence of Shri Abhishek Sood, Advocate ld. Counsel for the plaintiff and defendant already exparte.*
>
> *It is, ordered that the suit of the plaintiff is decreed, whereby plaintiff is held entitled to the recovery of Rs.65,874/- along with pendente lite and future interest @ 12% per annum from the date of suit till actual realization. No order as to cost."*

8. It is not in dispute that the above said decree was assailed before learned District Judge, Shimla in appeal by the plaintiff/ respondent herein by way of Civil Appeal No. 34-S/13/2018 and *vide* decree dated 15.3.2019 plaintiff/ respondent was further held entitled to use and occupation charges to the tune of Rs.58,674/- and costs of Rs.1,000/-.

9. The above noted decree having remained unsatisfied, respondent approached the executing Court for execution thereof. Petitioner appeared in response to the notice issued by the executing Court on 09.05.2019 and sought time for filing objections. The matter was adjourned thereafter to 13.06.2019, 05.07.2019 and 08.08.2019. On all these dates, time was sought on behalf of the petitioner herein to file objections and was accordingly granted. On 17.10.2019 no prayer for filing objections was made and accordingly the executing Court closed the opportunity to file objections.

10. Order 21 rule 17 of the Code of Civil Procedure (for short, "Code") provides for procedure to be adopted on receipt of applications for execution of the decree. Rule 22 of Order 21 provides for issuance of notice to the person against whom the execution is applied requiring him to show cause, on a date to be fixed as to why the decree should not be executed against him. Under Rule 23 of Order 21 of the Code, the judgment debtor can offer objections to the execution of decree, whereupon, the executing Court is mandated to consider objections so preferred and to pass such orders as it thinks fit. The aforesaid provisions reveal that it is for the judgment debtor to avail opportunity of filing the objections, if any, on the date when he appears to answer the show cause issued to him under Rule 22 *supra*. In the present case, despite seeking adjournment on the pretext of filing objections, petitioner had failed to prefer any objection whatsoever.

11. Thus, the grievance of petitioner that he was not afforded sufficient opportunity to file objections is against the records and also without merit.

12. Perusal of order dated 26.12.2019 does not suggest that the executing Court had issued any direction to attach the pension of petitioner. The order read as under:

"26.12.2019: List of property of JD and calculation of amount due filed today by the learned counsel for DH. Let warrant of

recovery by attachment of property of JD be issued as per list of property of JD for 25.04.2020."

The record further reveal that the learned executing Court had issued directions to the Manager, State Bank of India (erstwhile State Bank of Patiala), H.P. Secretariat, Chhota Shimla-2 to attach a sum of Rs.1,54,763/- from the saving account of the petitioner bearing No. 55069443026. This communication also does not reveal or imply that the directions were issued to attach the pension of petitioner.

13. Petitioner did not take any exception to order dated 26.12.2019 before learned executing Court. Without raising such issue before the executing Court, the petitioner cannot invoke the supervisory jurisdiction of this Court for assailing the order passed by the executing Court as far back on 26.12.2019.

14. Order dated 26.12.2019 has been passed by learned executing court in exercise the jurisdiction vested in it in accordance with law. Petitioner has failed to point out any illegality or perversity in the said order, hence no interference is called for

15. The attempt of the petitioner, by filing the present petition, appears just to delay the execution of the decree against him. The action of the petitioner definitely is not *bonafide*. The challenge to an order passed on 26.12.2019 by way of instant petition in the year 2021 speaks for itself.

16. As regards the challenge to order dated 05.04.2021, again no infirmity or illegality has been shown to have been committed by the executing Court. Law confers jurisdiction on the executing Court to satisfy the money decree, passed by it, by attachment and sale of the movable and immovable property of the judgment debtor. Law also provides remedy to the judgment debtor against the attachments made in pursuance to the orders of executing Court.

Petitioner, instead of availing any such remedy has straightaway approached this Court without any legal foundation for the same.

17. In view of the above discussion, there is no merit in the instant petition and the same is accordingly dismissed with costs of Rs.5,000/-. Pending application(s), if any, also stand dismissed.

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

Between:-

NATIONAL INSURANCE COMPANY
LIMITED, THROUGH ITS
ADMINISTRATIVE OFFICER (LEGAL),
DIVISIONAL OFFICE, HIMLAND HOTEL,
CIRCULAR ROAD, SHIMLA-171001, H.P.

....PETITIONER

(BY MS. SHILPA SOOD AND MR.ATUL JHINGAN, ADVOCATES)

AND

1. PRABHA VATI,
   W/O SHRI LAL BABU,
   R/O VILLAGE SANVARI BAZAR,
   NAYA TOLA, PO SOHANI,
   JALALPUR BAZAR, TEH/BLOCK
   LALALPUR, DISTT.CHHAPRA
   (BIHAR)-PRESENTLY C/O
   SHRI VED PRAKASH SHARMA,
   VILLAGE KHEL CHAURA,
   P.O. HALOG (DHAMI), TEHSIL
   AND DISTT. SHIMLA (HP)

2. LAL BABU,
   S/O LATE SH.RAMESHWAR,
   R/O VILLAGE SANVARI BAZAR,
   NAYA TOLA, PO SOHANI,
   JALALPUR BAZAR, TEH/BLOCK

LALALPUR, DISTT.CHHAPRA
(BIHAR)-PRESENTLY C/O
SHRI VED PRAKASH SHARMA,
VILLAGE KHEL CHAURA,
P.O. HALOG (DHAMI), TEHSIL
AND DISTT. SHIMLA (HP)

3. RENU KUMARI (MINOR),
D/O SHRI LAL BABU,
(THROUGH HER MOTHER &
NATURAL GUARDIAN PRABHA
VATI W/O SH. LAL BABU)
R/O VILLAGE SANVARI BAZAR,
NAYA TOLA, PO SOHANI,
JALALPUR BAZAR, TEH/BLOCK
LALALPUR, DISTT.CHHAPRA
(BIHAR)-PRESENTLY C/O
SHRI VED PRAKASH SHARMA,
VILLAGE KHEL CHAURA,
P.O. HALOG (DHAMI), TEHSIL
AND DISTT. SHIMLA (HP)

4. SANJU KUMARI (MINOR),
D/O SHRI LAL BABU,
(THROUGH HER MOTHER &
NATURAL GUARDIAN PRABHA
VATI W/O SH. LAL BABU)
R/O VILLAGE SANVARI BAZAR,
NAYA TOLA, PO SOHANI,
JALALPUR BAZAR, TEH/BLOCK
LALALPUR, DISTT.CHHAPRA
(BIHAR)-PRESENTLY C/O
SHRI VED PRAKASH SHARMA,
VILLAGE KHEL CHAURA,
P.O. HALOG (DHAMI), TEHSIL
AND DISTT. SHIMLA (HP)

5. SH.MADAN LAL,
S/O SH. BAL KRISHAN
SHARMA,
R/O VILLAGE HALOG, PO
HALOG (DHAMI), TEH. AND
DISTT. SHIMLA (HP)

(OWNER OF VEHICLE NO.
HP-63B-1237).

6. SH. NITIN GAUTAM,
S/O SH. NARINDER GAUTAM,
R/O VILLAGE BANUTI,
PO ROURI, TEH. AND DISTRICT SHIMLA (DRIVER OF VEHICLE NO. HP-63B-1237)

7. INCOME TAX OFFICER (TDS),
SECTOR-2, PANCHKULA,
HARYANA. .....RESPONDENTS

(RESPONDENTS NO. 1, 3 AND 4 ARE ALREADY EX-PARTE VIDE ORDER DATED 23.07.2020)
(NONE FOR RESPONDENTS NO.5 AND 6)
(BY SHRI VINAY KUTHIALA, SR. ADVOCATE WITH MR.DIWAN NEGI, FOR R-7)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.381 OF 2018
DECIDED ON:01.09.2021

Motor Accident Claims Tribunal – Payment - Tax deducted at source for income tax on interest payable to claimant deducted by Insurance Company - Held - Deduction of income tax by Insurance Company on the interest accrued on the compensation deposited by the Insurance Company is illegal and contrary to the law of the land- Direction issued to Income Tax Officer to refund the tax deducted at source within eight weeks.

Cases referred:
The H.P. State Cooperative Bank Ltd. and others reported in 2014 (Suppl.) Him.L.R. (DB) 2575;

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

O R D E R

Present petition has been filed against direction passed by the Motor Accident Claims Tribunal-IV, Shimla on 20.06.2018, in Exe.(MACT) No. 18-S/10 of 2016, titled as Prabha Vati and others vs. Madan Lal and others, filed by claimants for payment of balance amount of Rs.45,804/- which was not paid by the petitioner/Insurance Company to the claimants/respondents but were deducted as TDS for income tax on interest payable to the claimants/respondents on compensation awarded in their favour as Motor Accident Claim and deposited with respondent No. 7, The Commissioner (TDS), Sector-2, Panchkula.

2. In execution petition preferred by the claimants/respondents for payment of balance amount of compensation, the Motor Accident Claims Tribunal, vide impugned order, has directed petitioner/Insurance Company to deposit the balance amount of Rs.45,804/- within 45 days from the date of order, failing which warrant of attachment of movable and immovable property of petitioner has been ordered to be issued.

3. Section 194-A of Income Tax Act, 1961, clearly provides that any person, not being an individual or a Hindu undivided family, responsible for paying to a 'resident' any income by way of interest, other than income by way of interest on securities, shall deduct income tax on such income at the time of payment thereof in cash or by issue of cheque or by any other mode. Compensation awarded under Motor Vehicle Act cannot be said to be taxable income. Compensation is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident, which is damage and not income.

4. It is well settled that interest awarded by the Motor Accident Claims Tribunal on a compensation is also a part of compensation upon which income tax is not chargeable as also held by the Division Bench of this Court in ***Court on its own motion vs. The H.P. State Cooperative Bank Ltd. and***

others reported in ***2014 (Suppl.) Him.L.R. (DB) 2575*** and reiterated in ***CWP No. 460 of 2014 titled Shiv Ram Sharma vs. Union of India and others*** and other connected matters vide decision dated 3.6.2015.

5. Therefore, in view of above said decision, deduction of income tax by petitioner/Insurance Company on the interest accrued/awarded on the compensation deposited by the petitioner/Insurance Company is illegal and is contrary to the law of land.

6. In view of above discussion, this petition is disposed of directing respondent No. 7 Income Tax Officer, (TDS), Sector 2, Panchkula, Haryana to refund the TDS to the petitioner/Insurance Company within eight weeks from date of receiving information thereof, which shall be supplied by petitioner/Insurance Company within two weeks from today, as per Rules applicable and petitioner company is also directed to make payment of balance amount of compensation along with interest, if any received by it from the Income Tax Department to the claimants/respondents, within two weeks from the date of receipt of refund, failing which petitioner company shall also be liable to pay interest @ 9% per annum on the said amount with effect from 20.6.2018 till payment/deposit. Interim order dated 25.09.2018 passed in CMP No. 9331 of 2018 also stands vacated in above terms. The Motor Accident Claims Tribunal-IV, Shimla H.P. is directed to proceed further accordingly.

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

No order as to costs.

The petitioner is permitted to produce copy of order downloaded from the High Court website and the concerned authorities shall not insist for

certified copy of the order, however, they may verify the order from the High Court website or otherwise.

Dasti copy on usual terms.

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

Between:

SH. ASHWANI KUMAR MAHAJAN, SON OF LATE SHRI SOM DUTT, RESIDENT OF WARD NO.2, NURPUR, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

....PETITIONER/TENANT.

(BY SH. SANJAY JASWAL, ADVOCATE)

AND

RAJIV MAHAJAN, SON OF LATE SHRI SOM DUTT, RESIDENT OF WARD NO.2, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

....RESPONDENTS/APPLICANT.

(By. Sh. Mukul Sood, Advocate.)

Civil Misc. Petition Main (Original)
No.263 of 2020
Decided on: 11.08.2021

Code of Civil Procedure, 1908 - Order 8 Rule 1A(3) - Permission for placing on record documents - Application dismissed- The tenant evidence was closed by the Court on 29.07.2019 after affording numerous opportunities – Held -

Tenant cannot be allowed to re-open the trial by allowing him to place on record the documents- Petitioner not diligent- Petition dismissed.

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 petitioner/tenant assails order dated 06.02.2020, passed by learned Rent Controller-I, Nurpur, District Kangra, H.P. in CMA No.72 of 2020, titled as Rajiv Mahajan Versus Ashwani Kumar, filed in a Rent Petition No.02 of 2016, vide which an application moved under Order 8, Rule 1-A (3) of the Code of Civil Procedure by the present petitioner, stood dismissed by the learned Rent Controller.

2. I have heard learned counsel for the parties and have gone through the documents appended with the petition including the impugned order.

3. Record demonstrates that the respondent/ landlord has filed an application for eviction of the petitioner/tenant, under Section 14 of the H.P. Urban Rent Control Act, 1987, *inter alia*, on the grounds of cease to occupy and also causing material impairment to the value of utility of the Bills. The eviction petition was filed in the year 2016.

4. After recording of the evidence of the landlord, despite numerous opportunities being availed by the tenant to conclude his evidence, the same was not done, which lead to the learned Court below to pass an order of closing the evidence of the tenant, on 29.07.2019.

5. Thereafter, an application stood filed by the tenant under Order 8, Rule 1-A(3) of the Code of Civil Procedure (Annexure P-4), with the prayer that the tenant be granted permission to place on record the photographs of the shop as also the electricity bills of the shop in dispute. It was mentioned in the application

that the documents intended to be placed on record could not be produced by the applicant at the time of closing of evidence despite due diligence and the documents otherwise were material for the adjudication of the case and therefore, the same be taken on record.

6. The application was resisted by the landlord, *inter alia*, on the ground that the tenant could not be permitted to place on record the documents as he had failed to do the needful at the time of leading evidence since 28.11.2017. It was also mentioned in the response that the documents proposed to be placed on record were not at all necessary for the adjudication of the case and the application was filed with the sole intent of delaying the proceedings.

7. Vide order dated 06.02.2020, learned Rent Controller dismissed the application. While passing the order it held that the proposed documents were not produced by the tenant at the time of filing of reply to the main petition or during the course of leading evidence. It observed that the petition was pending since the year 2016 and the same was pending for recording evidence of the tenant since 11.01.2018. Numerous opportunities were availed by the tenant to conclude its evidence and ultimately the same had to be closed by the order of the Court, on 29.07.2019. The electricity bill sought to be produced on record pertained to the month of September, 2019. The Rent Petition was*, inter alia*, filed on the ground that the tenant had ceased to occupy the tenanted premises continuously for a period of twelve months preceding the date of filing of the petition. Therefore, subsequent occupation of the tenanted premises would not have any bearing on the rent petition. Learned Rent Controller further observed that as far as photographs were concerned, it was not mentioned as to on what date the same were taken and there was nothing to justify as to why the same could not be placed on record earlier by the tenant. Learned Rent Controller observed that the tenant cannot be allowed to reopen the trial by granting him opportunity to place on record the documents, prayed for, after ample opportunity

stood granted to the tenant to conclude his evidence. On these basis, learned Rent Controller dismissed the case.

8. In my considered view, there is no infirmity in the order passed by the learned Rent Controller, which stands impugned by way of this petition. It is not in dispute that the eviction proceedings were initiated against the petitioner in the year 2016. It is also not in dispute that the matter was kept pending for a long time for recording and concluding the evidence of the tenant and during said period no endeavour or effort was made by the tenant to place on record the documents which were now intended to be placed on record by way of application, which stood dismissed by the learned Rent Controller.

9. Order 8, Rule 1-A(3) of the Code of Civil Procedure, *inter alia*, envisages that where defendant basis his evidence upon a document or relies upon a document in his possession or power in support of his defence etc., he shall enter such document in evidence and produce in the court when the written statement is filed. Order 8, Rule 1-A(3) of the Code of Civil Procedure further provides that the document which ought to be produced in the Court by the defendant under Order 8, Rule 1-A of the Code of Civil Procedure, but is not produced, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

10. Admittedly, the documents in issue were not placed on record by the tenant at the time when he filed his response to the eviction proceedings or during the course of leading evidence. Why so, is not spelled out from the averments contained in the application filed under Order 8, Rule 1-A(3) of the Code of Civil Procedure. All that is mentioned in this application is that the documents could not be placed on record despite exercising due diligence.

11. In the considered view of the Court, the provisions of Order 8, Rule 1-A(3) of the Code of Civil Procedure are not to condone the acts of omissions of the defendant nor the intent of the said provision is to allow the defendant to fill up lacunae in the case. The powers conferred upon the Court under the said

provision are to be exercised diligently where the Court is satisfied that despite due diligence, the documents could not be placed on record by the defendant and the same is otherwise necessary for deciding the lis between the parties.

12. In this case, petitioner has failed to demonstrate that despite due diligence he could not have had produced said documents on record earlier. Besides this, as has been rightly pointed out by the learned Rent Controller, otherwise also the documents intended to be placed on record do not further the cause of the tenant as admittedly the electricity bill sought to be placed on record pertains to the year 2019, whereas the petition seeking eviction of the tenant on the ground of cease to occupy has been filed in the year 2016. The findings returned by the learned Rent Controller with regard to the photographs that the same were undated etc., are also a matter of record.

13. Otherwise also, in exercise of powers conferred under Article 227 of the Constitution of India, this Court is not to ordinarily interfere with the orders passed by learned Court below, if the view taken by the Court is one of the views possible on the basis of pleadings and evidence before it. The interference can be only in the cases of perversity. The impugned order herein, in the considered view of the Court does not suffers from any perversity and the view which has been taken by the learned Rent Controller is one of the views possible on the basis of averments contained in the application filed under Order 8, Rule 1-A(3) of the Code of Civil Procedure as well as reply on record.

14. Accordingly, as this Court does not finds any merit in the present petition, the same is dismissed. Parties are directed to appear before the learned Rent Controller on 13.09.2021. Interim order, if any, stands vacated.

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

Sarwan Kumar alias Majnu ....Petitioner.

Versus

Punjab National Bank & another ...Respondents.

CMPMO No.130 of 2021
Decided on: 22.07.2021

Constitution of India, 1950 - Article 227 - Supervisory jurisdiction - Opportunity for leading evidence - The Trial Court closed the evidence of petitioner on failure to produce evidence despite reasonable opportunities- Held- If the Court does not assemble on a particular day, certain cases are listed for recording evidence, then if there is general notice that those cases should be taken on the next date, it cannot be assumed that on the said next date the parties have to necessarily produce their witnesses- Petition allowed. (Paras 5 & 6)

For the petitioner : Mr. Romesh Verma, Advocate.
For the respondents : Mr. Sanjay Dalmia, Advocate.

(Through Video Conferencing)
The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, filed under Section 227 of the Constitution of India, the petitioner/defendant No.2 has assailed order dated 06.04.2021, vide which the Court of learned Civil Judge, Bilaspur, H.P., has closed the evidence of defendant No.2, on the ground that said defendant had failed to lead evidence despite reasonable opportunities having been granted.

2. I have heard learned counsel for the parties and have gone through the documents appended with the petition as well as the Zimni Orders, including the impugned order. Perusal thereof demonstrates that after the evidence of the plaintiff-bank was recorded, on 09.07.2019, the case was ordered to be listed for evidence of defendant No.2 (DWs), i.e. the present petitioner, on 21.10.2019. However, on the said date, no witness (DW) was present and accordingly, on the request of defendant No.2, the case was

ordered to be listed for examination of DWs on 17.12.2019, on steps being taken within seven days in this regard.

3. Record demonstrates that on 17.12.2019 also, defendant No.2 failed to lead any evidence and as a matter of indulgence, learned Court below posted the case for 26.02.2020, for evidence of defendant No.2. The story was repeated on 26.02.2020 also and the matter was ordered to be listed on 04.05.2020, for recording evidence of defendant No.2 "*subject to 3rd and last opportunity*". However, the matter was not listed before the Court on, 04.05.2020, due to Covid-19 Pandemic and the same was listed on 30.06.2020, on which date the following order stands recorded:-

> "*Ld. P.O. is on medical leave today and due to the spread of Pandemic disease Covid-19, none appeared for parties before the Court, as such, case is adjourned for proper order for 18.08.2020*"

Reader".

4. It appears that, thereafter, on 18.08.2020 also, the case could not be listed before the learned Court below as the Courts were not fully functional due to Covid-19 Pandemic. The matter was listed on 25.02.2021, on which date, learned counsel for the represented parties appeared before the Court and the case was ordered to be listed on 03.04.2021, for recording statements of defendant's witnesses (DWs). The Court did not assemble on 03.04.2021 and it was on 06.04.2021 that the Court assembled, on which date the impugned order was passed, which reads as under:-

> "*Perusal of the files shows that case has been taken up today for effective hearing, vide separate office order. On the previous date of hearing, i.e. on 25.02.2021, it was clarified that in the interest of justice, one last opportunity, i.e. fourth opportunity was given to the defendants to lead evidence, however, neither steps have been taken, nor the*

> *evidence has been procured, as such, it deems fit to this Court to close the evidence on behalf of defendants and list the case for arguments on 29.04.2021".*

5. In the considered view of the Court, as on 25.02.2021, the case was ordered to be listed for recording evidence of DWs for 03.04.2021 and the matter was not listed before the Court on the said date, i.e. 03.04.2021, then in these circumstances, learned Court below could not have had closed the evidence of the present petitioner/ defendant No.2, in the manner in which it has been done vide impugned order dated 06.04.2021. Even if, it is to be assumed that on 03.04.2021, the parties were put to notice may be by way of a General Notice that the matters listed on the said date shall be listed on 06.04.2021, then also, *ipso facto*, it could not have been taken for granted that defendant No.2 was to bring his witnesses for examination on the said date in the absence of a judicial order. There is no doubt that reasonable opportunities were given by the learned Court below to defendant No.2 to lead his evidence before 03.04.2021, but in the peculiar circumstances, keeping in view the fact that the date on which the case was actually ordered to be listed by the learned Court below for recording the evidence, the Court did not assemble, interest of justice demanded that fresh date by way of a judicial order ought to have been given, listing the matter for recording the statements of DWs. To put it differently, if the Court does not assembles on a particular date and on the said date, certain cases are listed for recording evidence of the parties, then if there is a General Notice that the matter listed on that particular date, shall be taken on the next date, it cannot be assumed that on the said date, the parties have to necessarily produce their witnesses. Fairness demands, when the Court assembles and the matters are listed fresh, actual date has to be fixed by the learned Judge, calling upon the parties to lead evidence.

6. In view of the findings returned hereinabove, this petition is allowed. Order dated 06.04.2021, vide which the learned Court below has closed the evidence of the defendants, is set aside, with the direction that one more opportunity shall be granted by the learned Court below to defendant No.2 to lead his evidence. It is clarified that defendant No.2 will lead his evidence on self responsibility and Court assistance shall not be allowed as earlier no steps were taken on three occasions by the present petitioner to take steps for summoning any witness. The parties through counsel are directed to appear before the learned Court below on 16.08.2021, on which date, an actual date shall be given by the learned Court below for recording the statements of witnesses of defendant No.2. It is further clarified that in case defendant No.2 does not leads his evidence on the said date, then no further opportunity for any reason whatsoever shall be granted by the learned Court below and the right of defendant No.2 to lead evidence shall stand closed. This condition, however, shall not apply in case the Court does not assembles on the date when the matter may be fixed by it for recording the statements of witnesses of defendant No.2.

7. With these observations, this petition is disposed of. No order as to closed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

BETWEEN:

JUMLA JAMINDARAN, VILLAGE PANGI NUMBERING 214 (KHEWAT HOLDERS)THROUGH:

1. PREM RAJ SON OF SHRI DIWAN SINGH.
2. AMIT KUMAR, SON OF SHRI RAM

PARKASH NEGI,

BOTH RESIDENTS OF VILLAGE PANGI, TEHSIL KALPA, DISTRICT KINNAUR, H.P.

….PETITIONERS.

(BY SHRI SUNEET GOEL, ADVOCATE)

AND

JUMLA JAMINDARAN VILLAGE
TEHANGI, NUMBERING 75
(KHEWAT HOLDERS)
THROUGH:

1. SHRI HARISH KUMAR, SONOF SHRI INDER LAL.
2. MAN SINGH, SON OF SHRI SUDERSHAN LAL.

BOTH RESIDENTS OF VILLAGE TALANGI, TEHSIL KALPA, DISTRICT KINNAUR, H.P.

3. STATE OF HIMACHAL PRADESH THROUGH COLLECTOR, KINNAUR.

….RESPONDENTS.

(BY. SHRI BHUPENDER GUPTA, SENIOR ADVOCATE, WITH MR. JANESH GUPTA, ADVOCATE, FOR RESPONDENT NO.1.

MR. ASHOK SOOD, ADVOCATE GENERAL, WITH MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, AND MR. J.S. GULERIA, MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATES GENERAL, FOR RESPONDENT NO.3.

MR.K.D.SOOD, SENIOR ADVOCATE, WITH MR.MUKUL SOOD AND MR. HET RAM, ADVOCATES, FOR PROPOSED RESPONDENT, NAMELY, SHRI CHANDU LAL.

MR. G.D.VERMA, SENIOR ADVOCATE, WITH MR.ROMESH VERMA, ADVOCATE, FOR PROPOSED RESPONDENT, NAMELY, SHRI JAR CHERRING.

RESPONDENT NO.2 IS STATED TO HAVE DIED)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO.380 OF 2017
DECIDED ON:24.08.2021

Code of Civil Procedure, 1908 - Order 6 Rule 17 - Amendment of pleading - Amendment of written statement - Application allowed – Held - Amendment is not likely to change the nature of defence and is only explanatory in nature- Petition dismissed.

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

J U D G M E N T

By way of this petition, filed under Article 227 of the Constitution of India, the petitioners have prayed for quashing of order dated 23.08.2017, passed by the Court of learned Senior Civil Judge, Kinnaur at Recong Peo, District Kinnaur, H.P., in a miscellaneous application filed under Order 6, Rule 17 read with Section 151 of the Code of Civil Procedure, in Civil

Suit No.11-R/1 of 1999/2014, titled as Jumla Jamindaran Village Pangi & others Versus Jumla Jamindaran Village Telangi & others, by the private defendants therein, vide which, said application filed for amendment of the written statement was allowed by the learned Court below.

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

A Civil Suit stands filed by the petitioners/plaintiffs, for declaration to the effect that the plaintiffs have customary rights over the suit land and the order to the contrary passed by Settlement Collector is bad in law and liable to be set aside and the defendants have no right over the suit land.

3. Record demonstrates that earlier a suit was filed in the year 1984 by the plaintiffs and decreed on 26.06.1987. In appeal, the learned District Judge remanded the case to the learned Trial Court on the question of jurisdiction and the court of learned Senior Sub Judge, Kinnaur at Recong Peo, District Kinnaur, H.P., vide judgment dated 30.08.1994 held the suit to be beyond the pecuniary jurisdiction of the said Court and the plaint was returned for its proper presentation. Thereafter, the suit was filed in the Court of learned District Judge, Kinnaur, H.P., which was decreed on 03.10.2001. The defendants filed an appeal, i.e. RFA No.450 of 2001 before this Court, which appeal was allowed vide judgment dated 30.05.2014 and the matter was remanded back to the learned District Judge for decision afresh after impleading the State of Himachal Praesh as a defendant. The suit thereafter stood transferred to the Court of learned Civil Judge (Senior Division), Kinnaur, on account of the change of the pecuniary jurisdiction of the learned Courts. Thereafter, the State of Himachal Pradesh stood impleaded as a party defendant and written statement to the suit was filed by the newly added defendant, which is dated 24.09.2014. An application was filed under Order 6, Rule 17 read with Section 151 of the Code of Civil Procedure by the original

defendants, seeking amendment in the written statement to the following effect:-

> "*a. That in preliminary objections add "new para 5" and further add words "That the suit of the plaintiffs is hopelessly time barred since the plaintiffs are challenging the order of settlement Collector decided on 02.09.1983 in the suit being filed on 23rd day of October, 1999, hence same is liable to be dismissed on this score only."*
> *b. In para 3 after the last word alleged add words "there is a passage having constructed by cutting rocks through Kacha Dhank, which have been used since time immemorial for to and fro to the suit land by khewatdarans of Village Telangi for exercising their customary rights.*"

4. It was mentioned in the application that on account of inadvertence at the time of drafting the written statement, defendants could not put forth their plea of accessibility of the suit land through a path passing through 'Kacha Dhank', which stood constructed by cutting of rocks and which was in use for to and from the suit land by Khewatdarans of village Talangi for exercising customary rights over the suit land since time immemorial. It was further pleaded in the application that the challenge to the order of the Settlement Collector by way of a suit filed by the plaintiffs was time barred as the order stood passed by the Settlement Collector on 02.09.1983, whereas the suit stood filed on 23.10.1999, therefore, plea of limitation was sought to be taken. On these pleas, a prayer was made by the defendants for permission to amend the written statement. This application is dated 25.09.2014.

5. The application was resisted by the plaintiffs, *inter alia*, on the ground that the original suit was filed in the year 1984 and decreed on 26.06.1987 and therefore, the same was not time barred. It stood explained in para-1 of the reply as to how the suit was within limitation qua the order passed by the Settlement Collector was there. With regard to the other

amendments sought by the applicants, the same were resisted, *inter alia*, on the ground that there was no cogent explanation as to why said stand was not taken by the applicants earlier at the time of filing the written statement or within some reasonable time thereafter and as per the non-applicants, the intent of the applicants was to linger on with the litigation by seeking amendment on incorrect or false facts.

6. By way of the impugned order, the application stood allowed by the learned Court below. The reasons assigned by the learned Court below while allowing the application, *inter alia*, were that the rigors of Order 6, Rule 17 of the Code of Civil Procedure after amendment were not applicable to the case as the suit was filed before the amendment was carried out in the provisions of Order 6, Rule 17 of the Code of Civil Procedure. It further held that the amendment prayed was in the written statement and the rigors applicable while dealing with the amendments to a plaint were not applicable while dealing with an application, praying for amendment in the written statement where a liberal approach could be taken by the Court. It further held that the amendments which are essential to determine the real controversy, notwithstanding that there was negligence or omission on the part of the parties, should be permitted so that the parties are not forced to take recourse to the legal proceedings again and again. Learned Court below also held that no delay would be caused if proposed amendments were allowed as the State which was added as a party to the suit pursuant to the directions passed by the High Court had filed its written statement and besides this, the proposed amendments were also essential for effective adjudication of the controversy between the parties. By assigning said reasons, the application stood allowed by the learned Court below subject to payment of costs of Rs.5,000/-.

7. Feeling aggrieved, the order stands assailed by the plaintiffs by way of this petition.

8. Learned counsel for the petitioners has argued that the order passed by the Learned Court below is not sustainable in the eyes of law as the learned Court has erred in not appreciating that in the application filed praying for amendment in the written statement, due diligence was not shown and the provisions of Order 6, Rule 17 of the Code of Civil Procedure cannot be permitted to be invoked by a party to fill up the lacunae. He has further argued that the learned Court erred in not appreciating that the Civil Suit was initially filed in the year 1984, to which written statement stood filed by the defendants and yet the amendments sought after almost three decades, stood allowed by the learned Court below without dwelling on this aspect of the matter as to why the same were either not incorporated in the main written statement or were not incorporated may be by way of amendment within some reasonable time, as it is not the case of the defendants that the cause they intended to introduce by way of amendment was a subsequent cause which arose after the filing of the Civil Suit or the written statement. He has further submitted that the impugned order is an unreasoned order. On these basis, a prayer has been made by the learned counsel for setting aside the impugned order.

9. Defending the order, learned Senior Counsel, appearing for the respondents has argued that there is no infirmity with the order passed by the learned Court below, for the reason that one of the amendment which is relatable to the issue of limitation being a matter of law and fact, can be allowed to be raised by a party at any stage and the other amendments sought were also only clarificatory in nature if read harmoniously with the written statement earlier filed to the original suit. He has further submitted that the learned Trial Court has correctly held that amendments which go to the root of the controversy, should be allowed and the same cannot be rejected on the ground of negligence of a party because the intent of the Court is to impart justice between the parties before it and if facts are placed before

the Court which are necessary for the adjudication of the lis, may be by way of amendments, then same cannot be brushed aside on the ground of delay etc. Learned Senior Counsel also submitted that it was rightly held by the learned Trial Court that the parameters for allowing the amendments in the written statement are not as rigorous as they are to amend the plaint. As per him, as the amendments sought in the written statement otherwise also do not change the nature of the defence taken by the defendants in the earlier filed written statement, therefore also, there is no infirmity with the order passed by the learned Trial Court. Learned Senior Counsel further submits that in exercise of its power of superintendence, ordinarily this Court is not to interfere with the order passed by the learned Court below in case the view which has been taken by the learned Court below is one of the possible views on the basis of material before it and it is only in the cases of perversity that the Court interferes. Accordingly, a prayer has been made for dismissal of the application.

10. I have heard learned counsel for the parties and have also gone through the impugned order as well as record of the case.

11. It is not in dispute that the suit is an old one and the written statement which stood filed by the defendants to the same, copy thereof is appended with the present petition as Annexure P-2, was also filed somewhere in the month of April, 2000. However, it is also a matter of record that the matter stood remanded back for fresh adjudication by the High Court after setting aside decree and judgment with the direction that the State of Himachal Pradesh be impleaded as a party defendant in the suit. After the State was impleaded as a party defendant and opportunity was given to the State to file a written statement, it filed its written statement to the plaint in the month of September, 2014. The application which stood filed under Order 6, Rule 17 of the Code of Civil Procedure, praying for amendment in the written statement is also dated 25.09.2014. This demonstrates that there was

not a considerable delay in filing of the said application as taken from the date, when the written statement to the plaint was filed by one of the parties to the Civil Suit. The prayer which stood made in the application was to allow the applicants to take up the plea of limitation by way of a preliminary objection and to add the factum of existence of a passage which stood constructed by cutting rocks through 'Kacha Dhank' by carrying out necessary amendments in para-3 of the written statement. The issue of limitation being a mixed question of law and facts can be allowed to be raised by a party at any stage if the Court is convinced that adjudication on the same is necessary to arrive at a fair decision and in this view of the matter, the prayer to this effect being allowed by the learned Court below, cannot be faulted with as the same goes to the core of the dispute between the parties. Coming to the other amendment sought by way of the application, as mentioned above, it was to introduce the factum of a passage having been constructed by cutting rocks to 'Kacha Dhank', which as per the defendants was being used since time immemorial to have access to the suit land by Khewatdarans of village Talangi for exercising their customary right. A perusal of the original written statement earlier filed by the defendants, demonstrates that they have mentioned therein that the defendants were having customary rights over the suit land and they have refuted the contention of the plaintiffs that it were the plaintiffs who were only having the customary rights over the suit land and not the defendants. In this view of the matter, this Court finds merit in the contentions of learned Senior Counsel for the respondents that the amendments allowed did not change the nature of the defence and was only explanatory in nature. Even otherwise, the amendments allowed do not prejudice the plaintiffs as they get opportunity to rebut the amendments by way of replication and onus to prove the grounds taken in the amendments which now stand incorporated in the written statement, but natural, is upon the defendants and incorporation of said pleas in the written statement does

not means that the said stand of the defendants has been accepted by the Court.

12. As far as the submissions made by learned counsel for the petitioners that the impugned order suffers from non-consideration of the issues of due diligence etc., all that this Court can say is that the reasons which have been given by the learned Court below, do take care of all the issues, because the findings returned by the learned Court below while allowing the application, *inter alia*, are to the effect that the amendments essential to determine the real controversy should be allowed notwithstanding negligence/omission on the part of a particular party. This Court concurs with the findings so returned by the learned Court below in the peculiar facts of this case taking into consideration the factum of the original Civil Suit being filed before the proviso was added to Order 6, Rule 17 of the Code of Civil Procedure.

13. This Court also concurs with the submissions made by learned counsel for the respondents that in exercise of its powers under Article 227 of the Constitution of India, ordinarily this Court should not interfere with the orders passed by the learned Court below unless the same suffers from perversity. In this particular case, on the basis of material before it, the view which has been taken by the learned Court below is one of the views which should have been taken and this Court does not intends to interfere with the same.

14. In view of the reasoning assigned hereinabove, this petition is dismissed by upholding the order passed by the learned Court below.

15. Taking into consideration the fact that the Civil Suit is quite an old one, it is ordered that an endeavour shall be made by the learned Trial Court to decide the same within a period of six months, by directing the parties to cooperate with the learned Court below in the earlier adjudication of the same.

16. It is clarified that the suit shall be decided by the learned Trial Court on the basis of the pleadings before it and any observations made in this order should not be construed as any adjudication viz-a-viz the rights of either of the parties because the observations which have been made by this Court in this order are only for the purpose of the adjudication of the present petition. It is further clarified that the respondents herein who are not party to the main Civil Suit, stood impleaded only for the purpose of adjudication of this petition and the suit shall be tried *intra* the contesting parties who were before the learned Trial Court at the time of the passing of the impugned order.

17. The contesting parties through learned counsel are directed to appear before the learned Court below, on **20.09.2021**. Registry of this Court is directed to forthwith returned back with the record of the case. Pending miscellaneous applications, including for being impleading as party respondents, stand disposed of by holding that now no order is required to be passed on the same. Interim order, if any, stands vacated.

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

Between:-

1. AJAY KUMAR

2. VIJAY KUMAR
   BOTH SONS OF
   LATE SH. DIWAKAR DUTT,
   R/O VILLAGE SHADHYAL,
   TEHSIL KANDAGHAT,
   DISTT. SOLAN, H.P.

3. SMT. SEEMA DEVI
   W/O SH. MADAN LAL,
   R/O VILLAGE SUNARAN,
   P.O. KANDA, TEHSIL KASAULI,
   DISTRICT SOLAN, H.P.

4. SMT. UMA DEVI,
W/O SH. DIWAKER DUTT,
(MADAN LAL WRONGLY TYPED
BY THE PETITIONER IN
MEMO OF PARTIES IN
APPELLATE COURT),
R/O VILLAGE SHADHYAL,
TEHSIL KANDAGHAT,
DISTT. SOLAN, H.P.

……PETITIONERS

(BY SH. G.D. VERMA, SENIOR ADVOCATE
WITH SH. B.C. VERMA, ADVOCATE)

AND

ISHWAR DUTT
S/O LATE SH. BHIMI RAM,
R/O VILLAGE SHADHYAL,
TEHSIL KANDAGHAT,
DISTRICT SOLAN, H.P.

……RESPONDENT

(BY SH. BALWANT SINGH
THAKUR, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 555 of 2018
DECIDED ON: 03.09.2021

Code of Civil Procedure, 1908 - Order 39 Rules 1 & 2 - Temporary injunction - Joint land - Parties are in separate possession of suit land- All the co-sharers had been raising construction over the joint land as per their possession- Plaintiff has failed to demonstrate any prejudice to him by the construction of defendant – Held - One who seeks equity must do equity- Grant of temporary injunction improper - Petition allowed- Defendant permitted to raise construction.

Cases referred:
Ashok Kapoor Versus Murtu Devi, 2016 (1) Shim. LC 207;
Mandali Ranganna & Ors. etc. v. T. Ramachandra & Ors., AIR 2008 SC 2291;
Payar Singh v. Narayan Dass and others, (2010) 3 Shim. LC 205;
Shiv Chand v. Manghru and others. 2007 (1) Latest HLJ (H.P.) 413;

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

O R D E R

An application moved by the plaintiff under Order 39 Rule 1 and 2 of the Code of Civil Procedure (CPC), seeking temporary injunction against the defendants, has been concurrently allowed by the learned Courts below. Feeling aggrieved, the defendants have assailed these orders by means of the present petition filed under Article 227 of the Constitution of India.

The parties are hereinafter referred to as they were before the learned Trial Court.

2. Facts:-

2(i). Plaintiff filed a civil suit under Section 38 of the Specific Relief Act for permanent prohibitory and perpetual injunction to restrain the defendants from causing any interference, damage, cutting and changing the nature of the suit land etc. The case as set up in the plaint was that the plaintiff, defendants and others are co-owners in possession of the suit land comprised in Khata/Khatauni Nos.16/32, 33, 34, 35, 36, 37, 38, 39 and 40, bearing Khasra Nos.213/202/5 Min, 212/202/5 Min, Kitas 16 measuring 176-09 bighas, situated at Village Shadyal, Tehsil Kandaghat, District Solan. In support of the averments, Jamabandi for the year 2009-10 was appended. The projected grievance of the plaintiff was that the defendants were raising construction over the suit land with an intention to grab its best portion adjoining to village Shadyal-Basha road. It was further averred that by raising the construction, the defendants were trying to possess more land on the spot than their share. Alongwith the civil suit, an application under Order 39 Rule 1 and 2 read with Section 151 CPC for grant of temporary injunction was also moved.

2(ii). In the written statement, stand of the defendants was that:-

2(ii)(a). Partition/Family arrangement had taken place amongst the ancestors of the shareholders of the suit land. Subsequent thereto, all the shareholders are in separate possession of different khataunis. Their such separate possession has been recorded in the jamabandi.

2(ii)(b). Area comprised in Khatauni Nos.37, 38 and 39 is in possession of the defendants and others, whereas area comprised in Khatauni No.40 is in possession of the plaintiff and others. The revenue record evidences this fact. Defendants intended to raise construction only over 6 biswas of land falling under KhatauniNos.37, 38 and 39, out of suit land total measuring 176-09 Bighas.

2(ii)(c). The possession of co-sharers over separate parcel of lands under different khataunis has remained un-objected and uninterrupted. The land entered in different khataunis in possession of different co-owners to the exclusion of others has been accepted by all the joint owners. Therefore, the plaintiff is estopped from filing the suit to restrain the defendants from raising construction over the land in their possession.

2(ii)(d). It is not only the defendants, who were raising construction over the land comprised in Khatauni Nos.37-39, i.e. parts of suit land, but various other co-owners, viz. daughters of Smt. Kalavati and Smt. Taravati, were also constructing houses over the suit land at a distance of around 30 feet from the land where the defendants were digging the pits. The plaintiff had not objected to raising of construction over the suit land by these two co-owners. But by means of instant suit, he was opposing the construction over the suit land by the defendants. Raising of construction over the suit land by other co-owners was concealed in the plaint.

2(ii)(e). The plaintiff had himself raised construction over best portion of the suit land adjacent to National Highway No.22, i.e. Shimla-Parwanoo road. He had raised a three storied structure, out of which one floor was commercial and was fetching him monthly rent of Rs.40,000/-.

2(iii). In replication, the plaintiff did not dispute the fact that he had constructed a three storied house over parts of suit land (Khatauni No.40)adjoining to the national highway. The plaintiff did not deny that other co-owners named in the written statement had also been raising construction over parts of suit land. The plaintiff did not even dispute that the defendants were attempting to raise construction only over 6 biswas of land comprised in Khatauni Nos.37-39 out of the total suit land measuring 176-09 bighas and that land under these three khataunis was in possession of defendants alongwith others.

3. After considering the entire material available on record, learned Trial Court held that the defendants had not placed on record any document to show that family settlement regarding the suit land was carried out. And that such family arrangement was with corresponding intent of severance of joint status of the co-sharers over the suit land. So long the property is joint amongst the parties, no co-owner can exercise his right upon the land in a manner, which would adversely or prejudicially affect the rights and interests of other co-owners. It is only after getting the suit land partitioned by metes and bounds or with the consent of all the co-owners that construction can be raised by a co-owner over the land. Consequently, the application under Order 39 Rule 1 and 2 CPC, moved by the plaintiff, was allowed. Parties were directed to maintain status-quo qua the nature, possession and construction over the entire suit land measuring 176-09 bighas. The order was affirmed in appeal by the learned Additional District Judge-II, Solan, District Solan.

It is in this background that the instant petition has been filed by the defendants.

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

Sh. G.D. Verma, learned Senior Counsel appearing for the defendants/petitioners contended that present was a case where all the co-sharers had been raising construction over the suit land as per their choice over the yearson the areas in their respective possession. A family arrangement had taken place inter-se the ancestors of the joint owners, pursuant to which the co-sharers were in separate possession of the khataunis. Their separate possession of the areas in different khataunis was recorded in the Jamabandi for the year 2014-15 and in the revenue record even prior thereto. Area measuring 20-10 bighas comprised in Khatauni Nos.37, 38 and 39 has been reflected in separate possession of the defendants alongwith others to the exclusion of plaintiff, whereas area measuring 30 bighas comprised in Khatauni No.40 has been reflected in the revenue record in possession of the plaintiff and others to the exclusion of the defendants. All the co-owners have accepted and recognized separate possession of co-owners over distinct areasunder different khataunis of the suit land. It is in this manner that the plaintiff had raised construction of a three storied house over the best portion of the suit land falling under Khatauni No.40 on National Highway No.22 (Shimla to Parwanoo). Some portion of this construction, being used by him for commercial purposes is fetching him Rs.40,000/- per month as rent. In similar manner, some other co-sharers, i.e. daughters of Smt. Kalavati and Smt. Taravati, are also raising construction over the parts of the suit land in their possession. This construction is being raised at a distance of around 30 feet from the place where the defendants wanted to raise the construction. The plaintiff had not objected to the construction being raised by the daughters of above two named co-sharers. Under such circumstances, plaintiff has no right to restrain the defendants from raising construction over parts of suit land, which is in their possession. In the facts and circumstances of the case, the remedy, if any, available to the plaintiff, was to initiate partition proceedings and not to file the civil suit seeking injunction.

Per contra, Sh. Balwant Singh Thakur, learned counsel for the plaintiff (respondent herein) argued that the suit land is joint. It has not been partitioned by metes and bounds. The defendants do not have any right to raise construction over the suit land in excess of their share. They can raise construction only over their share, which can be determined in the partition proceedings. The area comprised in Khatauni Nos.37-39 is not in exclusive possession of the defendants, rather, the defendants are in possession of the area under these three Khataunis alongwith others. Learned counsel for the plaintiff also stated that defendant No.1, Sh. Ajay Kumar, has already raised a shop over 2 biswas of land falling under Khatauni Nos.37-39, which he has rented out. Learned counsel, therefore, argued that the orders under challenge do not suffer from any infirmity.

5. Observations:-

5(i). Persons in settled joint possession of immovable property are supposed to respect the right to joint possession of each other in the same fashion and manner as the owners in joint possession. A person in joint possession of immovable property cannot change the nature of suit property unless the property is partitioned or the other persons in joint possession consent to such change in the nature of the property (Re: ***2007 (1) Latest HLJ (H.P.) 413,*** titled ***Shiv Chand v. Manghru and others***).

(2010) 3 Shim. LC 205, titled ***Payar Singh v. Narayan Dass and others***, was a case where stand of the respondents was that they were in separate possession of land in family partition over which they were raising construction. They also stated that petitioner had also constructed his house over the land in his possession. Finding force in contentions of the respondents, following was observed in paragraph 12 of the judgment:-

> *"12. The respondents in the written statement have specifically pleaded that parties are in separate possession under family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that*

respondents are raising construction on an area which is more than their share. The case of the respondents is that petitioner has constructed his house on a better portion of the land. The under construction house of the respondents is away from the National Highway 21 whereas the house of the petitioner abuts N.H. 21. The respondents have placed on record on the file of revision photographs of under construction house of the respondents. The photographs indicate sufficient gap between the already constructed house of petitioner and under construction house of the respondents over which even slab has been placed. It is the case of the respondents in written statement that they are in separate possession of the land in family arragment. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision the scope is limited as held in The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another v. Ajit Prasad Tarway, Manager (Purchase ad Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76. The suit is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record."

Various judgments on the inter se rights and liabilities of co-sharers were considered by a Co-ordinate Bench of this Court in ***2016 (1) Shim. LC 207***, titled ***Ashok Kapoor Versus Murtu Devi***, wherein following principles were culled out:-

"41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the

rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

1. *A co-owner has an interest in the whole property and also in every parcel of it.*
2. *Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.*
3. *A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*
4. *The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.*
5. *Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.*
6. *Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.*
7. ***Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.***
8. *The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.*
9. *Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not*

necessary in such a case to show that special damage has been suffered."

5(ii). Against the backdrop of above legal position, facts of instant case may be considered. The suit land measures 176-09 bighas. The entire suit land falls in two khasra numbers and in different khataunis. As per the Jamabandi for the year 2014-15, the area under these khataunis has been reflected in possession of different co-sharers. 20-10 bighas of land under Khatauni Nos.37-39 has been reflected in possession of the defendants alongwith some others. Plaintiff's possession is not recorded in these khataunis. The revenue record shows construction of a shop over 2 biswas of land under these three khataunis. Similarly, land measuring 30 bighas under Khatauni No.40 has been shown in possession of the plaintiff alongwith some others. Possession of defendants is not reflected in this khatauni. The plaintiff is also shown to have constructed a house over an area of 4 biswas falling in Khatauni No.40.

5(iii). The plaintiff has not disputed his raising a three storied house over the area falling in Khatauni No.40 on National Highway No.22. He has not disputed that a part of this house has been rented out by him and is fetching him Rs.40,000/- per month as rent.

5(iv). The plaintiff has also not denied that other co-owners, i.e. daughters of Smt. Kalavati and Smt. Taravati, are raising construction over portions of suit land in their possession, which is at a distance of about 30 feet from the place where the defendants intended to raise construction. It is not the case of the plaintiff that he has filed any suit for restraining these two co-owners from raising construction over the suit land on the ground that the suit land is joint and co-owner cannot be permitted to raise construction till the time the entire suit land is partitioned by metes and bounds.

5(v). When a co-sharer himself raises a construction over the joint land, when a co-sharer does not object to raising of construction over the joint

land by some other co-owners, then, he cannot seek to restrain one specific co-owner from raising construction over part of suit land, more so, when the construction being raised by that particular co-owner is over a portion, which, as per the revenue record, is in his possession alongwith others and when the plaintiff has not been shown in possession of this specific portion of land. Law relating to grant or refusal of injunction is well settled. Hon'ble Apex Court in ***AIR 2008 SC 2291,*** titled ***Mandali Ranganna & Ors. etc. v. T. Ramachandra & Ors.***, held that while considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz. existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively.

For considering satisfaction of parameters laid down for grant of temporary injunction, following observations of Ashok Kapoor's case, supra, are also material to the facts of instant case:-

> *"46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-*
>
> *(i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common*

property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In

addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

Plaintiff has not even shown as to how in the facts of the case, raising of construction by the defendants over 6 biswas of land falling under Khatauni Nos.37-39which are in their possession, will cause prejudice to him or would be detrimental to his interest. The conduct of the plaintiff also assumessignificancewhile considering his prayer for grant of equitable relief of injunction. He has himself raised construction over the joint land. He has not raised any objection to other co-sharer's raising construction over the suit land. He is earning handsomely by putting to use the construction raised by him over the joint land. He does not object to the construction raised over the parts of suit land by the other co-sharers, but for the reasons best known to him, has objected to raising of construction over the suit land by the defendants. One who seeks equity must do equity.Out of total suit land measuring 176-09 Bighas, the defendants alongwith others have been recorded to be in specific possession of Khatauni Nos.37-39 measuring 20-10 Bighas. The parameters of order 39 Rule 1 and 2 are not satisfied in the instant case for granting temporary injunction in favour of plaintiff.It is the pleaded case of the defendants that they intend to raise construction only over 6 biswas of land falling under Khatauni Nos.37-39 out of total suit land measuring 176-09 Bighas. This position has been reiterated during hearing of the case by learned Senior Counsel for the defendants on instructions that the defendants shall not raise any construction exceeding 6 biswas of land falling under Khatauni Nos.37-39.

For the foregoing reasons, the instant petition is allowed. The impugned order dated 19.05.2018, passed by the learned Civil Judge,

Kandaghat, District Solan in the application under Order 39 Rule 1 and 2 read with Section 151 CPC and the order dated 07.09.2018 passed by the learned Additional District Judge-II, Solan, District Solan in Civil Misc. Appeal No.8ADJ-II/14 of 2018, are set aside. The defendants are permitted to raise construction over 6 biswas of land comprised in Khatauni Nos.37-39, out of total suit land measuring 176-09 Bighas. It is made clear that observations made above are confined only to the adjudication of the instant petition and shall have no effect on the merits of the matter. Learned trial Court shall decide the civil suit without being influenced by above observations.The construction raised by the defendants in terms of this order shall abide by the final decision of the suit. The parties, through their learned counsel, are directed to remain present before the learned Trial Court on ***16.09.2021***.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous application(s), if any.

Records be returned forthwith.

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

Between:

GAURAV OBEROI SON OF SH. HARASH KUMAR, RESIDENT OF HOUSE NO.117/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, H.P.

....PETITIONER

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

AND

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

2. THE SUPERINTENDENT OF POLICE, MANDI, DISTRICT MANDI, H.P.
3. STATION HOUSE OFFICER, POLICE STATION, SADAR, TEHSIL SADAR, DISTRICT MANDI, H.P.
4. PRAVEEN KUMARI DAUGHTER OF SH. LAL CHAND, RESIDENT OF VILLAGE AND POST OFFICE MANGWAIN, TEHSIL SADAR, DISTRICT MANDI, H.P. (WORKING AS NAZIR), IN DISTRICT COURTS MANDI, DISTRICT MANDI, HIMACHAL PRADESH

....RESPONDENTS

(BY SH .SUDHIR BHATNAGAR AND SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERALS WITH SH. KAMAL KISHORE AND SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERALS FOR R-1 TO 3).
(BY SH. SANJEEV KUTHIALA, SENIOR ADVOCATE WITH MS. RACHNA KUTHIALA, ADVOCATE FOR R-4).

CRIMINAL MISC.PETITION (MAIN)
U/S 482 Cr.P.C No. 259 of 2017
DECIDED ON: 25.08.2021

Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 341, 504 and 506- Quashing of FIR - Where a criminal proceeding is manifestly attended with malafide or maliciously instituted with ulterior motive to wreak vengeance, High Court while exercising power under Section

482 of Code of Criminal Procedure can proceed to quash the proceedings - Chances of conviction are remote - FIR and consequent proceedings quashed.

Cases referred:
Gurudwara Sahib versus Gram Panchayat Village Sirthala and others (2014)1 SCC 679;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335,;
State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699;

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 Cr.P.C., prayer has been made on behalf of the petitioner for quashing of summoning order, dated 24.04.2017 ***(Annexure P-8)***, passed by learned Judicial Magistrate 1st Class, Court No.1, Mandi, Himachal Pradesh, in challan filed by the police in case FIR No.135 of 2016, dated 12.04.2016, registered at police Station, Sadar, District Mandi, H.P., under Sections 341, 504 and 506 of IPC.

2. For having bird's eye view, certain undisputed facts as emerge from the record are that private respondent No.4, Praveen Kumari filed a written complaint before learned District and Sessions Judge, Mandi, H.P., which was received in the office of Superintendent of Police, Mandi through letter No.DJ-R(Per)/MND2016-2646, dated 4th May, 2016 for taking appropriate necessary action as per law. Police after having received aforesaid complaint, lodged FIR No.135/2016, dated 12.5.2016, under Sections 341, 504 and 506 of IPC against the petitioner.

3. Reply filed on behalf of respondents No.1 to 3 reveals that during investigation in the FIR, as detailed hereinabove, allegation with regard to

"criminal force to woman with intent to outrage her modesty", as levelled in the FIR was not found to be correct and accordingly, investigating officer deleted Section 354 of IPC while submitting charge sheet before the competent court of law. After completion of the investigation, police presented charge sheet under Section 173 Cr.P.C., against the petitioner for having committed offence under Sections 341, 504 and 506 of IPC in the court of learned Judicial Magistrate 1st Class, Court No.4, Mandi, H.P.

4. Learned court below taking cognizance of challan filed by the police, issued summons, returnable for 27.6.2017, directing therein petitioner to remain present on the given date (Annexure P-8). In the aforesaid background, petitioner has approached this Court in the instant proceedings for quashing of FIR as well as summoning order on the ground that bare reading of FIR as well as challan filed in the competent court of law, nowhere discloses offences, if any, against the petitioner much less under Sections 341, 504 and 506 of IPC.

5. Careful perusal of reply filed on behalf of respondents No.1 to 3 reveals that petitioner had some boundary dispute with respondent No.4, who was working as Nazir in District Court Mandi, H.P. Since private respondent No.4 and her family had encroached upon the Government land, which is adjacent to the land of the petitioner's family and mother of private respondent No.4 had got prepared false, fake and forged tatima, petitioner filed a complaint to Deputy Commissioner, Mandi, alleging therein that mother of private respondent No.4 has prepared false, fake and forged tatima of the Government land, resultantly, Deputy Commissioner, Mandi forwarded the complaint of the petitioner to the police (Annexure P-1). Police took cognizance on aforesaid complaint and after investigation arrived at a conclusion that mother of private respondent No.4 has committed offence under Sections 420, 465, 466, 468 and 471 of IPC and accordingly registered FIR No. 28 of 2015 against the mother of private respondent No.4. Mother of private respondent No.4, Smt. Kaushalya Devi also filed Civil Suit No. 18 of 2012 for permanent prohibitory injunction in the Court of

learned Civil Judge (Senior Division) Mandi, H.P. (Annexure P-3) against the petitioner.

6. Reply of respondent No.1 to 3 reveals that private respondent No.4 in the year 2013 committed offence under Sections 447, 504, 506, 34 of IPC alongwith other three persons against the petitioner and his family by raising unnecessary dispute on the boundary of the petitioner and his family and matter was reported to the police and in that regard, FIR No.19/2013, dated 28.01.2013 was registered with police Station, Sadar, District Mandi, H.P., at the behest of the petitioner (Annexure P-4).

7. It is quite apparent from the reading of the reply filed on behalf of respondents No.1 to 3 that there are number of Civil and Criminal cases pending adjudication interse petitioner and family of respondent No.4. On account of pendency of aforesaid litigation relationship interse petitioner and respondent No.4 are not good. In the year, 2016 allegedly private respondent No.4, who was working as Nazir in the office of learned District and Sessions Judge, Mandi, H.P., was interfering in the proceedings of all these cases pending in the competent court of law. Petitioner as well his family members submitted a complaint to learned District and Sessions Judge, Mandi with a copy of the same to the Hon'ble Chief Justice of this Court with a prayer that respondent be restrained from interfering in the cases pending adjudication before the different courts at Mandi. Besides above, petitioner also prayed that private respondent may be transferred from District Court Complex Mandi in the interest of justice. Copy of complaint dated 24.04.2016 is annexed as Annexure P-5.

8. In counter blast to aforesaid complaint filed by the petitioner and his family members, private respondent lodged a complaint with learned District and Sessions, Mandi, alleging therein that she is working as Nazir in the office of learned District and Sessions Judge, Mandi and the family of the petitioner and private respondent were having boundary dispute. She alleged

that on 12.05.2016 while she was coming to her office, petitioner not only stopped her but abused her publically and also made caste based remarks. She alleged that petitioner threatened her to get her terminated from her job. She alleged that on the same day petitioner again came to her office and remained sitting in the office upto 5:00 PM and when she was going to home, petitioner followed and besides abusing also threatened her with dire consequences. Learned District and Sessions, Judge, Mandi forwarded the aforesaid complaint to police with the endorsement to take action against the petitioner. While forwarding complaint of respondent No.4 to the police, learned District and Sessions Judge, Mandi ordered that whatever action taken pursuant to complaint of respondent No.4 be intimated in the office of learned District and Sessions Judge, Mandi. On the basis of aforesaid complaint, police without investigation straightaway lodged the FIR No.135/2016, dated 12.5.2016 (Annexure P-6).

9. During investigation since police found no offence to have been committed under Section 354 of IPC, it deleted Section 354 from the FIR and thereafter presented the challan in the competent Court of law under Sections 341, 504 and 506 of IPC (Annexure P-7). Record reveals that learned Court below taking cognizance of aforesaid challan straightaway recorded the statement of the complainant as well as other witnesses adduced on record in support of the complaint and issued summoning order to petitioner, returnable for 27.06.2017 (Annexure P-8).

10. Since learned trial Court before issuing summons for 27.6.2017 (Annexure P-8) failed to pass order citing therein reasons for summoning the petitioner in FIR No.135 of 2016 lodged at the behest of the complainant coupled with the fact that FIR, as mentioned hereinabove, does not disclose offence, if any, much less under Sections 341, 504 and 506 of IPC against the petitioner, petitioner has approached this Court in the instant proceedings for quashing of FIR.

11. I have heard learned counsel representing the parties and gone through the record carefully.

12. Before ascertaining the correctness and genuineness of the aforesaid submissions made on behalf of learned counsel representing the parties, this Court deems it necessary to discuss /elaborate the scope and competence of this Court to quash the FIR as well as criminal proceedings while exercising power under Section 482 Cr.PC.

13. In case titled ***State of Haryana and others vs. Bhajan Lal and others*, *1992 Supp (1) SCC 335***, the Hon'ble Apex Court while elaborately discussing the scope and competence of High Court to quash criminal proceedings under Section 482 Cr.PC laid down certain principles governing the jurisdiction of High Court to exercise its power. After passing of aforesaid judgment, issue with regard to exercise of power under Section 482 Cr.PC, again came to be considered by the Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr.***, wherein it has been held that saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. court proceedings ought not to be permitted to degenerate into a weapon of harassment or persecution.

14. A three-Judge Bench of the Hon'ble Apex Court in case titled ***State of Karnataka vs. L. Muniswamy and others*, 1977 (2) SCC 699**, held that High Court while exercising power under Section 482 Cr.PC is entitled to quash the proceedings, 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.

15. The Hon'ble Apex Court in ***Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293***, relying upon its earlier judgment titled as ***Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330***, reiterated that

High Court has inherent powers under Section 482 Cr.PC., to quash the proceedings 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. In the aforesaid judgment, the Hon'ble Apex Court concluded that while exercising its inherent jurisdiction under Section 482 of the Cr.P.C., Court exercising such power must 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 overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. Besides above, the Hon'ble Apex Court further held that 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. In the aforesaid judgment titled as ***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."

16. It is quite apparent from the bare perusal of aforesaid judgments passed by the Hon'ble Apex Court from time to time that 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/her due to private and personal grudge, High Court while exercising power under Section 482 Cr.PC can proceed to quash the proceedings.

17. Mr. R.L.Chaudhary, learned counsel representing the petitioner while making this Court to peruse the documents placed on record alongwith the writ petition, vehemently argued that FIR sought to be quashed in the instant proceedings came to be instituted under the directions of learned District and Sessions Judge, Mandi, who otherwise had no role, whatsoever to issue directions to police to register FIR against the petitioner, especially when no legal proceedings, if any, were initiated before him by the complainant. Mr. Chaudhary, argued that private complainant after having heard of filing of complaint against her by petitioner to the learned District and Sessions Judge , Mandi lodged false complaint to learned District and Sessions, Mandi, alleging therein that she was prevented by the petitioner from coming to the office and he had used filthy language against her. But learned District and Sessions Judge, Mandi without making an enquiry, if any, into the allegation

straightaway forwarded the complaint to police for taking appropriate action. Mr. Chaudhary, argued that complainant aggrieved, if any, of illegal action of the petitioner could always file FIR straightaway in the police Station, who further after having investigated the matter either would have lodged the FIR or rejected the complaint, but since in the case at hand, specific direction came to be issued from the office of learned District and Sessions Judge, Mandi, police without verifying the correctness of the allegation levelled in the complaint by the private respondent, proceeded to lodge FIR. While referring to FIR as well as final challan filed in the competent court of law (Annexures P-6 & P-7), Mr. Chaudhary strenuously argued that no case much less under Sections 341, 504 and 506 of IPC, is made out against the petitioner and as such, FIR as well as summoning order issued by the court below deserve to be quashed and set-aside.

18. Mr. Sudhir Bhatnagar, learned Additional Advocate General while supporting the summoning order issued by the court below, contended that since court after having recorded the statement of the complainant as well as evidence adduced on record in support of complaint had arrived at a prima-facie conclusion that petitioner has committed offence under sections 341, 504 and 506 of IPC, there was no occasion for it to pass order citing therein reason for summoning petitioner before issuance of summon order, dated 24.4.2017, calling upon the petitioner to remain present on 27.6.2017. However, learned Additional Advocate General while referring to the reply filed by respondents No.1 to 3 fairly admitted that there are numbers of litigation i.e. criminal and civil pending interse petitioner and family of respondent No.4.

19. Before adverting to aforesaid submissions having been made by learned counsel representing the parties, it would be apt to take note of order dated 12.12.2017, passed by this Court, perusal whereof reveals that this Court having perused the record found that dispute interse petitioner and

respondent No.4 was on account of land and since private respondent had encroached upon the private land, this Bench passed following order:-

> "On 31.10.2017, this Court had directed the State to ascertain the status of the property in dispute. Today, the learned Assistant Advocate General has placed on record a communication received by him from the District Collector, Mandi, dated 08.12.2017, the relevant portion whereof reads as under:
>
> "Kindly refer your office letter No. Cr. MMO 259/2017 dated 04.12.2017, on the subjected cited above.
>
> The matter was got inquired into through the Tehsildar, Sadar who has reported that the land comprising Khasra No. 1657 area measuring 5634-75 Sq. Mtrs. classified as "Khadetar" is recorded in the ownership of State of H.P. and in the possession column Raja Joginder Sen son of Shri Kishan Singh son of Shri Man Singh local resident is recorded "Bila Sift" as per jamabandi for the year 2009-10 in Muhal Mangwain/366/8 Tehsil Sadar, District Mandi. As per the spot verification done by the field revenue agency it is found that some portion of the above land is lying vacant whereas in some portion there are buildings constructed on spot. Copy of spot map and Nakal Jamabandi for the year 2009-10 muhal Mangwain Tehsil Sadar, District Mandi, report of Tehsildar, Sadar are enclosed herewith for further necessary action as desired please."

At this stage, Shri R.L.Chaudhary, learned counsel for the petitioner has placed before me a copy of the ejectment order passed against Lal Chand son of Shri Rakha Ram, who is none-else than the father of respondent No.4. It is not only surprising but rather shocking that this fact has not at all been mentioned by the Collector in his aforesaid report. The least that was expected of the Collector was to have brought before this Court the true and correct position as is existing on the spot including the cases of eviction that are sub-judice or have attained finality.

In the given circumstances, let Collector, Mandi, file a detailed report on his personal affidavit before the next date of

hearing.

The learned counsel for the parties jointly pray for and are granted two weeks' time to place on record additional documents. List on 02.01.2018".

20. Pursuant to aforesaid order passed by this Court District Collector, Mandi filed affidavit, indicating therein that ejectment orders stood passed against predecessor-in-interest of respondent No.4 on 9.12.2014. Since, affidavit was conspicuously silent as to where such matter is subjudice, this Court directed District Collector, Mandi to file his personal affidavit, detailing therein batter particulars. On 13.3.2018, District Collector, Mandi filed his personal affidavit, wherein he stated that there were 35 cases of encroachment in Muhal Mangwain, Tehsil Sadar, District Mandi, H.P., which have been decided by Assistant Collector Mandi by passing ejectment order. He also disclosed that person namely, Lal Chand had filed suit for declaration and injunction, wherein learned Civil Judge(Junior Division) Court No.4, Mandi passed status quo order qua nature and possession of the suit land.

21. Since, relief claimed in the suit was for decree of declaration on the ground that plaintiff has become owner of the property by way of adverse possession, this Court observed in order dated 13.3.2018 that suit is not at all maintainable in view of the judgment passed by Hon'ble Apex Court in ***Gurudwara Sahib versus Gram Panchayat Village Sirthala and others*** (2014)1 SCC 679 and accordingly directed learned Civil Judge(Junior Division) Court No.4, Mandi to first decide the maintainability of the suit in the light of aforesaid judgment.

22. Having scanned the entire material placed on record by respective parties as well as order dated 13.3.2018 and 12.12.2017, passed by this Court, one thing is ample clear that dispute interse petitioner and respondent No.4 was on account of boundary dispute. It also emerge from the record that respondent No.4 alongwith many other persons encroached upon

the government land and as such, pursuant to directions issued by this Court many cases of encroachment came to be instituted against various persons including private respondent No.4 and proceedings in that regard are pending adjudication before one forum or other.

23. Precise case of the petitioner is that FIR sought to be quashed in the instant proceedings is a counter blast to the complaints filed by the petitioner against family of respondent No.4 qua encroachment made by them on the Government land and as such, same deserves to be quashed and set-aside. It is not in dispute that FIR sought to be quashed came to be instituted after filing of written complaint Annexure P-5 by petitioner to learned District and Sessions Judge, Mandi, wherein he alleged that private respondent No.4 being Nazir in the court learned District and Sessions Judge, Mandi is unnecessarily interfering in many cases pending interse him and respondent No.4 in the various court of law at Mandi. Moreover, if contents of FIR sought to be quashed are perused in its entirety though reveals that on 30.4.2016 petitioner restrained private respondent No.4 from coming to her office and abused her publically, but if the final challan filed by police after investigation is perused, no evidence, worth credence, ever came to be fore, enabling investigating agency to frame petitioner under various provisions of Scheduled Castes and Scheduled Tribes Act. Similarly, final challan (Annexure P-5) clearly reveals that person namely, Sonika wife of Sh. Inder Singh is the sole witness to the alleged incident, but there is no material available on record suggestive of the fact that at the time of alleged incident above named Sonika wife of Inder Singh was present on the Spot, rather allegedly such incident happened while private respondent No.4 was coming to her office. She alleged that petitioner abused her and used **casteist** remarks in open public place. Perusal of challan suggests that no independent witness came forward to support aforesaid allegation of private respondent No.4. Though, police in final challan filed under Section 173 categorically stated that since number of cases

are pending interse private respondent No.4 and petitioner, private respondent No.4 has narrated alleged incident in exaggerated manner and no witness from court complex and Ramnagar qua the alleged incident was found, but yet it proceeded to present challan against accused under Section 341, 504 and 506 IPC.

24. Having carefully perused the contents of the FIR, sought to be quashed vis-à-vis final challan filed by the police in the competent court of law, this court is compelled to agree with Mr. R.L.Chaudhary, learned counsel representing the petitioner that FIR sought to be quashed is not only counter blast to the complaint filed by petitioner against family respondent no.4, but same is result of uncalled for sympathy shown by the then learned District and Sessions Judge, Mandi, who without verifying the contents of the complaint, directed police to lodge complaint with further direction to report the matter back to him.

25. Leaving everything aside, Judicial Magistrate without bothering to look into contents of challan proceeded to issue summons to accused. No doubt, record reveals that learned Judicial Magistrate before issuing notice recorded the statement of the complainant as well as other witnesses adduced in support of complaint, but yet before issuing summons, he/she ought to have passed order, detailing therein reasons for summoning the accused. Since, such orders never came to be passed, it prevented petitioner herein to lay challenge to such order in the competent court of law, if he was so aggrieved. Since, trial Court straightaway summoned the petitioner without passing any summoning order, it has resulted into grate miscarriage of justice to the petitioner, who in the event of having received summoning order would have got an opportunity to approach appropriate court of law.

26. After having perused contents of FIR sought to be quashed as well as challan filed under Section 173 Cr.P.C vis-à-vis prayer made in the instant petition, this Court has no hesitation to conclude that court below

mechanically without bothering to look into the correctness and genuineness of the contents of FIR as well as final report submitted under Section 173 Cr.P.C, proceeded to issue summon, causing great prejudice to the petitioner.

27. Bare reading of FIR as well as final challan filed under Section 173, nowhere discloses offences, if any, much less under Sections 341, 504 and 506 of IPC against the petitioner and as such, no fruitful purpose would be served in case FIR sought to be quashed as well as summoning order issued by Court below are allowed to sustain. Since it stands duly recorded in the challan filed under Section 173 Cr.P.C that nothing was found against the petitioner during investigation and no independent witness is available qua the alleged incident occurred near the Court complex or Ram Nagar chances of conviction of petitioner otherwise are very remote and bleak and as such, continuation of proceedings, if any, pursuant to filing of challan in the competent court of law and summoning orders would result in sheer abuse of process of law.

28. Consequently, in view of the detailed discussion made herein above, the preset petition is allowed and FIR No.135 of 2016, dated 12.4.2016, under Sections 341, 504 and 506 of IPC, registered at police Station Sadar, District Mandi, H.P., as well as summoning order dated 24.4.2017, are quashed and set-aside. Needless to say, action taken by the competent authority of law pursuant to interim orders 13.3.2018 and 12.12.2017, passed by this Court shall be taken to its logical end. Pending applications, if any, also stand disposed of.

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

Between:

RAKESH KATOCH, SON OF SHRI DEVI CHAND KATOCH, RESIDENT OF VILLAGE BRUHAN, POST OFFICE DHANAG, TEHSIL BAIJNATH, DISTRICT KANGRA, HIMACHAL PRADESH.

….PETITIONER.

(BY SHRI HAKAM BHARDWAJ, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH SECRETARY (HOME) GOVT. OF H.P. SHIMLA, H.P.

2. VISHAL GOSWAMI, SON OF SHRI VIJAY KUMAR, RESIDENT OF VILLAGE GANKHETAR, POST OFFICE & TEHSIL BAIJNATH, DISTRICT KANGRA, H.P.

….RESPONDENTS.

(BY SHRI ADARSH SHARMA, SHRI SUMESH RAJ, SHRI SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENT NO.1

SHRI RAJESH PRAKASH, ADVOCATE, FOR RESPONDENT NO.2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC, No.358 of 2021
DECIDED ON: 14.09.2021

Code of Criminal Procedure, 1973 - Section 482 - Quashing of sentence - Under Section 138 of the Negotiable Instruments Act, 1881 - Held - where after suffering a judgment at conviction the appellant settled the matter with the complainant yet he still suffer the conviction on account of the impugned order - Petition allowed- Order of Trial Court as well as Appellate Court set aside. Title: Rakesh Katoch vs. State of H.P. & another Page-801

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

J U D G M E N T

This petition has been filed by the petitioner under Section 482 of the Criminal Procedure Code, praying for quashing of the sentence passed by the Court of learned Judicial Magistrate, 1st Class, Baijnath, District Kangra, H.P., against the present petitioner, in Criminal Complaint No.49-III/14, dated 17.04.2015, titled Vishal Goswami Versus Rakesh Katoch.

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

The private respondent herein filed a complaint under Section 138 of the Negotiable Instruments Act against the petitioner herein, which complaint was allowed by the Court of learned Judicial Magistrate, 1st Class, Baijnath, District Kangra, H.P., vide judgment dated 17.04.2015, convicting the petitioner herein for commission of the offence under Section 138 of the Negotiable Instruments Act and sentencing him to undergo simple imprisonment for a period of six months and also to pay a fine of Rs.1,70,000/-.

3. Feeling aggrieved, the petitioner herein preferred an appeal under Section 374 of the Criminal Procedure Code before the learned Appellate Court. It appears that during the pendency of said appeal, some settlement took place between the complainant and the accused. This was

followed by recording the statement of learned counsel for the present petitioner, i.e. the appellant therein before the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala (Circuit Court at Baijnath), in the following terms:-

> *"Stated that the appellant has paid the full and final compensation amount to the respondent. Now I want to withdraw the said appeal".*

4. Pursuant thereto, the appeal stood dismissed as withdrawn by the Court of learned Additional Sessions Judge-III, Camp at Baijnath, vide order dated 15.01.2019, which order is being quoted hereinbelow:-

> "*Vide his separate statement ld. Counsel for appellant stated that he does not want to pursue with present appeal as appellant has received entire amount. File complete in all respects be consigned to record room."*

5. Learned counsel for the petitioner has argued that on account of a bonafide mistake which stands committed by the learned counsel for the petitioner, who was representing him before the learned Appellate Court, the impugned order stands passed by the learned Appellate Court as the intent of the learned counsel was not to have had withdrawn the appeal itself, but to have had made a prayer for setting aside of the conviction in view of the matter being amicably settled in a complaint filed under Section 138 of the Negotiable Instruments Act. The petitioner has also placed on record an affidavit of respondent No.2/complainant who has mentioned in said affidavit that he has received full and final payment of the cheque in issue and he has no objection in case the proceedings initiated at his behest are ordered to be quashed and set aside.

6. In this background, learned counsel for the petitioner has submitted that in view of the fact that the matter stands amicably settled

between the parties, it will be in the interest of justice in case this petition is disposed of by permitting the complainant to withdraw the complaint which stood filed under the provisions of Section 138 of the Negotiable Instruments Act as the petitioner is willing to do so.

7. Learned counsel for respondent No.2/complainant, on instructions, informs the Court that the matter indeed stands amicably settled between the parties and the complainant has no objection in case this Court in exercise of its inherent jurisdiction, permits the complainant to withdraw the complaint which was so filed by him under Section 138 of the Negotiable Instruments Act.

8. Having heard learned counsel for the parties, this Court is of the view that besides a mistake being committed by the learned counsel appearing for the appellant before the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala (Camp at Baijnath), the impugned order demonstrates that the same has been passed by the said Court without any due application of mind. Learned Appellate Court erred in not appreciating that the appellant before it was suffering a conviction and withdrawal of the appeal in lieu of settlement of the issue was of no assistance to the appellant. In these circumstances, the learned Court ought to have had sensitized the appellant before it through his counsel as to what would be the effect of withdrawal of the appeal. Not only this, it appears that when the impugned order was passed by the learned Appellate Court, it mistook the appellant to be the complainant as the order passed is to the effect that learned counsel for the appellant stated that he did not intend to pursue the appeal as the appellant had received the entire amount. Learned Appellate Court erred in not appreciating that in his statement which learned counsel for the appellant had got recorded before the said Court, what said stated by the learned

counsel was that the appellant had "paid the full and final consideration amount of the respondent".

9. In this background, this Court is of the view that this is a fit case wherein this Court has to invoke its inherent jurisdiction vested under Section 482 of the Criminal Procedure Code in order to ensure that injustice is not meted out to the petitioner.

10. Herein is a typical case where after suffering a judgment of conviction, the appellant settled the matter with the complainant, yet he still suffers the conviction on account of the impugned order which resulted from an unjustified request made by his counsel before the learned Appellate Court.

11. Therefore, this petition is allowed and as jointly prayed for, the same is disposed of in the following terms:-

Respondent No.2 is permitted to withdraw the complainant, which he filed under Section 138 of the Negotiable Instruments Act, i.e. Criminal Complaint No.49-III/14, titled Vishal Goswami Versus Rakesh Katoch, decided on 17.04.2015. As a result of the complaint being permitted to be withdrawn by this Court, the judgment of conviction passed upon the same and the sentence imposed upon by the learned Trial Court on the basis of said complaint, is ordered to be set aside so also the order passed by the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala (Camp at Baijnath), in Criminal Appeal No.15 of 2016, titled as Rakesh Katoch Versus Vishal Goswami, on 15.01.2019.

12. At this stage, a joint prayer has been made by the parties that an amount of Rs.42,000/- which is lying deposited with the learned Appellate Court concerned, be released in favour of respondent/complainant. It is ordered that the said amount be released in his favour. Pending miscellaneous applications, if any, stand disposed of.

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

Between:

RAJIV SHARMA,
S/O SH. PYARE LAL,
AGED 41 YEARS,
R/O WARD NO.2,
NEAR SHIV MANDIR, BADDI,
TEHSIL BADDI,
DISTRICT SOLAN,
H.P.

....PETITIONER

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

AND

22. THE STATE OF HIMACHAL PRADESH.

2. SHRI CHHOTU RAM,
S/O SHRI SADAR DEEN,
R/O VILLAGE BILANWALI-GUJJARAN,
TEHSIL BADDI,
DISTRICT SOLAN,
H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR
ADDITIONAL ADVOCATE GENERAL
WITH MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL, FOR R-1)

(BY MR. KARAN SINGH KANWAR,
ADVOCATE, FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
No.1360 of 2021

DECIDED ON: 01.09.2021

Code of Criminal Procedure, 1973 - Section 439 (2) read with Section 482 Cr.P.C. - Cancellation of anticipatory bail – Held - While exercising power under Section 439 (2) of Code of Criminal Procedure High Court as well as Court of Sessions can proceed to cancel the bail granted either by it or by the Subordinate Courts, if it comes to the conclusion that Court granting bail has ignored relevant material indicating prima facie involvement of the accused or has taken into account irrelevant material, which has no relevance to the question of grant of bail to the accused - Petition dismissed.

Cases referred:
Central Bureau of Investigation v. Ramendu Chattopadhyay, 2020 14 SCC 396;
Dinesh M.N. (S.P.) v. State of Gujarat, 2008 (5) SCC 66;
Myakala Dharmarajam and Ors v. State of Telangana and Anr, 2020 (2) SCC 743;
P. Chidambaram v. Directorate of Enforcement, 2019 (9) SCC 24, Dinesh M.N. (S.P.) v. State of Gujarat, 2008 (5) SCC 66;
P. Chidambaram v. Directorate of Enforcement, 2019 (9) SCC 24;
Puran v. Rambilas & Anr and Shekhar &Anr v. State of Maharashtra and Anr, 2001 (6) SCC 338;
State of Gujarat v. Mohanlal Jitamalji Porwal and Anr, 1987 (2) SCC 364;

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 Section 439 (2) Cr.PC., read with Section 482 Cr.PC., prayer has been made on behalf of the petitioner-complainant for cancellation of anticipatory bail granted by the learned Additional Sessions Judge, Nalagarh, District Solan, H.P., in case No. 44 of 2020, titled ***Chhotu Ram v. State of HP*** in case FIR No. 300 of 2020, dated 6.12.2020, registered at PS Baddi, District Solan, under Sections 406, 420 and 506 of IPC.

23. Briefly stated facts, as emerge from the record are that, petitioner-complainant met respondent No.2-Chhotu Ram, through one ---- Tarsem Lal, who happens to be his co-brother for purchasing some plot at Panchkula Haryana. Respondent No.2 allegedly told the complainant that government has acquired land of farmers and same shall be subsequently given as a plot and since he has acquaintance with certain farmers, he will get one plot sold to the petitioner-complainant. Allegedly, petitioner-complainant on the askance of the respondent No.2, gave Rs. 66.00 lac to him through Sh. Tarsem Lal for the purchase of plot. Sum of Rs. 41.00 lac was deposited in the bank account of respondent No.2 on 17.6.2013, whereas Rs. 25.00 lac was allegedly paid as cash at Baddi. Since despite having received aforesaid amount, respondent No.2-accused failed to get the plot allotted/transferred in favour of the petitioner-complainant, he filed the FIR detailed herein above. Apprehending his arrest, respondent-accused filed an application under Section 438 CrPC in the court of learned Additional Sessions Judge, Nalagarh, District Solan, praying therein for interim bail.

24. Learned court below vide order dated 7.4.2021, enlarged the respondent-accused on bail in the event of his arrest in the FIR detailed herein above subject to his joining investigation as and when required by the arresting officer. On 19.5.2021, court below after having taken note of the status report as well as record made available by the investigating agency made the order dated 7.4.2021, absolute, subject to following conditions

> *1. That the applicant shall join the investigation as and when required by the police.*
> *2. That he/she shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so s to dissuade him from disclosing such fats to the court or to ay Police Officer.*
> *3. That he/she shall not leave India without previous permission of the court.*

25. Being aggrieved and dis-satisfied with the aforesaid order granting bail in favour of respondent No.2, petitioner-complainant has approached this Court in the instant proceedings filed under Section 439 (2) Cr.PC for the cancellation of the bail.

26. Pursuant to notices issued by this Court, respondents have filed reply to the petition. Specific objection with regard to maintainability of the petition has been taken by both the respondents. Learned Additional Advocate General, while referring to the impugned order granting anticipatory bail vehemently submits that since there is nothing on record suggestive of the fact that after grant of anticipatory bail, respondent-accused has jumped over the conditions imposed by the court below while granting bail, instant application for cancellation of bail filed under Section 439(2) Cr.Pc is not maintainable, he further contends that if the petitioner intends to lay challenge to the aforesaid order granting bail on merits, appropriate remedy under law is to file criminal revision petition under Section 397 Cr.PC, but not definitely, under Section 439 (2) Cr.PC.

27. Mr. J.L. Bhardwaj, while making this Court peruse provisions contained under Section 439 (2) Cr.PC contends that application for cancellation of bail can be filed directly to the court of learned Sessions Judge as well as High Court under Section 439 (2) and it is not necessary to file criminal revision petition under Section 397 Cr.PC., especially when impugned order granting bail is perverse on the face of it. Mr. Bhardwaj, learned counsel, while making this Court peruse, status report filed on behalf of the respondent-state during the proceedings pending before the learned court below, contends that since court below has failed to take note of the contents of the status report as well as record made available to it during the proceedings, order granting bail in favour of respondent No.2 deserves to be cancelled being totally perverse and contrary to the record. He argued that since respondent during his interrogation himself admitted factum with regard

to receipt of Rs. 66.00 lac by him from the petitioner, which fact was disclosed to the court by way of status report, court below had no option but to deny the anticipatory bail to the petitioner, who is accused of committing serious economic offence. In support of his aforesaid submissions, he placed reliance upon following judgments, titled as ***Central Bureau of Investigation v. Ramendu Chattopadhyay, 2020 (14) SCC 396***, ***State of Gujarat v. Mohanlal Jitamalji Porwal and Anr, 1987 (2) SCC 364, P. Chidambaram v. Directorate of Enforcement, 2019 (9) SCC 24, Dinesh M.N. (S.P.) v. State of Gujarat, 2008 (5) SCC 66.***

28. Having heard learned counsel for the parties and perused material available on record, this court finds that under Section 439 (2) Cr.PC., High Court or Court of Sessions can direct that any person who has been released on bail under chapter XXXIII of Cr.PC be arrested and commit him to custody. Section 439 (2) Cr.PC nowhere limits or restricts the power of High Court or Sessions Court to cancel the bail on the ground of violation of conditions imposed at the time of granting bail, rather, High court finding order granting bail contrary to the provisions of law and facts, can always proceed to order for cancellation of bail granted by it or by the subordinate courts. In this regard reliance is placed on judgment passed by the Hon'ble Supreme Court in case titled ***Dinesh M.N. (S.P.) v. State of Gujarat, 2008 (5) SCC 66***, wherein Hon'ble Apex Court has held that bail can be cancelled if material(s), on which bail is granted, is/are substantially irrelevant. Relevant paras of the aforesaid judgment read as under:

> *"17. In support of the appeal, learned counsel for the appellant submitted that the parameters for grant of bail and cancellation of bail are entirely different as has been laid down by this Court in several cases. In the application for cancellation of bail there was no reference to any supervening circumstance and only analysis of the materials which were considered by the trial Court to*

grant bail were highlighted. It is submitted that even if two views are possible, once the bail has been granted, it should not be cancelled. Reliance is placed on decisions of this Court in State (Delhi Admn.) v. Sanjay Gandhi (1978 (2) SCC 411), Bhagirathsinh v. State of Gujarat (1984 (1) SCC 284), Aslam Babalal Desai v. State of Maharashtra (1992 (4) SCC 272), Dolat Ram v. State of Haryana (1995 (1) SCC 349), Ramcharan v. State of M.P. (2004 (13) SCC 617), Mehboob Dawood Shaikh v. State of Maharashtra (2004 (2) SCC 362), Nityanand Rai v. State of Bihar (2005 (4) SCC 178), State of U.P. v. Amarmani Tripathi (2005 (8) SCC 21) and Panchanan Mishra v. Digambar Mishra (2005 (3) SCC 143). It is pointed out that the common thread passing through the aforesaid decisions is that there is no scope for cancellation of bail on re-appreciation of evidence. It is pointed out that in Mehboob's case (supra) and Amarmani's case (supra) the bail was cancelled as it was established that there were serious attempts to tamper with the evidence and to interfere and sidetrack the investigation and threaten the witnesses. It is pointed out that as laid down by this Court in Sanjay Gandhi's case (supra) and Dolat Ram's case (supra) the bail granted should not have been cancelled by way of re- appreciating evidence.

18. In response, learned counsel for the State of Gujarat submitted that it has not been laid down by this Court that only if supervening circumstances are there, on assessing the same bail can be cancelled. He referred to findings of the High Court as to how appellant has tried to divert attention and thereby defeat the course of justice.

19. As is evident from the rival stands one thing is clear that the parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial Court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Though it was urged by learned counsel for the appellant that the aspects to be dealt with while considering the application for cancellation of bail and on appeal against the grant of bail, it was fairly accepted that there is no scope of filing

an appeal against the order of grant of bail. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Sessions, or the High Court.

20. It has been fairly accepted by learned counsel for the parties that in some judgments the expression "appeal in respect of an order of bail" has been used in the sense that one can move the higher court.

21. Though the High Court appears to have used the expression 'ban' on the grant of bail in serious offences, actually it is referable to the decision of this Court in Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr. (2004 (7) SCC 528) In para 11 it was noted as follows:

> *"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter or course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non- application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:*
>
> > *(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
> >
> > *(b) Reasonable apprehension of tampering with the witness or*

apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh (2002 (3) SC 598) and Puran v. Rambilas (2001 (6) SCC 338).

22. It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are sine qua non for granting bail even under Section 439 of the Code.

In para 14 it was noted as follows:

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001. While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient

to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

23. Even though the re-appreciation of the evidence as done by the Court granting bail is to be avoided, the Court dealing with an application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

24. In Puran v. Rambilas and Anr. (2001 (6) SCC 338) it was noted as follows:

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.). In that case the Court observed as under: (SCC p. 124, para 16) "If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the

> *accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-`-vis the High Court."*

29. Reliance is also placed on judgment passed by the Hon'ble Apex Court in case titled **Puran v. Rambilas & Anr** and **Shekhar &Anr v. State of Maharashtra and Anr, 2001 (6) SCC 338**, wherein it has been held as under:

> *"7.Mr. Lalit submitted that one of the reasons why the High Court set aside bail was that the Additional Sessions Judge had not referred to any material circumstance on record and had not given any reasons. He submitted that the High Court was wrong in so observing. He submitted that the same Additional Sessions Judge had earlier granted bail to the ladies by his Order dated 11th September, 2000. He pointed out that, whilst so granting bail, the Additional Sessions Judge had given very cogent reasons. He submitted that against that Order a Petition had been filed in the High Court. He submitted that even though the High Court rejected the Petition, the High Court observed as follows :*
>
> > *"I agree with the learned Counsel appearing on behalf of the complainant that while granting bail the learned Judge ought not to have ventured to discuss the merits or demerits of the evidence collected against the accused persons. Probably he was not aware or he was not remined of the advice given by the Apex Court in the case of Niranjan Singh & another vs. Prabhakar Rajaram Kharote and Others reported in AIR 1980 S.C. 785 wherein detailed examination of the evidence and elaborate documentation of the merits of the case while passing orders on bail application was deprecated."*

8. He submitted that in view of these observations the learned Additional Sessions Judge did not given reasons whilst granting bail. He submitted that in these circumstances the Additional Sessions Judge cannot be faulted. He submitted that the High Court could not cancel bail on this ground. We see no substance in this contention. Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. What the Additional Sessions Judge had done, in the Order dated 11th September, 2000 was to discuss the merits and de-merits of the evidence. That was what was deprecated. That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated.

9.Mr. Lalit next submitted that the High Court has itself not given reasons but has mechanically set aside the order of the bail. We see no substance in this submission. The High Court has correctly not gone into merits or demerits of the matter. The High Court has noted that evidance prima-facie indicated demand of dowry. The High Court has briefly indicated the evidence on record and what was found at the scene of the offence. The High Court has indicated that evidance prima facie indicated that a demand for Rs. 1 lac was made just a month prior to the incident in question. The High Court has stated that the material on record suggested that the offences under Sections 498-A and 304-A were prima facie disclosed. The High Court has concluded that the material on record, the nature of injuries, demand for Rs. 1 lac and the other circumstances were such that this was not a fit case for granting bail. Thus the High Court has given very cogent reasons why bail should not have been granted and why this unjustified erroneous Order granting bail should be cancelled.

10.Mr. Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of Dolat Ram & Ors. vs. State of

Haryana reported in 1995 (1) S.C.C. 349. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

11.Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.) reported in AIR 1978 SC 179. In that case the Court observed as under:-

> *"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under S. 439 (2) to commit the accused to custody. When,*

> *however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court.*
>
> *12.It must be mentioned that in support of the above submission Mr. Lalit had also relied upon the authorities in the cases of Subhendu Mishra vs. Subrat Kumar Mishra and another reported in 1999 Crl.L.J. 4063, State (Delhi Administration) vs. Sanjay Gandhi reported in (1978) 2 S.C.C. 411 and Bhagirathsinh s/o Mahipat Singh Judeja vs. State of Gujarat reported in 1984 (1) S.C.C. 284. These need not be dealt with separately as they are of no assistance in a case of this nature where bail has been cancelled for very cogent and correct reasons.*
>
> *13. Our view is supported by the principles laid down in the case of Gurcharan Singh & Others, etc. vs. State (Delhi Administration) reported in 1978 (1) S.C.C. 118. In this case it has been held, by this Court, that under Section 439(2), the approach should be whether the order granting bail was vitiated by any serious nfirmity for which it was right and proper for the High Court, in the interest of justice, to interfere.*

30. Recently, the Hon'ble Apex Court in case titled ***Myakala Dharmarajam and Ors v. State of Telangana and Anr, 2020 (2) SCC 743***, has held that cancellation of bail can be done in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant material indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High

Court or the Sessions Court would be justified in cancelling the bail while exercising power under Section 439 (2) Cr.PC.

31. Having taken note of the aforesaid exposition of law laid down by the Hon'ble Apex Court and provision of law contained under Section 439 (2) Cr.PC, this Court is of the view that High Court or Court of Sessions can cancel the bail granted by it or by subordinate courts while exercising power under Section 439(2) Cr.PC, if they after having seen record come to the conclusion that order granting bail suffers from serious infirmity resulting in miscarriage of justice. No doubt in normal circumstance, court, which has granted bail, shall have power to cancel the bail in case conditions imposed by it at the time of grant of bail are violated or jumped over by the person, in whose favour, bail is/was granted. But High Court as well as Court of Sessions while exercising power under Section 439 (2) Cr.PC can proceed to cancel the bail granted by it or either by the subordinate courts, if it comes to the conclusion that court granting bail has ignored relevant material indicating prima facie involvement of the accused or has taken into account irrelevant material, which has no relevance to the question of grant of bail to the accused. Hence, in view of the aforesaid, it can be safely held that under Section 439 (2) Cr.PC, High Court has inherent jurisdiction to cancel the bail granted by the subordinate court for the reasons taken note herein above.

32. In the case at hand, petitioner/complainant lodged FIR against the respondent-accused that he misappropriated Rs. 66.00 lac given by him for purchase of some plot. Neither respondent returned the money nor got the plot purchased in favour of the petitioner-complainant. However, replies having been filed by the respondents, especially, respondent No.1 as well as status report filed by the respondent-State in the proceedings before the court below, if read in its entirety vis-à-vis order dated 19.5.2021, whereby interim bail granted vide order dated 7.4.201, came to be affirmed reveal that at no point of time, petitioner-complainant was able to produce any agreement

executed inter-se him and respondent with regard to purchase of the plot. Though material available on record reveals that sum of Rs. 41.00 lac was transferred in the bank account of the respondent, but he categorically disclosed to the police during investigation that aforesaid amount was advanced by him to the petitioner/complainant as a loan with a view to save him from the criminal proceedings initiated at the behest of lady namely Kulwant Kaur to whom, allegedly petitioner had issued cheques, but same were dishonoured. Similarly, respondent/complainant disclosed to the police that petitioner complainant had advanced Rs. 19.00 lac to him, but same was returned to complainant-Rajiv Sharma. Transaction qua the aforesaid amount took place inter-se petitioner/complainant and respondent-accused somewhere in the year 2013, but interestingly, FIR, which is subject matter of the present case, came to be instituted in the year, 2017 after an inordinate delay of four years. Since petitioner/ complainant failed to place on record any agreement to sell or agreement of an kind executed inter-se him and respondent, containing therein factum with regard to payment of Rs. 66.00 lac by the petitioner-complainant to the respondent, court below rightly proceeded to grant interim bail to the respondent vide order dated 7.4.2021, which subsequently, came be affirmed vide order dated 19.5.2021. Interestingly, even in these proceedings, petitioner complainant has failed to place on record documentary evidence, if any, with regard to payment of Rs. 66.00 lac allegedly made by him to respondent for purchase of a plot. It is otherwise difficult to believe that sum of Rs. 66.00 lac was paid to the respondent by the petitioner for purchase of the plot without there being any agreement to sell. To the contrary, respondent while fairly admitting factum with regard to receipt of 41.00 lac in his bank account has claimed that aforesaid sum was advanced by him to the petitioner-complainant. Whether sum of Rs. 66.00 lac was paid by the petitioner complainant to the respondent and same was subsequently misappropriated by the respondent-accused, is a matter of trial

and court below in the absence of documentary evidence, if any, adduced on record by the petitioner-complainant had no reason to infer/conclude complicity, if any, of the respondent in the alleged commission of the aforesaid offences.

33. Though in the instant case, police also made correspondence with the Income Tax Officer, Parwanoo, for obtaining the ITR of the accused, but till passing of the order dated 19.5.2021, same could not be placed before this court and as such, no fault, if any, can be found with the order dated 19.5.2021, affirming interim bail order date 7.4.2021, passed by the court below. Record reveals that matter repeteadly came to be adjourned, enabling the investigating agency to place on record documentary evidence, if any, with regard to the payment of Rs. 66.00 lac to the respondent by the petitioner, but since such documents were not in existence, police failed to place the same on record. There cannot be any quarrel with regard to the proposition of law laid down by the Hon'ble Apex Court that in the cases of economic offences, court should be slow/loath in acceding prayer for grant of bail. See. ***Central Bureau of Investigation v. Ramendu Chattopadhyay, 2020 14 SCC 396. P. Chidambaram v. Directorate of Enforcement, 2019 (9) SCC 24.*** In the aforesaid judgments, it has been held that legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody, but the court while doing so is also required to keep in mind that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake and as such, a delicate balance is required to be established between the two rights i.e. 1. safeguarding the personal liberty of an individual and; 2. the societal interest.

34. However, in the case at hand though there is an allegation of misappropriation of 66 lac by the respondent, but as has been taken note here

in above, there is no evidence worth credence available on record that sum of Rs. 66.00 lac was paid by the petitioner-complainant to the respondent for purchase of plot. Had aforesaid sum been paid for purchase of the plot by the petitioner to the respondent, definitely there would have been some agreement, but in the case at hand, neither there is any agreement to sell nor there is a receipt if any, issued qua the payment of 66 lac by the petitioner complaint to respondent No.2. Sum of Rs. 41 lac received in the bank account of respondent has been duly explained by him by stating that aforesaid amount was paid by him to the petitioner-complainant with a view to save him from criminal proceedings initiated at the behest of the lady namely Kulwant Kaur. Whether respondent No.2 committed an economic offence is a question, which needs to be decided on the basis of evidence collected on record by the prosecution and mere use of expression "*economic offence*" cannot be made basis to deny the prayer made on behalf of the respondent for grant of anticipatory bail, especially in the given facts and circumstances of the case.

35. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court sees no merit in the present petition and same is dismissed being devoid of any merits and order dated 19.5.2021 passed by the court below is upheld. Observation, if any, made herein above, shall have no bearing on the merits of the main case.

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

Between:
NARENDER SINGH SON OF SH.
MOHINDER SINGH,R/O VILLAGE
AND P.O. CHAMUKHA, TEHSIL RAKKAR,
DISTRICT KANGRA, HIMACHAL PRADESH

....PETITIONER

(BY MS. SUNITA SHARMA, SENIOR ADVOCATE

WITH SH. DHANANJAY SHARMA AND SH.
RANVIR SINGH, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY
(HOME) TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH SHIMLA-2

3. SUPERINTENDENT OF POLICE,
KANGRA, DISTRICT KANGRA, H.P.

....RESPONDENTS

(BY SH. SUDHIR BHATNAGAR, ADDITIONAL
ADVOCATE GENERAL WITH SH. R.P. SINGH,
AND SH NARENDER THAKUR, DEPUTY
ADVOCATE GENERALS.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 7404 of 2019
DECIDED ON: 13.08.2021

Constitution of India, 1950 - Article 226 - Service Matter - Petitioner a police constable named in FIR No. 78/ 2013 under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, represented the Director General of Police, Himachal Pradesh, to reinstate him in service on account of his acquittal by Hon'ble High Court of Himachal Pradesh- Representation rejected - Held - Representation rejected in slip shod manner without assigning any reason - Order passed by Director General of Police, Himachal Pradesh, is quashed and set aside with the direction to reinstate petitioner in service forthwith. (Para 5)

Case referred:

S.Bhaskar Reddy and another versus Superintendent of Police, and another (2015)2 SCC 365;

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

O R D E R

Being aggrieved and dissatisfied with the order dated 12.4.2016, passed by Director General of Police, Himachal Pradesh, whereby representation ***(Annexure A-2),*** dated 23.11.2015, having been filed by the petitioner to reinstate him in service on account of his acquittal in criminal case No.119 of 2014 vide judgment dated 24.7.2015 passed by Hon'ble High Court of Himachal Pradesh in Cr. Appeal No.120 of 2014, came to be rejected.

2. For having bird's eye view, certain undisputed facts as emerge from the record are that the petitioner, who was constable in Police Department, came to be named in the FIR No.78/2013, dated 11.7.2013 under Sections 20 of the Narcotic Drugs & Substances Act***,(for short 'Act'),*** registered at police Station, Bangana, District Una, Himachal Pradesh, on the allegation that he was unauthorizedly carrying narcotic substance. On the basis of information supplied by Sub Divisional Police Officer, Dehra, petitioner was placed under suspension w.e.f.11.7.2013. Vide judgment dated 24.3.2014, learned Special Judge, Una, District Una, H.P., convicted and sentenced the petitioner alongwith other co-accused under Sections 20 of the Act, as a consequence of which, he remained in judicial custody for 256 days with effect from 11th July, 2013 to 23rd March, 2014. On account of petitioner's being convicted and sentenced under Section 20 of the Act, Superintendent of Police, Kangra vide order dated 9.6.2014 dismissed him from service with effect from 11th July, 2013 as per the provisions laid down in Rule 16.19 of HPPR (Annexure A-1).

3. Petitioner herein, being aggrieved and dissatisfied with the aforesaid judgment of conviction and order of sentence recorded by learned court below, filed an appeal before the Division Bench of this Court, which came to be registered as Cr. Appeal No.120 of 2014. Division Bench of this Court vide judgment dated 24th July, 2015, acquitted the petitioner of the offences punishable under Sections 20(b)(ii)(C) read with Section 29 of the Act and as such, petitioner by way of representation(Annexure P-2), dated 23.11.2015, requested the Superintendent of Police, Kangra at Dharamshala, Himachal Pradesh to reinstate him in service. However, such prayer of him came to be rejected vide order dated 12.4.2016, passed by Director General of Police, Himachal Pradesh, Annexure R-1, annexed with the reply filed by the respondents. In the aforesaid background, petitioner has approached the erstwhile H.P. Administrative Tribunal by way of Original Application No.1783 of 2019, however on account of abolishment of erstwhile H.P. Administrative Tribunal, case came to be transferred to this Court and stands registered as CWPOA No.7404 of 2019, praying therein following reliefs:-

1. That Annexure A-1 may be quashed and set aside and respondent may be directed to reinstate the applicant with all consequential benefits.

2. That the applicant is entitled for the full salary from the date it fell due.

3. That the suspension period is required to be counting for qualifying service.

4. That the respondents may be directed to reinstate the petitioner with seniority.

5. That the respondent No.2 may be directed to decide the representation Annexure A-6 in time bound manner.

4. Having heard learned counsel representing the parties and perused the material available on record, this court finds that there is no dispute interse parties that vide judgment dated 24th July, 2015, petitioner herein stands acquitted of the charges framed against him under Sections 20(b)(ii)(C) read with Section 29 of the Act. It is also not in dispute that as of today, no disciplinary proceedings are pending against the petitioner herein. Prayer made on behalf of the petitioner after his having acquitted in criminal case for reinstatement came to be rejected on the ground that acquittal of petitioner in appeal by Division Bench of this Court is not hounourable and he does not qualify for consideration of reinstatement in service. It would be profitable to take note of order dated 12.4.2016, passed by Director General of Police, Himachal Pradesh, rejecting therein the prayer made on behalf of the petitioner for reinstatement herein below:-

> " An acquittal has to be " hounourable" to qualify for consideration of reinstatement. There is no provision for automatic reinstatement in service. Another case has also been registered for which charge sheet is ready".

5. Having carefully perused the order passed by the competent authority, this Court has no hesitation to conclude that representation having been filed by the petitioner has been considered and rejected by the competent authority in slip shod manner without assigning any reason. Though, in the aforesaid order, it has been mentioned that acquittal has to hounourable to qualify for consideration of reinstatement, but there is nothing mentioned in the order that how petitioner cannot be said to have been acquitted hounourable vide judgment dated 24.3.2014, passed by Division Bench of this Court in Cr. Appeal No.120 of 2014.

6. Having carefully perused the judgment dated 24.3.2014, this Court finds that Division Bench of this Court acquitted the petitioner of the

offences punishable under Sections 20(b)(ii)(C) read with Section 29 of the Act, after having discussed entire evidence available on record. If judgment passed by Division Bench of this Court, is read in its entirety, it clearly reveals that independent witnesses associated by the police while effecting recovery also not supported the case of the prosecution. PW-1 in his cross-examination by prosecution denied the suggestion that charas weighed 1.5 kg was recovered in his presence.

7. Though, learned Deputy Advocate General while referring to the judgment of acquittal passed by Division Bench of this Court argued that since appeal having been filed by the petitioner came to be allowed on technical grounds, his acquittal cannot be said to be hounourable, but this Court after having scanned the material available on record, finds no force in the aforesaid submission made by learned Deputy Advocate General. As has been observed hereinabove, Division Bench of this Court has discussed the entire evidence led on record by the prosecution, appeal of the petitioner has been not only allowed on the ground of non-adherence of statutory provisions contained under the Act, rather Division Bench taking into consideration entire evidence, proceeded to acquit the accused. Division Bench of this Court while acquitting may not have specifically mentioned that prosecution witnesses have not supported the case of the prosecution, but while acquitting the accused of offences Sections 20(b)(ii)(C) read with Section 29 of the Act, Division Bench of this Court has discussed the entire evidence and has not extended the benefit of doubt to the petitioner, rather has acquitted him honourably.

8. Expression 'hounourable' acquittal has been not defined anywhere, but such expression came to be discussed and reported in the judgment passed by Hon'ble Apex Court in ***S.Bhaskar Reddy and another versus Superintendent of Police, and another*** (2015)2 Supreme Court Cases 365, wherein it has been held that if Court below has recorded the finding of fact on proper appreciation and evaluation of evidence on record and has held

that the charges framed in the criminal case are not proved against the accused, it shall be deemed to be hounourable acquittal. In the aforesaid judgment Hon'ble Apex Court has held that it is difficult to define precisely what is meant by the expression "honorably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted. It would be profitable to take note of paras No.21 to 23 and 26 herein- below:-

> "21. It is an undisputed fact that the charges in the criminal case and the Disciplinary proceedings conducted against the appellants by the first respondent are similar. The appellants have faced the criminal trial before the Sessions Judge, Chittoor on the charge of murder and other offences of IPC and SC/ST (POA) Act. Our attention was drawn to the said judgment which is produced at Exh. P-7, to evidence the fact that the charges in both the proceedings of the criminal case and the Disciplinary proceeding are similar. From perusal of the charge sheet issued in the disciplinary proceedings and the enquiry report submitted by the Enquiry Officer and the judgment in the criminal case, it is clear that they are almost similar and one and the same. In the criminal trial, the appellants have been acquitted honourably for want of evidence on record. The trial judge has categorically recorded the finding of fact on proper appreciation and evaluation of evidence on record and held that the charges framed in the criminal case are not proved against the appellants and therefore they have been honourably acquitted for the offences punishable under 3 (1) (x) of SC/ST (POA) Act and under Sections 307 and 302 read with Section 34 of the IPC. The law declared by this Court with regard to honourable acquittal of an accused for criminal offences means that they are acquitted for want of evidence to prove the charges.

22. The meaning of the expression "honourable acquittal" was discussed by this Court in detail in the case of Deputy Inspector General of Police & Anr. v. S. Samuthiram[3], the relevant para from the said case reads as under :-

> "24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."
>
> (Emphasis laid by this Court)

After examining the principles laid down in the above said case, the same was reiterated by this Court in a recent decision in the case of Joginder Singh v. Union Territory of Chandigarh & Ors. in Civil Appeal No. 2325 Of 2009 (decided on November 11, 2014.

23. Further, in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr. (supra) this Court has held as under:-

> "34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, "the raid conducted at the appellant's residence and recovery of incriminating articles there from". The findings

recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

24. (emphasis laid by this Court) Further, in the case of G.M. Tank v. State of Gujarat and Ors.(supra) this Court held as under:-

26. We have answered the alternative legal contention urged on behalf of the appellants by accepting the judgment and order of the Sessions Judge, in which case they have been acquitted honourably from the charges which are more or less similar to the charges levelled against the appellants in the Disciplinary proceedings by applying the decisions of this Court referred to supra. Therefore, we have to set aside the orders of dismissal passed against the appellants by accepting the alternative legal

plea as urged above having regard to the facts and circumstances of the case."

9. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court is unable to accept the reasoning assigned by the competent authority while rejecting the representation having been filed by the petitioner pursuant to his acquittal in criminal case. Since, Division Bench of this Court after having discussed the entire evidence, proceeded to acquit the accused that too without extending benefit of doubt, it cannot be said that he was not honourably acquitted and as such, order dated 12.4.2016, passed by Director General of Police, Himachal Pradesh, is quashed and set-aside and respondents are directed to reinstate the petitioner in service forthwith. Consequential benefits, if any, be also released in favour of the petitioner. Pending applications, if any, also stand disposed of.

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

Between:-

1. M/S SUPER VENDING TECHNOLOGIESVILLAGE NARIYAL,
NEAR OLD TIMBER DEPOT,SECTOR 4 PARWANOO, TEHSIL KASAULI,
DISTRICT SOLAN,
H.P. THROUGH ITS PARTNER/PROPRIETORTEJ PAL SINGH
S/O LATE SH. TARA SINGH.

2. TEJ PAL SINGH
S/O LATE SHRI TARA SINGHAGED ABOUT 55 YEARS
R/O H.NO 1900 BASANT BIHAR,KALKA, PARTNER
M/S SUPER VENDING TECHNOLOGIES,VILLAGE NARIYAL, NEAR OLD
TIMBERDEPOT, SECTOR 4 PARWANOO, TEHSIL KASAULI,
DISTRICT SOLAN H.P.

.....PETITIONERS

(BY SH. DIBENDER GOSH,
SH. RAVI SHANKAR SOOD, ADVOCATES)AND

1. SHRI MUKESH SAHNI,
S/O LATE SH. KULDEEP RAJ SAHNIAGED 50 YEARS,
R/O MIG 102 SECTOR 4
PARWANOO,PARTNER M/S SUPER
VENDING TECHNOLOGIES,
VILLAGE NARIYAL,NEAR OLD
TIMBER DEPOT,

SECTOR 4 PARWANOO,

TESHIL KASAULI, DISTRICT SOLAN H.P.

2. STATE BANK OF INDIA,
B.O SECTOR 4
PARWANOO, THROUGH ITS
AUTHORIZED
OFFICER/BRANCH
MANAGER.

.....RESPONDENTS

(SH.DALIP K. SHARMA, ADVOCATE, FOR R-1,
SH. ARVIND THAKUR, ADVOCATE, FOR R-2.
SMT. MANJU NEGI, SBI LAW OFFICER)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 168 OF 2021
DECIDED ON:28.09.2021

Constitution of India, 1950 - Article 227 - Section 8 of the Arbitration and Conciliation Act 1996 - Mandatory provisions of Section 8 of the Arbitration and Conciliation Act are required to be complied with while filing application under Section 8 of the Act in as much as necessary documents for reaching the conclusion as drawn by the learned Trial Court in the impugned order had to be part of the application- Order of Trial Court set aside- Petition allowed.

Cases referred:

Atul Singh and others Vs. Sunil Kumar Singh and others, (2008) 2 SCC 602;
Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and another, (2009) 10 SCC 103;

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

O R D E R

An application moved by defendant No.1 under Section8 of the Arbitration and Conciliation Act 1996 (in short the Act) read with Order 7 Rule 11(d) of the Code of Civil Procedure was allowed bythe learned trial Court vide order dated 20.07.2021. The parties were directed to refer the dispute raised in the plaint to the Arbitrator. The plaint was also ordered to be returned to the plaintiffs. Based on this order, a separate order of even date was also passed for returning the plaint etc. to the plaintiffs. Aggrieved against the aforesaid orders passed on 20.07.2021, the plaintiffs have moved the instant petition under Article 227 of the Constitution of India.

2(i) A civil suit was filed by the petitioners seeking permanent prohibitory injunction for restraining respondent No.1 from interfering in the assets and properties described in the plaint and also in the business of plaintiffs as described therein. A decree of mandatory injunction was also prayed for directing respondent No.1 toexecute certain documents.

2(ii) On receipt of the notice of the plaint, defendant No.1/respondent No.1 filed an application under Section 8 of the Arbitration and Conciliation Act read with Order 7 Rule 11(d) of the Code of Civil Procedure. It was submitted in the application that the plaintiffs and defendant No.1 had executed a partnership deed registered on 11.10.2007. In terms of this partnership deed, plaintiff No.2, defendant No.1 and one Sh. Inder Pal became partners of partnership firm M/s Super Vending Technologies (plaintiff No.1). InderPal retired as partner of the firm vide 'Deed Of Dissolution Of Retirement Of One Partner' registered on 17.3.2016. The other two partners continued as partners of the firm (Petitioner No.1/plaintiff No.1). It was also submitted that an arbitration clause was contained in the partnership deed

dated 11.10.2007 to the effect 'that in case of any dispute between the partners, the same shall be referred to an Arbitrator, who may be appointed by mutual consent of the partners.' Paragraph-3 of the application moved by respondent No.1 reads as under:-

> *"3. That as per the above said partnership deed dated 11.10.2007*
>
> *it was mutally agreed amongst the partners of the firm that in eventof any kind of dispute between the partners of the firm, same shall be referred to Arbitrator. The contents of relevant paras of the partnership deed are reproduced for the kind perusal of the Hon'bleCourt as under:-*
>
> *"That in case of any dispute between the partners, the same may be referred to an ARBITRATOR, who may be appointed by mutual consent of the partners".*

On the strength of above averments, prayer was made in the application to refer the dispute to arbitration and to order return of the plaint.

2(iii) In their reply filed to the above application, the plaintiffs denied the assertions made in the application. The above extracted para-3 of the application was replied by them as under:-

> *"Para 3 to 6 That the contents of para 3 to 6 as alleged are wrong hence denied and not admitted to be correct in view of detailed submissions made herein above since there exists no arbitration clause with respect to matter in dispute in as much as the dispute if any is not subject to arbitration in view of minutes of meeting dated 23.12.2019 therefore the contention raised in this paras is a result of misinterpreting and misunderstanding and misconception of the issue involved as such the present application deserves to be dismissed being misconceived/devoid on any merit."*

2(iv) Learned trial Court vide impugned orders dated 20.07.2021 held that the partnership deed dated 11.07.2007 contained a clause in terms of which, the dispute between the partners was required to be adjudicated by the Arbitrator. The dispute raised by the petitioners/plaintiffs fell within the ambit of the arbitration clause. Accordingly, vide order dated 20.07.2021, the parties were directed to refer the dispute raised in the plaint to the Arbitrator "as mentioned in the Arbitration clause of the agreement". Vide separate order of the even date, the copy of the plaint and other documents were ordered to be returned to the petitioners for forwarding it to the Arbitrator. In the aforesaid background, the petitioners have filed the instant petition assailing the orders passed on 20.07.2021 by thelearned Trial Court.

3. I have heard learned counsel for the parties and gone through the documents available on record.

4(i) Since the application allowed by the learned trial Court under the impugned orders was moved under Section 8 of the Act, therefore, it will be appropriate to first notice this section. Section 8 ofthe Arbitration and Conciliation Act, 1996 reads as under:-

> *"8. Power to refer parties to arbitration where there is an arbitration agreement:-*
>
> *(1) A judicial authority, before which an action is brought in a matterwhich is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*
>
> *(2) The application referred to in sub-section (1) shall*

not be entertained unless it is accompanied by the original arbitrationagreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy ofthe arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub- section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made"

Plain reading of Section 8 of the Act makes out that alongwith the application moved under Section 8, the original arbitration agreement or a duly certified copy thereof has to be enclosed. Without these documents, the application cannot be maintained. The proviso to Section 8(2) states that in case the original/certified copy of the arbitration agreement is not available withthe applicant and the same is with the other party to the agreement, then the applicant alongwith a copy of arbitration agreement appended with the application shall pray to the Court to direct the other party to produce the original/certified copy of arbitration agreement before the Court. In this regard, it is apt to refer to following paragraphs from a judgment reported in ***(2009) 10 SCC 103***, titled as ***Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and another***:-

"17.....An analysis of Section 8 *would show that for its applicability, the following conditions must be satisfied:*

(a) that there exists an arbitration agreement;

(b) that action has been brought to the court by one party to the arbitration agreement against the other party;

(c) that the subject matter of the suit is same as the subject matter of the arbitration agreement;

(d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties toarbitration; and

(e) that along with the application the other party tenders the originalarbitration agreement or duly certified copy thereof.

18. Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as aforestated are satisfied, the court must refer the parties to arbitration.

As a matter of fact, on fulfillment of conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. There is nothing on record that the pre-requisite conditions of Section 8 are not fully satisfied in the present case. The trial court, in the circumstances, ought to have referred the parties to arbitration as per arbitration clause 22."

In ***(2008) 2 SCC 602*** titled ***Atul Singh and others Vs. Sunil Kumar Singh and others***, it was held that mandatory provisions of Section 8 requiring the application under Section 8 of the Act to be accompanied by original arbitration agreement or duly certified copy thereof, are required to be fulfilled. Relevant paragraph of the judgment reads as under:-

"19. There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear

non-compliance with sub-section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, defendant no.3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit."

4(ii) While assailing the orders dated 20.07.2021, a specific ground has been taken in the present petition that the application moved by respondent No.1 under Section 8 of the Act was neither accompanied by the original nor the certified copy of either the agreement dated 6.9.2007 or the partnership deed dated 11.10.2007. Though the record of the case is not before this Court nor the same atpresent is before the learned trial Court. The impugned order passed by learned trial Court also does not indicate as to whether the necessary documents as per Section 8 of the Act were before it or not. However, learned counsel for respondent No.1 did not dispute that application moved by respondent No.1 under Section 8 of the Act was an application simplicitor. That neither the agreement dated 6.9.2007 nor the partnership deed dated 11.10.2007 were appended alongwith the application. That no document was enclosed with the application. It is not disputed that the documents viz. the partnership deed dated 11.10.2007 and the agreement dated 6.9.2007 were not even part of the plaint. It is not the case of respondent No.1 that he had invoked the proviso to Section 8(2) seeking procurement of the same. If that is so then, in absence of deed of partnership dated 11.10.2007, in absence of agreement dated 6.9.2007, the learned trial Court could not have drawn any conclusion about the existence of the arbitration clause or that the dispute raised in the plaint was required to be

referred to the Arbitrator in terms of that imaginary clause. Mandatory provisions of Section 8 of the Arbitration Act were required to be complied with by respondent No.1 while filing application under Section 8 of the Act inasmuch as the necessary documents for reaching the conclusion as drawn by the learned trial Court in the impugned order had to be part of the application. Though the impugned orders passed by learned trial Court do not throw any light in this regard, however, in view of the submissions made by learned counsels for the parties during hearing of the case, it appears that provisions of Section 8 of the Act were not complied by respondent No.1.

For the aforesaid reasons, the order dated 20.07.2021 passed in CMA No.139/2021 and the order dated 20.07.2021 returning the plaint passed in Civil Suit No.50/2021 by learned Civil Judge Kasauli District Solan are set aside. Civil Suit is ordered to be restored to its original number. Learned counsel for the parties are directed to remain present before the learned trial Court on 08.10.2021. Petitioners/plaintiffs shall timely take all necessary steps for bringing on record of the learned trial Court, the pleadings/documents/ orders etc., returned to them under the impugned orders. In view of above observations, learned trial Court is directed to decide the application moved by respondent No.1 afresh after considering the original record of the case, in accordance with law. Pending miscellaneous applications, if any, shall also stand disposed of.

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

Between:-

SHRI SURINDER PAL BAMBA, SON OF LATE SHRI DARYAI LAL BAMBA, PARTNER M/S ALFA RESTAURANT, 14, THE MALL, SHIMLA, H.P.

(BY SHRI G. C. GUPTA, SENIOR ADVOCATE, WITH MS. MEERA DEVI,ADVOCATE)

AND

1. SHRI JOGINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.

2. SHRI JATINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.

3. MS. SUSHMA KUTHIALA, WIFE OF SHRI JOGINDER LAL KUTHIALA.

ALL RESIDENTS OF 11, CANALROAD, JAMMU (J&K).

...PETITIONER

4. M/S ALFA RESTAURANT, 14, THE MALL, SHIMLA, THROUGH ITS PARTNER SHRI SUNIL BAMBA.

...PROFORMA RESPONDENT

(SHRI SUNEET GOEL, ADVOCATE,
FOR R-1
TO R-3
R-4 *EX PARTE*)

CIVIL REVISION No. 214 of 2016

Between:-

SHRI SURINDER PAL BAMBA, SON OF LATE SHRI DARYAI LAL BAMBA, PARTNER M/S ALFA RESTAURANT, 14, THE MALL, SHIMLA, H.P.

(BY SHRI G. C. GUPTA, SENIOR ADVOCATE, WITH MS. MEERA DEVI,ADVOCATE)

AND

1. SHRI JOGINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.

2. SHRI JATINDER LAL KUTHIALA, SON OF LATE SHRI BISHAN LAL KUTHIALA.

3. MS. SUSHMA KUTHIALA, WIFE OF SHRI JOGINDER LAL KUTHIALA.

ALL RESIDENTS OF 11, CANALROAD, JAMMU (J&K).

4. M/S ALFA RESTAURANT, 14, THE MALL, SHIMLA, THROUGH ITS PARTNER SHRI SUNIL BAMBA.

...PROFORMA RESPONDENT

(SHRI SUNEET GOEL, ADVOCATE, FOR R-1 TO R-3
R-4 *EX PARTE*)

CIVIL REVISION No. 213 of 2016 &
CIVIL REVISION No. 214 of 2016
DECIDED ON: 23.09.2021

Code of Civil Procedure, 1908- Section 10- For the purpose of adjudication of a lis, while framing issues, there is no need to frame an issue as to whether the proceedings in the suit should be stayed in view of the provisions of Section 10 of the Code of Civil Procedure- The principle of res subjudice has nothing to do with the framing of issues- it is an interlocutory matter, which the Court, if called upon to answer, has to answer in terms of the application moved before it- Revision petition allowed.

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

J U D G M E N T

As similar issues are involved in both these petitions, therefore, they are being disposed of by a common judgment.

2. Civil Revision No. 213/2016, titled as *Shri Surinder Pal Bamba Vs. Shri Joginder Lal Kuthiala and others* has been filed by the petitioner feeling aggrieved by order, dated 17th November, 2016, passed by the Court of learned Rent Controller, Shimla, H.P. in CMA No. 104-6 of 2015, filed in Rent Case No. 191-2 of 2013/12, titled as *Shri Joginder Lal Kuthiala and others Vs. Shri Surinder Pal Bamba and another*, vide which,an application filed under Section 10 read with Section 151 of the Code of Civil Procedure, 1908 by the present petitioner for stay of the proceedings in the Rent Petition, *inter alia*, on the ground of pendency of earlier Rent Petition No. 14-2 of 2009/2000, has been dismissed.

3. Civil Revision No. 214 of 2016, titled as *Shri Surinder Pal Bamba Vs. Shri Joginder Lal Kuthiala and others* has been filed by the petitioner against an order, dated 17th November, 2016, passed by the Court of learned Rent Controller, Shimla, H.P. in CMA No. 109-6 of 2015, filed in Rent Case No. 189-2 of 2013/12, titled as *Shri Joginder LalKuthiala and others Vs. Shri Surinder Pal Bamba and another,* vide which also, an application filed under Section 10 read with Section 151 of the Code of Civil Procedure for stay of proceedings in the Rent Petition, onthe ground of pendency of an earlier Rent Petition, i.e., Rent Petition No. 14-2 of 2009/2000, has been dismissed.

4. Record of these cases is with the Court. Perusal thereof demonstrates that in both these cases, at the time of framing of issues, learned Rent Controller has framed an issue: "w*hether the petition is liable to be stayed under Section 10 of the Code of Civil Procedure, as alleged?"* The onus to prove the said issue is upon the respondents. This Court is of the considered view that as learned Rent Controller framed theabove issue for the purpose of adjudication of the Rent Petition, then, in such circumstances, even if

subsequently an independent application stood filed under 10 of the Code of Civil Procedure by the respondents therein praying for stay of the proceedings of the Rent Petition, the same ought not to have been adjudicated by the learned Rent Controller on merits, as by doing so, the issue framed by the learned Rent Controller, referred to above, has been rendered redundant.

5. Accordingly, without dwelling upon the merits of the orders, which stand impugned by way these petitions, the petitions are disposed of by setting aside the impugned orders, dated 17th November, 2016, passed by the Court of learned Rent Controller, Shimla, H.P. in CMA No. 104-6 of 2015, filed in Rent Case No. 191-2 of 2013/12, titled as *Shri Joginder Lal Kuthiala and others Vs. Shri Surinder Pal Bamba and another* and in CMA No. 109-6 of 2015, filed in Rent Case No. 189-2 of 2013/12, titled as *Shri Joginder Lal Kuthiala and others Vs. Shri Surinder Pal Bamba and another,* with further direction to learned Rent Controller to consolidate these two Rent Petitions alongwith Rent Petition No. 14-2 of 2009/2000.

6. In the Rent Petitions, in which, evidence has not yet been led, maximum three opportunities each shall be granted to the parties to lead evidence on the issues framed. As Rent Petitions are quite old, learned Rent Controller is directed to make an endeavour to decide the same by 31st March, 2022. Post consolidation, the matters shall be tried by the learned Rent Controller. Parties to appear before the learned Court below on 4th October, 2021. With the aforesaid observations, these petitions are closed. Miscellaneous applications, if any, also stand disposed of.

7. Before parting with the judgment, this Court wants to make an observation. Section 10 of the Code of Civil Procedure,1908 provides as under:-

> *"**10. Stay of suit.**- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties,*

or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or beforethe Supreme Court.

Explanation.-The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

8. The intent of said Section is that if two parties are already before a Court, in which, substantially the same issue is involved, which again stands raised by either party, then the subsequent proceedings should be stayed till the adjudication of earlier proceedings.

9. This Court is of the considered view that for the purpose of adjudication of a *lis*, while framing issues, there is no need to frame an issue as to whether the proceedings in the suit should be stayed in view of the provisions of Section 10 of the Code of Civil Procedure, as has been done in these cases. The purpose of framing the issues is that the parties know as to what are the main points involved in the case, on which, they have to lead evidence to put forth their respective contentions. The principle of *res subjudice* has got nothing to do with the framing of issues. Whether or not a subsequent *lis* is hit by the principle of *res subjudice,* is an interlocutory matter, which the Court, if called upon to answer, has to answer, in terms of the application moved before it. In case the Court comes to the conclusion that the case is hit by the principle of *res subjudice,* then it will stay the further proceedings in the matter and if not,it will venture to adjudicate the case, on merit. However, by no stretch of imagination, an issue in this regard can be

framed alongwith other issues on the merits of the case, as has been done in the present case. Learned Registrar General is called upon to bring this order to the notice of all the learned District and Sessions Judges, so that the Judicial Officers can be sensitized in this regard.

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

Between:-

JAGDISH KUMAR
S/O SHRI OM PRAKASH
R/O VILLAGE KHADRA, POST OFFICE SERI BANGALOW,
TEHSIL KARSOG, DISTRICT MANDI,
H.P. 175011

... PETITIONER

(BY MS. RANJANA PARMAR, SENIOR ADVOCATE
WITH MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (PERSONNEL) TO THE
GOVERNMENT OF H.P., SHIMLA-2.

2. H.P. UNIVERSITY, SUMMER HILL, SHIMLA
THROUGH ITS REGISTRAR

.. RESPONDENTS

(MR. SUDHIR BHATNAGAR
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. R.P. SINGH AND
MR. NARINDER THAKUR,
DEPUTY ADVOCATES GENERAL, FOR R-1

MR. VIVEKANAND NEGI, ADVOCATE, FOR R-2)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 4462 OF 2020
DECIDED ON:11.08.2021

Constitution of India, 1950 - Article 227 - Recruitment and Promotion Rules- Petitioner being eligible and qualified applied for the post of Junior Office Assistant (IT) against one post reserved for visually impaired category in Himachal Pradesh University- Representation for exemption from typewriting test on account of his being visually impaired disallowed- Since Government of Himachal Pradesh vide Communication dated 10.05.2013 instructed all the Departments that instead of granting exemption in typewriting test visually impaired may be imparted necessary basic training including computer training through Composite Regional Centre, Sundernagar, as such the request/representation of petitioner ought to have been accepted - Petition allowed - University directed to complete selection process of petitioner without insisting upon him to pass typewriting test.

Cases referred:
P. Tulsi Das v. Govt. of A.P., (2003) 1 SCC 364;

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

O R D E R

On 8.2.2017, respondent Himachal Pradesh University issued an advertisement dated 8.2.2017, Annexure A-3 for recruitment to various non-teaching posts in various categories, including two posts of Junior Office Assistant (Information Technology) under the category of general PWD (visually impaired/blind/ low vision). Petitioner being eligible in all respects, applied against one post of Junior Office Assistant (IT) reserved for visually impaired, /blind/low vision. Result of written test conducted pursuant to aforesaid advertisement was declared 19.7.2017, wherein petitioner was declared successful. Respondent University vide communication dated 21.7.2017, Annexure A-4 directed petitioner to appear for type writing test on computer on 30.7.2017, however a day before said typewriting test, petitioner by way of communication dated 29.7.2017, requested respondents to exempt

him from typewriting test on account of his being visually impaired/blind/low vision. However, aforesaid prayer of him was not accepted for more than six months and as such, petitioner was again compelled to send representation dated 10.1.2018 to respondent-University, praying therein to grant exemption from passing typewriting test. In response to aforesaid communication dated 10.1.2018 Registrar of University, vide annexure A-5 informed the petitioner that request having been made by him for exemption from passing typewriting test is not tenable under rules. Registrar of University informed that percentage of disability of petitioner as per disability certificate is 75% whereas, provision contained under letter No.Per(AP-B)B(19)-31/2007 dated 10.5.2013 issued by Government of Himachal Pradesh, provides that 100% visually impaired persons are required to be imparted necessary basic training including computer training through Composite Regional Centre (CRC), Sundernagar.. Besides above, respondent-University also informed the petitioner that the university has already completed recruitment process for filing posts of Junior Office Assistant (IT) initiated vide advertisement dated 8.2.2017 Annexure A-3.

2. Being aggrieved and dissatisfied with letter dated 5.2.2018 (Annexure A-5), whereby prayer made on behalf of petitioner to grant exemption came to he rejected, petitioner approached erstwhile Himachal Pradesh Administrative Tribunal in OA No. 2407 of 2018. Erstwhile Himachal Pradesh Administrative Tribunal vide order dated 4.5.2018, directed respondent-University not to fill up post against which petitioner stands selected till next date of hearing. After abolishment of Himachal Pradesh Administrative Tribunal, Original Application as detailed herein came to be transferred to this Hon'ble Court and was registered as CWPOA No. 4462 of 2020, wherein petitioner has prayed for following reliefs:

> "I) That communication dated 5th February 2018 may be quashed and set aside and respondents may be directed

to appoint the applicant as Junior Office Assistant from the date of his selection with all consequential benefits, or from any other date this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. Having heard learned counsel for the parties and perused the material available on record this court finds that there is no dispute inter se parties that petitioner being eligible and qualified applied for the post of Junior Office Assistant (IT) against one post reserved for visually impaired category. It is also not in dispute that petitioner was declared successful in written test, rather was the only qualified candidate in his category, where-after he was supposed to clear typewriting test. It is also not in dispute that a day prior to typewriting test, petitioner by way of written communication, requested respondent-University to exempt him from typewriting test, on account of his being visually impaired.

4. Ms. Parmar, learned senior counsel for the petitioner, while referring to communication dated 10.5.2013 (Annexure A-6), whereby decision of the Government to exempt disabled persons in respect of class I to IV posts from passing typewriting test, came to be communicated to all the Departments in the State of Himachal Pradesh, contended that since in the year 2013, Government in consultation with Department of Social Justice and Empowerment had decided that instead of granting exemption from typewriting test, visually impaired persons recruited under reserved quota of 1% may be imparted necessary basic training including computer training through Composite Regional Centre (CRC), Sundernagar set up by Ministry of Social Justice and Empowerment, Government of India, there was no occasion for respondent-University to reject the prayer having been made by petitioner vide communication dated 29.7.2017 seeking therein exemption from typewriting test.

5. Mr. Vivekanand Negi, learned counsel for the respondent-University while fairly acknowledging factum with regard to issuance of instructions contained in communication dated 10.5.2013, annexure A-6, contended that since the aforesaid instructions never came to be incorporated in Recruitment and Promotion Rules of the post in question, there was no occasion, if any, for respondent-University to consider the request of the petitioner for grant of exemption to appear in typewriting test. While referring to communication dated 10.3.2017, learned senior counsel representing the petitioner further argued that on 10.3.2017, Ministry of Social Justice and Empowerment, Government of India, had decided that in addition to Composite Resource Centre, Sundernagar, visually impaired persons may be allowed to undertake requisite training from NIVH, Dehradun and Composite Training Centre, Ludhiana, and amendment in Recruitment and Promotion Rules in this regard shall be made by Department of Personnel separately. Ms. Parmar, learned senior counsel argued that since pursuant to aforesaid decision taken by Government of Himachal Pradesh as well as Union of India, visually impaired persons were to be exempted from passing typewriting test forthwith, claim of petitioner cannot be allowed to be defeated on the ground that since decision circulated pursuant to aforesaid communications dated 10.5.2013 and 10.3.2017 was not incorporated in the Recruitment and Promotion Rules, no exemption could be granted to the petitioner from appearing in the typewriting test.

6. This court finds from record that in addition to communications dated 10.5.2013 and 10.3.2017, Annexures A-6 and A-7, Government of Himachal Pradesh vide communication dated 18.8.2017, (Annexure A-7) directed all the Heads of Departments in Himachal Pradesh to carry out necessary amendments in Recruitment and Promotion Rules, so that relaxation in educational qualification as prescribed in Recruitment and Promotion Rules for appointment to Class IV posts/services against direct

recruitment quota posts in favour of visually impaired persons may be incorporated in the Recruitment and Promotion Rules. Pursuant to aforesaid communication Government of Himachal Pradesh Department of Personnel made common Recruitment and Promotion Rules for the post of Junior Office Assistant (IT), Class III Non Gazetted, Ministerial Service in various Departments of Himachal Pradesh, which were also adopted by respondent-University, wherein for the first time, it came to be provided that visually impaired persons selected under 1% quota will be exempted from acquiring diploma in computer science/computer applications/computer technology and passing typewriting test instead they shall be imparted necessary basic training including computer training through Composite Regional Centre (CRC), Sundernagar, NIVH Dehradun and CTC, Ludhiana. It also came to be provided in Recruitment and Promotion Rules that differently-abled persons, who are otherwise eligible to hold clerical posts as certified being unable to type, by the Medical Board may be exempted from passing the typing test. The term, differently abled persons, does not cover those who are visually impaired or who are hearing impaired but cover only those whose physical disability/ deformity permanently prevent them from typing.

7. In nutshell, the reason cited by respondent-University for not granting exemption to petitioner despite his being visually impaired from appearing in written test is that since provision to exempt visually impaired from typewriting test came to be incorporated in Recruitment and Promotion Rules for the first time in September 2017, petitioner who had applied for the post advertised in February, 2017 and was called for interview on 30.7.2017, cannot be permitted to take benefit of instructions, if any, issued in this regard in the years 2013, 2016 and 2017.

8. However, this court is unable to accept aforesaid contention raised on behalf of respondent-University for the reason that at the time of issuance of advertisement, annexure A-3, dated 8.2.2017, there was no

provision contained in Recruitment and Promotion Rules with regard to exemption, rather, Government of Himachal Pradesh vide communication dated 10.5.2013 annexure A-6 had directed all Heads of Departments in Himachal Pradesh not to insist for typewriting test in the case of visually impaired persons recruited under reserved quota of 1% and it was suggested that instead of exempting them from typewriting test they may be imparted basic training including computer training through Composite Resource Centre Sundernagar set up by Ministry of Social Justice and Empowerment, Government of India.

9. Since there was no provision with regard to exemption from typewriting test in the Recruitment and Promotion Rules, instructions issued by Government, on 10.5.2013, were binding upon the respondent-University inasmuch as granting exemption of typewriting test to visually impaired persons is concerned. No doubt, administrative instructions cannot supersede provisions contained in Recruitment and Promotion Rules, which have a statutory sanction but if some specific provision is not made in Recruitment and Promotion Rules, administrative instructions issued in that regard shall be binding under Art. 162 of the Constitution of India.

10. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **P. Tulsi Das** v. **Govt. of A.P.**, (2003) 1 SCC 364, wherein Hon'ble Apex Court has held that in the absence of Rules under Article 309 of the Constitution in respect of a particular area, aspect or subject, it is permissible for the State to make provisions in exercise of its executive powers under Article 162 which is co-extensive with its Legislative powers laying conditions of service and rights accrued to or acquired by a citizen would be as much rights acquired under law and protected to that extent. It would be apt to reproduce para-14 of the judgment (supra), which reads as under:

> "14. On a careful consideration of the principles laid down in the above decisions in the light of the fact situation in these

appeals we are of the view that they squarely apply on all fours to the cases on hand in favour of the appellants. The submissions on behalf of the respondent-State that the rights derived and claimed by the appellants must be under any statutory enactment or rules made under Article 309 of the Constitution of India and that in other respects there could not be any acquisition of rights validly, so as to disentitle the State to enact the law of the nature under challenge to set right serious anomalies which crept in and deserved to undone, does not merit our acceptance. It is by now well settled that in the absence of Rules under Article 309 of the Constitution in respect of a particular area, aspect or subject, it was permissible for the State to make provisions in exercise of its executive powers under Article 162 which is co-extensive with its Legislative powers laying conditions of service and rights accrued to or acquired by a citizen would be as much rights acquired under law and protected to that extent. The orders passed by the Government, from time to time beginning from February 1967 till 1985 and at any rate upto the passing of the Act, to meet the administrative exigencies and cater to the needs of public interest really and effectively provided sufficient legal basis for the acquisition of rights during the period when they were in full force and effect. The orders of the High Court as well as the Tribunal also recognised and upheld such rights and those orders attained finality without being further challenged by the Government, in the manner known to law. Such rights, benefits and perquisites acquired by the Teachers concerned cannot be said to be rights acquired otherwise than in accordance with law or brushed aside and trampled at the sweet will and pleasure of

the Government, with impunity. Consequently we are unable to agree that the Legislature could have validly denied those rights acquired by the appellants retrospectively, not only depriving them of such rights but also enact a provision to repay and restore the amounts paid to them to State. The provisions of the Act, though can be valid in its operation 'in future' can not be held valid in so far as it purports to restore status quo ante for the past period taking away the benefits already available, accrued and acquired by them. For all the reasons stated above the reasons assigned by the majority opinion of the Tribunal could not be approved in our hands. The provisions of Section 2 and 3(a) insofar as they purport to take away the rights from 10-2-1967 and obligates those who had them to repay or restore it back to the State is hereby struck down as arbitrary, unreasonable and expropriatory and as such is violative of Articles 14 and 16 of the Constitution of India. No exception could be taken, in our view, to the prospective exercise of powers thereunder without infringing the rights already acquired by the appellants and the category of the persons similarly situated whether approached courts or not seeking relief individually. The provisions contained in Section 2 have to be read down so as to make it only prospective, to save the same from the unconstitutionality arising out of its retrospective application."

11. Though from the year 2013, instructions to not insist the visually impaired persons to pass typewriting test were being repeatedly issued by Government of Himachal Pradesh to all the Heads of Departments in Himachal Pradesh, but vide communications dated 10.3.2017 and 18.8.2017, all Departments were directed to make provisions with regard to

imparting basic training including computer training to visually impaired persons through CRC Sundernagar, set up by Ministry of Social Justice and Empowerment, Government of India.

12. Though first instruction in this regard was issued on 10.3.2017, but yet respondent-University without making suitable amendment in Recruitment and Promotion Rules, proceeded to go ahead with the advertisement issued by it vide communication dated 8.2.2017 for filling up various posts in Himachal Pradesh University. In the normal course, respondent-University after receipt of communication dated 10.3.2017, ought to have issued fresh advertisement after making necessary amendments in the Recruitment and Promotion Rules as were suggested vide communication dated 10.5.2013,10.3.2017 and 18.8.2017, Annexures A-6 and A-7.

13. Since the petitioner after having cleared written test was invited for interview vide communication dated 21.4.2017, Annexure A-4 and petitioner had requested to exempt him from typewriting test, respondent-University ought to have exempted the petitioner from typewriting test in terms of decision taken by Government of Himachal Pradesh vide communication dated 10.5.2013, wherein it was decided that instead of granting exemption in typewriting test visually impaired may be imparted necessary basic training including computer training through Composite Resource Centre Sundernagar.

14. Since the petitioner at the time of making application was 75% disabled, he was otherwise eligible to be exempted from typewriting test in terms of instructions contained in communication dated 10.5.2013, Annexure A-6. As has been observed herein above, there was no provision for exemption from typewriting test in Recruitment and Promotion Rules and as such, administrative instructions issued by Government of Himachal Pradesh granting exemption from typewriting test to visually impaired persons were applicable and as such, action of respondents in rejecting the prayer of

petitioner to grant him exemption, is not sustainable being in total violation of administrative instructions issued by Government of Himachal Pradesh. Otherwise also providing reservation to the Persons with Disabilities pursuant to enactment of legislation in this behalf, is a welfare step to ensure equal participation of differently abled persons in the mainstream.

15. Mr. Vivekanand, learned counsel for the respondent argued that since the process of selection initiated vide advertisement dated 8.2.2017, Annexure A-3 stood completed after expiry of one year, prayer having been made by petitioner cannot be accepted at this stage, however, this court is not in agreement with aforesaid submission of Mr. Negi, for the reason that the erstwhile Himachal Pradesh Administrative Tribunal vide order dated 4.5.2018 has already directed respondent-University not to fill up one post against which petitioner was selected. Shri Negi, otherwise has fairly admitted that one post of Junior Office Assistant (IT) is still vacant.

16. Consequently, in view of detailed discussion made above, present petition is allowed and respondent-University is directed to complete selection process of petitioner to the post of Junior Office Assistant (Information Technology), without insisting upon him to pass typewriting test. Since the petitioner is fighting for his claim since 2018, this court hopes and trusts that needful will be done by respondent-University within one month.

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

Between:-

DR. ARUN SINGH THAKUR
S/O LATE DR. P.C THAKUR,
R/O FLAT NO. 1,
CHERI

... PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. RAJESH RAJESH KUMAR, ADVOCATE)

AND

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

2. STATE OF HIMACHAL PRADESH
THROUGH ADDITIONAL CHIEF SECRETARY(HEALTH)
GOVERNMENT OF HIMACHAL PRADESH

3. DR. SHELJA VASHISTH
W/O SH. RAJEEV SHARMA,
DESIGNATED ASSTT. PROFESSOR
HP GOVT. DENTAL COLLEGE,
SHIMLA, H.P.

.. RESPONDENTS

(MR. AJAY VAIDYA,
SENIOR ADDITIONAL ADVOCATE GENERAL
FOR R-1 AND R-2

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

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO: 108 OF 2019
DECIDED ON: 12.08.2021

H.P. Medical Education (Dental) Service Rules, 2006 - Petitioner challenged the proposal to fill up one post of Assistant Professor (Dentistry) by way of direct recruitment - Petitioner has not been able to make out a case that by initiating process for filling up present vacancy by direct recruitment, respondents, in any manner violated the mandate of 50:50 between direct recruits and the promotees in the cadre consisting of two posts, ratio of 50:50 can be maintained between direct recruits and promotees by giving one share to each category but in the cadre of 3 posts ratio of 50:50 cannot be maintained, posts are offered by rotation so as to obey the mandate of Rules, 2006 - Petition dismissed.

Cases referred:
All India Judges Association and Ors vs. Union of India & Ors, (2002) 4 SCC 247;
Ram Sarup Kalia & others Vs. State of H.P. and others, Latest HLJ 2005 (HP)(DB) 520;
State of Punjab v. Dr. R.N. Bhatnagar, (1999) 2 SCC 330;

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

O R D E R

2. Being aggrieved and dissatisfied with the decision taken by respondents, as contained in annexure A-12, whereby special secretary health to the Government of Himachal Pradesh approved the proposal to fill up one post of Assistant Professor (Dentistry) by way of direct recruitment, petitioner approached erstwhile Himachal Pradesh Administrative Tribunal by way of OA No. 280 of 2019, which now stands transferred to this Court after abolishment of erstwhile Himachal Pradesh Administrative Tribunal and stands registered CWPOA No. , praying therein for following main reliefs:

"i. That impugned decision taken by the respondents as contained in Annexure A-12, whereby the approval has been granted to fill up the post by way of direct recruitment on 20.12.2028 may kindly be quashed and set aside.

ii. That directions may very kindly be given to the respondents to fill up the post of Assistant Professor (Public Health Dentistry) by way of promotion from amongst the eligible candidates, by further granting the seniority and consequential benefits from the date when post became available i.e. 26.09.2018 in the interest of law and justice, by following the Rules 2006."

3. For having bird's eye view of the matter, certain undisputed facts, as emerge from the pleadings adduced on record by parties to the lis are that as per Himachal Pradesh Medical Education(Dental) Services Rules, 2006 (hereinafter, 'Rules 2006') (Annexure A-1), post of Assistant Professor being a Class I Gazetted post is to be filled in the following manner:

(i) 50% by promotion failing which by direct recruitment or on contract basis in the manner specified in Column No. 11-A.

(ii) 50% by direct recruitment or on contract basis in the manner specified in Column No. 11-A.

4. At the time of framing of Rules 2006, there were 9 posts of Assistant Professors, out of which one post fell to the Department of Dentistry, but subsequently vide Notification dated 2.3.2009 (Annexure A-2), 20 more posts were created, out of which, 06 fell to the share of Assistant Professors and consequently one more post of Assistant Professor came to the share of Public Health Dentistry. As of today, there are two posts of Assistant Professors in the discipline of Public Health Dentistry. According to the petitioner, after framing of Rules 2006, respondent Department is to fill up posts of Assistant Professors in the Department of Public Health Dentistry by following roster provided in Chapter XIII of Handbook on Personnel Matters, whereby first post is to be filled up by way of promotion from amongst the feeder category of Lecturers and second post by way of direct recruitment. Since the first post falling to the share of promotional quota in the case at hand, could not be filled up on account of interim stay granted by Hon'ble Supreme Court, first post, which as per chapter XIII of Handbook on Personnel Matters, was meant for promotees came to be filled up on 1.9.2017 by way of direct recruitment by one Mr. Vinay Kumar Bhardwaj, however, second post which was to be filled by direct recruitment, came to be filled by

one Ms. Shelly Fotedar on 2.12.2013, on his promotion. Since Dr. Vinay Kumar Bhardwaj, who was recruited against the first post meant for promotees, stood further promoted to the post of Professor, one post of Assistant Professor, Public Health Dentistry/Community Dentistry fell vacant. Precisely the case of the petitioner is that since as per roster, first post was to go to promotees and second to direct recruits, post falling at point No.3 of roster, shall fall to the share of promotees and as such, he being borne on feeder cadre for promotion to the post of Assistant Professor, ought to have been considered for promotion to the post of Assistant Professor especially when he was otherwise fully eligible.

5. It is not in dispute that as per Rules 2006, petitioner, who was working as Lecturer in the Department since 19.5.2014 became eligible on 19.5.2017 for promotion to the post of Assistant Professor, but since his claim for promotion to the post of Assistant Professor was not being considered after promotion of Dr. Vinay Kumar Bhardwaj to the post of Professor, he repeatedly filed representations as contained in Annexures A-5 to A-7, however, respondents did not bother to respond to the same, as such, petitioner was compelled to serve the Department with legal notice dated 26.12.2018 (Annexure A-8).

6. After issuance of aforesaid legal notice, representations having been filed by the petitioner as well as respondent No.3 Dr. Shelja Vashisth, came to be dealt with by the Department concerned as is evident from information supplied to the petitioner under Right to Information Act, 2005, vide communication dated 7.1.2019 (Annexure A-12). Respondents having taken note of the provision contained in Chapter III of Handbook on Personnel Matters, Vol. I, wherein provision for maintaining roster, based on reservation in Rules 2006 is provided and instructions of DOP. No. Per(AP-IIA(3)-2/80 dated 7.11.2001, wherein method of recruitment has been provided whether by direct recruitment or by promotion, deputation, transfer

and the percentage of "posts" to be filed in the various method, concluded that since Dr. Vinay Kumar Bhardwaj, who had vacated the post of Assistant Professor was appointed as direct recruit, vacancy occurred on account of his promotion is also required to be filled up by way of direct recruitment. While taking aforesaid decision, respondents also took into consideration ratio of 50:50 as provided under Rules 2006 *inter se* promotees and direct recruits. However, record reveals that the petitioner as well as respondent No.3, who was also working as Lecturer (Public Health Dentistry) on regular basis since 29.5.2014 and had also completed three years service prescribed for appointment to the post of Assistant Professor, were designated as Assistant Professor (Public Health Dentistry/Community Dentistry) vide Notification dated 5.1.2018 (Annexure A-4).

7. Since respondents vide decision contained in Annexure A-12, decided to fill up post of Assistant Professor vacated by Dr. Vinay Kumar Bhardwaj on account of his promotion to the post of Professor by way of direct recruitment, petitioner approached erstwhile Himachal Pradesh Administrative Tribunal, by way of aforesaid application, praying therein for reliefs as reproduced herein above.

8. Respondents Nos. 1 and 2 in their replies, while justifying their decision to fill up post of Assistant Professor (Public Health Dentistry) by way of direct recruitment have claimed, "*the incumbent (Assistant Professor), who has vacated the post from the category of direct recruitment his post has to be filed up by way of the same method of recruitment i.e. direct recruitment and in case the post in question that falls vacant due to promotion, the same has to be filled up by way of promotion only.*" Respondents have further claimed in the reply that since in the case at hand, post came to be vacated by Dr. Vinay Kumar Bhardwaj, a direct recruit, on account of his promotion on 25.9.2018, same can be filled up by way of direct recruitment only and not by way of promotion.

9. Besides above, respondents Nos. 1 and 2 have claimed in their reply that the Rules 2006, otherwise provide for filling up posts of Assistant Professors 50% by direct recruitment and 50% by way of promotion. Since one post falling to the share of promotees, is already occupied by Dr. Shelly Fotedar, who is a promotee, second post of Assistant Professor vacated by Dr. Vinay Kumar Bhardwaj cannot be filled up by way of promotion because in the event of second post of Assistant Professor being filled up by way of promotion, entire cadre of Assistant Professors in Public Health Dentistry would be represented by promotees, which would be in violation of Rules 2006 which provide for filling up posts of Assistant Professors, 50% by direct recruitment and 50% by way of promotion.

10. Respondent No.3 in her reply has claimed that in the cadre of two posts of Assistant Professors, one post is to be filled up by direct recruitment and another by promotion. Hence posts were occupied by candidates from two sources i.e. direct recruitment and promotion in the ratio of 50:50 and since Dr. Vinay Kumar Bhardwaj coming from the line of direct recruitment stands promoted to the post of Professor, post vacated by him in the cadre of Assistant Professors, can only be filled up direct recruitment and not by promotion, especially when one person from the category of promotees is already occupying the post of Assistant Professor in the cadre of two posts.

11. I have heard the parties and gone through the records of the case.

12. Mr. Sanjeev Bhushan, learned senior counsel representing petitioner, duly assisted by Mr. Rakesh Chauhan, vehemently argued that since posts were to be filled up on the basis of roster, provided in Chapter XIII of Handbook on Personnel Matters, third post would definitely go to the promotees and not to the direct recruits. He argued that since the first post which was otherwise meant for promotees came to be filled by way of direct recruitment on account of non-availability of candidate from feeder cadre,

third post which has fallen vacant on account of promotion of one of the Assistant Professors, who had consumed first post of promotee, can only be filled up by way of promotion and not by way of direct recruitment. Mr. Bhushan, learned senior counsel, while referring to the Rules 2006 argued that the method of recruitment of posts of Assistant Professors in HP Dental College, is 50% by direct recruitment and 50% by promotion but while giving effect to aforesaid provision made in Rules 2006, roster as prescribed under Chapter XIII of Handbook on Personnel Matters is to be followed, whereby, first post would go to promotee and second to the direct recruit, third to promotee and again fourth post to direct recruit. As per Mr. Bhushan, learned senior counsel, first post was meant for promotee but on account of non-availability of candidate from feeder cadre, post came to be filled up by way of direct recruitment but that does not mean that post meant for promotee shall be deemed to have been consumed by promotee though against that post, person by way of direct recruitment was appointed, rather, in that case, person occupying the post shall be deemed to have consumed the post meant for promotee, as a consequence of which post vacated by him, on account of promotion can only be filled by promotee and not by direct recruitment. Lastly Mr. Bhushan, learned senior counsel while referring to certain reply-affidavits filed by respondents in other litigations, contended that in the case at hand, respondents have taken altogether contrary stand by stating that the post vacated from the category of direct recruitment is to be filled up by way of same method i.e. direct recruitment in terms of instructions of Department of Personnel, dated 7.11.2001, whereas in some other cases, respondents claimed before the court that 13 point roster is to be made applicable, while filling up the posts of Assistant Professors in the Department of Dental Education. In support of his contention, Mr. Bhushan, learned senior counsel placed reliance upon judgment rendered by Hon'ble Apex Court in **State of Punjab** v. **Dr. R.N. Bhatnagar**, (1999) 2 SCC 330, to

claim that since first roster point fell to share of promotee and second to direct recruit, hence, present vacancy falling at third roster point has to be offered to the promotee.

13. Mr. Ajay Vaidya, learned Senior Additional Advocate General and Mr. Dilip Sharma, learned senior counsel representing respondents Nos. 1 and 2 and respondent No.3, respectively, supported the decision taken by the respondents in filling up the post fallen vacant on account of promotion of Dr. Vinay Kumar Bhardwaj, by way of direct recruitment. Above named counsel vehemently argued that since expression used in Rules 2006 is "posts" the quota has to be applied to the posts and not to the vacancies. Mr. Dilip Sharma, learned senior counsel argued that statutory Rules 2006 prescribe ratio of 50:50 for direct recruitment and promotees and Chapter XIII of Handbook on Personnel Matters is by way of administrative instructions. He argued that mandate of statutory quota is that the posts available in the cadre may be filled up 50% by direct recruitment and 50% by promotion, but if the roster is applied in filling up posts in violation of statutory quota, it would be in complete defiance to the mandate of rules. Lastly Mr. Dilip Sharma, learned senior counsel, argued that since there are only two posts of Assistant Professor (Public Health Dentistry), one is required to be filled up by promotion and another by direct recruitment and in case prayer of petitioner is accepted, both the posts of Assistant Professors (Public Health Dentistry) would come to be filled by way of promotion, which would be in complete violation of Rules 2006 and otherwise would amount to 100% reservation to promotees in the cadre of two.

14. Having heard learned counsel for the parties and perused the pleadings adduced on record by respective parties, vis-à-vis prayer made in the petition, this court finds that following question falls for consideration of this court

"Whether the ratio of 50:50 prescribed for promotees and direct recruitment in rules 2006, annexure A-1 applies to the "posts" as contended by respondents or to the "vacancies" as asserted by the petitioner."

15. Having carefully perused judgment rendered by Hon'ble Apex Court in **R.N. Bhatnagar** (supra), this court finds force in the submission of Mr. Dilip Sharma, learned senior counsel appearing for respondent No. 3 that aforesaid judgment has no applicability in the case at hand, for the reason that in the case before Hon'ble Apex Court, roster was prescribed as per Recruitment and Promotion Rules, however, in the case at hand, there is no mention of roster in statutory rules.

16. Mr. Bhushan, learned senior counsel, while referring to para-9 of the aforesaid judgment vehemently argued that when posts in cadre are to be filled in from two sources, whether candidates come from departmental promotees or by way of direct recruitment, once both enter common cadre, their birth mark disappears and they completely get integrated in a common cadre.

17. As per aforesaid judgment, direct recruits and promotees lose their birth-marks on fusion into a common stream of service and they cannot thereafter be treated differently by reference to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequal once again.

18. However, in the case at hand, where there is cadre of only two posts, posts are to be filled in the ratio of 50:50 in terms of Rules 2006, meaning thereby, one post would go to the promotee and another to the direct recruit.

19. Admittedly as per respondents, first post in the cadre of two posts of Assistant Professors was to be filled up by way of promotion in terms of Rules 2006, post meant for promotee could not be filled by way of promotee on account of some interim stay granted by Hon'ble Apex Court, post otherwise meant for promotee came to be filled up by direct recruitment, meaning thereby direct recruit consumed its quota of 50% in the cadre of two posts. Since after appointment of direct recruits against the post meant for promotees, second post falling to the share of direct recruit, came to be filled up by promotee i.e. Dr. Sheilja Fotedar, meaning thereby that 50% quota meant for promotee in terms of Rules 2006 also stood consumed. Since there were only two posts, 13 point roster as provided under Chapter XIII of Handbook on Personnel Matters otherwise could not be made applicable in the instant case.

20. If the submission made by learned senior counsel for the petitioner is accepted that roster was to be applied while filling up two posts of Assistant Professors in the discipline of Public Health Dentistry/Community Dentistry, even then roster stood completely applied with the appointment of promotee against second post and direct against first post. In such eventuality, otherwise, post vacated by direct recruit is to be filled up by way of direct recruitment and not by promotion.

21. Otherwise also, till the time, one post of Assistant Professor (Public Health Dentistry) is occupied by promotee, second post which fell vacant on account of promotion of incumbent, who was a direct recruit, cannot be filled up by way of promotion, because that would amount to 100% reservation to the promotees in the cadre of two, which if permitted shall be in complete violation of law laid down by Hon'ble Apex Court and against the mandate of Rules 2006 governing the field.

22. If judgment rendered by Hon'ble Apex Court in **R.N. Bhatnagar** (supra), is read in its entirety, it clearly reveals that in the case before Hon'ble

Apex Court, percentage for recruitment of Assistant Professor from departmental candidate was 75% and 25% reserved for direct recruitment and there was dispute with regard to 16th vacancy at roster point No. 16. Since in that case, roster was prescribed by statutory Rules, Hon'ble Apex Court while elaborating upon working of roster point, regulating the recruitment from two sources i.e. promotees and direct recruits observed that the word ”post” as used in rule 9 of rules, may or may not refer to the total number of posts in the cadre and may not exclude vacancies. Hon'ble Apex Court further held that recruitment to fill up vacancies from time to time is controlled by quota or percentage of posts meant for promotee and direct recruits, meaning thereby posts are definitely to be filled up as per quota/percentage prescribed in the Recruitment and Promotion Rules.

23. Mr. Dilip Sharma, learned senior counsel appearing for respondent No.3, while inviting attention of this court to judgment rendered by Hon'ble Division Bench in **Ram Sarup Kalia & others Vs. State of H.P. and others**, Latest HLJ 2005 (HP)(DB) 520, argued that wherever there is roster and once quota is filled up, then roster must not be applied any further.

24. Having carefully perused aforesaid judgment relied upon by learned senior counsel for respondent No.3 this court finds that the proposition that, whether quota can be applied to vacancies or to the posts, came to be considered in the aforesaid judgment passed by Hon'ble Division Bench of this court. In the case supra, Recruitment and Promotion Rules for the post of Assistant Engineer in Public Works Department initially used word “vacancies” while prescribing method of recruitment but subsequently same was changed by amending the rules and substituted word, “vacancies” by the word, “posts”. Hon'ble Division Bench has specifically taken note of the judgment of Hon'ble Apex Court in **R.N. Bhatnagar** (supra) in its judgment in **Ram Sarup Kalia** (supra). It would be apt to take note of the para 29 and 30 of the judgment rendered by this court.

"29. From a perusal of the various judgments of the Apex Court the position which clearly emerges, is that the State can lay down a policy with regard to promotion. The State also has the power to amend the policy with regard to promotion. The State also has the power to amend the policy even if it to the detriment of certain class of employees. The only valid ground to challenge such a policy is that the same violates the mandate of Articles 14 and 16 of the Constitution of India.

30. The judgments relied upon by the petitioners turned on the words of the rules, which were to be interpreted in each of those cases. From a perusal of the judgments of the Apex Court cited above, it cannot be said that the Supreme Court has held that in every case, where quota is prescribed for recruitment from two or more sources, it should always be related to vacancies and in no case can it be applied to post. This would depend on the rules in each case and the circumstances under which the rule has been framed. In fact, the Supreme Court itself in RK Sabharwal's case has deprecated the practice of operating a roster ever after the quota has been reached. It has also stated that concept of vacancies has no reliance in operating the percentage of reservation. The argument of the petitioners is that this judgment only relates to cases of reservations and not to cases of recruitment from two different sources. The answer to this argument lies in the observation of the Apex Court case in All India Judges' Association case wherein the Supreme Court has again, in no uncertain terms stated that wherever, there is a roster once the quota is filled then the roster should not be applied any further.

25. It is not in dispute that aforesaid judgment has attained finality on account of dismissal of Civil Appeal No. 3606 of 2008 having been filed by respondent State in the Hon'ble Apex Court.

26. Careful perusal of aforesaid judgment passed by Hon'ble Division Bench of this Court, reveals that that Hon'ble Division Bench while distinguishing the judgment rendered by Hon'ble Apex Court in **R.N. Bhatnagar** (supra), ruled that it cannot be said that in every case, where quota is prescribed for recruitment from two or more sources, it should always be related to vacancies and in no case can it be applied to post, rather, this would depend on the rules in each case and the circumstances under which the rule has been framed. In **Ram Sarup Kalia** (supra), Hon'ble Division Bench has observed that, in fact, the Supreme Court itself in RK Sabharwal's case has deprecated the practice of operating a roster ever after the quota has been reached. The argument of the learned senior counsel appearing for the petitioner that **R.K. Bhatnagar** (supra) only relates to cases of reservations and not to cases of recruitment from two different sources, is not tenable in view of findings rendered by Apex Court case in **All India Judges Association and Ors.** v. **Union of India and Ors**., (2002) 4 SCC 247, wherein the Supreme Court has again, in no uncertain terms has held that wherever, there is a roster once the quota is filled then the roster should not be applied any further.

27. It would be also relevant to take note of judgment passed by Hon'ble Apex Court in All India Judges Association vs. Union of India, wherein Hon'ble Apex Court has held that one of methods of avoiding litigation and bringing about certainty in this regard by specifying quotas in relation to "posts" and not in relation to "vacancies".

> "22. The respondents also placed reliance on All India Judges' Association and others V. Union of India and others. In this case, the

Supreme Court in para 29 placing reliance on R.K. Sabharwal's case supra held thus:

> "29. Experience has shown that there has been a constant discontentment amongst the members of the Higher Judicial Service in regard to their seniority in service. For over three decades a large number of cases have been instituted in order to decide the relative seniority from the officers recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the principle "merit¬cum¬seniority", 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, insofar as seniority is concerned, is where a roster system is followed. For example, there is, as per the rules of the Central Government, a 40¬point roster which has been prescribed which deals with the quotas for Scheduled Castes and Scheduled Tribes. Hardly, if ever, there has been a litigation amongst the members of the service after their recruitment as per the quotas, the seniority is fixed by the roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising. The 40 point roster has been considered and approved by this Court in R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745. One of the methods of avoiding any litigation and bringing about certainty in this regard is by specifying

quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40 point roster works. We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in R.K. Sabharwal case as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31-3-2003.".

28. Otherwise also, in **Ram Sarup Kalia** (supra), Hon'ble Division Bench of this Court has held that State can lay down a policy with regard to promotion. The State also has the power to amend the policy, with regard to promotion. The State also has the power to amend the policy even if it is to the detriment of certain class of employees. The only valid ground to challenge such a policy is that the same violates the mandate of Articles 14 and 16 of the Constitution of India.

29. Interestingly, in the case at hand, neither there is challenge to policy of State to fill up posts form two sources, by applying quota neither learned senior counsel for petitioner has been able to demonstrate that on account of filling up to posts of from two streams i.e. 50% by direct recruitment and 50% by promotion, in the cadre of two, prejudice if any can

be said to be caused to category of promotee who at present is otherwise occupying one post of Assistant Professor in the cadre of two posts.

30. Though there is no specific mention with regard to applicability of roster as prescribed in Chapter XIII of Handbook on Personnel Matters in the Rules 2006 occupying the field, but otherwise also petitioner on the strength of administrative instructions, if issued under Chapter XIII of Handbook on Personnel Matters cannot be permitted to claim that action of the respondents is illegal. Petitioner has not been able to make out a case that by initiating process for filling up present vacancy by direct recruitment, respondents, in any manner, violated the mandate of 50:50 between direct recruits and the promotees.

31. Judgment of Hon'ble Apex Court in **RN Bhatnagar** has no applicability in the case at hand, for the reason that in that case, Recruitment and Promotion Rules itself provided for roster but as has been observed above, there is no mention of word 'roster' in the Rules 2006 while filling up two posts of Assistant Professors in the Department of Public Health Dentistry,

32. Having perused the replies, Annexure A-9 and A-10 filed in some other petitions, this court finds that in Department of **paedontrics**, there were three posts of lecturer and as such, ratio of 50:50 as prescribed under Rules 2006 cannot be maintained unless roster is applied. But in the cadre consisting of two posts, ratio of 50:50 can be maintained between direct recruits and promotees by giving one share to each category. Since in the cadre of 3 posts ratio of 50:50 cannot be maintained, posts are offered by rotation so as to obey the mandate of rules.

33. Leaving everything aside, after having taken note of the fact that at present one post of Assistant Professor is already occupied by a promotee, this court is of the view that second post, which otherwise has been vacated by direct recruit, must go to the same category, i.e. direct recruit and not to the promotee category.

34. Since both the categories stood represented in the cadre of Assistant Professors, as such, now the posts are to be filled up from the category, which vacated the same i.e. post occupied by direct recruit would go to direct recruit and the post vacated by a promotee would be filled up by way of promotion, so as to maintain the ratio of 50:50 for both the categories in terms of Rules, 2006.

35. In view of detailed discussion made supra, present writ petition is dismissed being devoid of merit. All pending applications are also disposed of. Interim directions, if any, stand vacated.

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

Between:

MOHD. AZAM S/O SH. MOHD. ISLAM, RESIDENT OF VILLAGE MOHKAMPUR NAWADA, POST OFFICE SHIVPOR, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

....PETITIONER

(BY SH. KUSH SHARMA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH, THROUGH SECREATRY HOME, GOVERNMENT OF HIMACHAL PRADESH

....RESPONDENT

BY SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SH. R.P.SINGH AND SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL FOR R-1)

CRIMINAL MISC. PETITION (MAIN)
No. 1548 of 2021
DECIDED ON:18.08.2021

Code of Criminal Procedure, 1973 - Section 438 - Anticipatory bail – Held - Petitioner has already solemnized marriage with the victim/prosecutrix and nothing remains to be recovered from the bail petitioner, this Court sees no reason for custodial interrogation of the bail petitioner and as such, he deserves to be enlarged on bail- Object of the bail is to secure the attendance of the accused in the trial and proper test to be applied in the solution of the question qua grant or refusal of bail is whether it is probable that accused will appear to take his trial- Normal rule is of bail and not jail- Bail granted with conditions- Petition allowed. (Paras 5 & 8)

Cases referred:

Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Sanjay Chandra versus Central Bureau of Investigation (2012)1 SCC 49;

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

O R D E R

Sequel to order dated 9.8.2021, whereby bail petitioner was ordered to be enlarged on interim bail in the event of his arrest in case FIR No.14 of 2021, dated 27.07.2021, under sections 376, 354(a),(c),(d), 292, 294 of IPC and Section 4 of the Protection of Children from Sexual Offences Act, registered at police Station, Mahila Police Thana, Nahan, District Sirmaur, H.P., Mr. Desh Raj Thakur, learned Additional Advocate General has placed on record status report prepared on the basis of the investigation carried out by the Investigating Agency. SI Vidya Sagar has also come present alongwith the record. Record perused and returned.

2. Status report/record reveals that on 13.8.2021, victim/ prosecutrix (***name withheld to protect her identity),*** lodged a complainant at Mahila Police Station, Nahan, District Sirmaur, H.P., disclosing therein that she is student of 10th class and her date of birth is 1st June, 2003. She alleged

that one year back bail petitioner finding her alone at home sexually assaulted her against her wishes. She stated before the police that though she had raised hue and cry, but since none was around, nobody came forward for her help. She alleged that after the alleged incident bail petitioner threatened her that in case she disclosed this incident to anybody, he would make video of alleged incident made by him viral. She alleged that after two months of first incident bail petitioner again finding her alone sexually assaulted her and despite her repeated requests, failed to delete the video from his phone. She alleged that on 25th July, 2021, bail petitioner misbehaved indecently with her, however he after having seen her Uncle Chanan Singh, fled away from the spot. She alleged that bail petitioner keeps stalking her with the intention to tarnish her image and he has also written bad words about her on the walls of the houses in the village. In the aforesaid background, FIR, as detailed hereinabove, came to be lodged against the bail petitioner, who pursuant to order dated 8.9.2021 has already joined the investigation. Since investigation in the case is complete and nothing remains to be recovered from him, learned counsel for the petitioner has prayed for confirmation of interim bail granted by this Court vide order dated 9.8.2021.

3. Mr. Desh Raj Thakur, learned Additional Advocate General while fairly admitting factum with regard to joining of investigation by the petitioner, submits that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of the offence alleged to have been committed by him, prayer having been made on his behalf for grant of bail deserves outright rejection. Learned Additional Advocate General further argued that since at the time of alleged offence age of the victim/prosecutrix was less than 18 years, consent, if any, of her, is immaterial and as such, present petition may be dismissed.

4. Having heard learned counsel representing the parties and perused the material available on record, this court finds that incident

allegedly happened/occurred one year prior to lodging of the FIR, but no plausible explanation ever came to be rendered on record qua the delay in filing the FIR. Though, in the initial complaint victim/prosecutrix claimed that after three months of first incident, she was again subjected to sexual intercourse by bail petitioner, but there is no material available on record suggestive of the fact that attempt, if any, ever came to be made at the behest of victim/prosecutrix, who at that relevant time was 17 years old to lodge the complaint either with the Gram Panchayat or with the police, rather she kept on waiting till filing of the FIR, which is subject matter of the present case. If the statement of the victim/prosecutrix made under Section 164 Cr.P.C., is red in its entirety, it can safely be inferred that victim/prosecutrix had prior acquaintance with the bail petitioner and she wanted to solemnize marriage with him. Since, age of the victim/prosecutrix was less than 18 years, proposal of her marriage with bail petitioner could not be materialized. After one year of alleged incident, FIR came to be instituted and explanation rendered on record qua the delay is not worth credence.

5. On 13th August, 2021, learned counsel representing the petitioner informed this Court that victim/prosecutrix and petitioner herein has already decided to marry each other and today during the proceedings of the case, victim/prosecutrix alongwith her father and Pradhan of Gram Panchayat, Nawada, have come present. Father of the victim/prosecutrix has made available one Nikhanama, perusal whereof reveals that on 17th August, 2021 victim/prosecutrix, who has now turned 18 years has solemnized marriage with the petitioner. Investigating Officer present in Court fairly admits that victim/prosecutrix has turned 18 years and as such, is entitled to solemnize marriage. Since, alleged incident is of one year prior to filing of the FIR, medical evidence adduced on record is of no relevance, perusal whereof otherwise discloses no case against the petitioner. Similarly, father of the victim/prosecutrix also states before this Court that marriage interse

petitioner and her daughter i.e. victim/prosecutrix stands solemnized. Smt. Mehraj Khatun, Pradhan of Gram Panchayat, who is also present in Court states before this Court that marriage interse petitioner and victim/prosecutrix was solemnized on 17.8.2021. Since, petitioner has already solemnized marriage with the victim/prosecutrix and nothing remains to be recovered from the bail petitioner, this Court sees no reason for custodial interrogation of the bail petitioner and as such, he deserves to be enlarged on bail.

6. By now it is well settled that freedom of an individual is of utmost importance and cannot be curtailed for indefinite period. Till the time guilt of accused is not proved, in accordance with law, he is deemed to be innocent. In the case at hand, the guilt, if any, of the bail petitioner is yet to be proved, in accordance with law.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has categorically held that freedom of an individual is of utmost importance and same cannot be curtailed merely on the basis of suspicion. Hon'ble Apex Court has further held that till the time guilt of accused is not proved, in accordance with law, he is deemed to be innocent. The relevant paras No.2 to 5 of the judgment are reproduced as under:-

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home***

(whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

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

> ***deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.***
>
> ***5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons***

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

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor***

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

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

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

11. Consequently, in view of the above, order dated 9.8.2021 passed by this Court, is made absolute, with following conditions:-

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

b. he shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. he shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or the Police Officer; and

d. he shall not leave the territory of India without the prior permission of the Court.

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

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

State of H.P and others .....Appellants

Versus

Munshi Ram deceased through legal representatives, Vidya Sagar and others ....Respondents

RSA No. 4110 of 2013
Decided on : July 15, 2021

Code of Civil Procedure, 1908 - Regular Second Appeal under Section 100 of Code of Civil Procedure - Concurrent findings - Held that High Court while exercising power under Section 100 of Code of Civil Procedure, cannot upset concurrent findings of fact unless the findings so recorded are shown to be perverse - In the case in hand there is no perversity as such in the impugned judgments and decrees passed by the Learned Courts below, rather the same are based upon correct appreciation of evidence, as such, deserve to be upheld - Appeal dismissed.

Cases referred:

Geeta Vidhyapeeth Palampur and others vs. State of H.P. and others 1992(1) Shimla Law Cases 374

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;

-

For the appellants Mr Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur and Ms. Svaneel Jaswal, Deputy Advocates General.

For the respondents: Mr. Bhender Kumar Chaudhary, Advocate

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under S.100 CPC, lays challenge to judgment and decree dated 31.10.2012 passed by learned District Judge, Mandi in Civil Appeal No. 8/2012, titled State of Himachal Pradesh and others vs. Munshi Ram, affirming judgment and decree dated 22.11.2011 passed by learned Civil Judge (Senior Division), Court No.1, Mandi, whereby appeal filed by the appellants-defendants (hereinafter, 'defendant') against the respondent-plaintiff (hereinafter, 'plaintiff') came to be dismissed and the suit for injunction having been filed by the plaintiff came to be decreed.

2. Facts in brief, as are necessary for the adjudication of the appeal at hand are that the plaintiff filed a civil suit against the defendants averring therein that the plaintiff is owner-in-possession of land denoted by Khewat Khatauni No. 190, min /217 min Khasra No. 8/9/2/1 measuring 0-4-15 Bigha situate in Mohal Kot /275 Illaqua Rajgarh Balh, Tehsil Sadar, District Mandi,(hereinafter, 'suit land'). Plaintiff averred in the plaint that the defendants constructed road namely Nalsar-Chunahan through the suit land and for this purpose they had taken possession of the suit land long ago. Plaintiff averred in the plaint that the acquisition proceedings qua the suit land were initiated but the same were allowed to lapse intentionally with the motive to grab the suit land without paying compensation to the plaintiff. Plaintiff though served the defendants under Section 80 CPC but no steps, if

any, ever came to be taken by the defendants either to initiate acquisition proceedings or pay the compensation to the plaintiff. Since the defendants, despite repeated assurances, failed to pay compensation the plaintiff, he filed suit in question seeking therein relief of mandatory injunction directing the defendants to initiate acquisition proceedings and complete the same within stipulated time.

3. Aforesaid claim of the plaintiff came to be refuted by defendants by filing written statement, wherein they, while specifically raising objections of maintainability, cause of action, estoppel, non-joinder & mis-joinder of necessary parties and limitation, fairly admitted the factum with regard to construction of road through the suit land in the year 1970, but claimed that such road was constructed through the land of plaintiff with his consent and permission. Defendants averred in the written statement that the road was metalled in the years 1973-74 and since then HRTC buses are plying on the same but, at no point of time, plaintiff ever raised objection, if any, qua the use of the road passing through his land. Besides above, defendants claimed that after construction of road, value of land of plaintiff has increased and since at no point of time, plaintiff objected to the construction of road through his land, he is not entitled for the decree as prayed for by him in the instant suit. Defendants also stated before the learned trial Court that the plaintiff never demanded any compensation for the land covered under road and as such, prayer made after an inordinate delay for initiation of acquisition proceedings and payment of compensation otherwise deserves rejection on the ground of limitation.

4. On the basis of pleadings adduced on record by respective parties, following issues came to be framed by learned trial Court on 21.4.20211:

1. Whether the plaintiff is entitled for decree of mandatory injunction, as prayed for? OPD
2. Whether the suit is not maintainable, as alleged? OPD

3. Whether the plaintiff has on enforceable cause of action, as alleged? OPD
4. Whether the plaintiff is estopped by his own act and conduct, as alleged? OPD
5. Whether the suit is bad for non joinder and mis joinder of necessary parties, as alleged? OPD
6. Whether the suit is barred by limitation, as alleged? OPD
7. Relief.

5. Plaintiff with a view to prove his case, besides examining himself, also examined one Rirku Ram as PW-2, who tendered his evidence by way of affidavit, Ext. PW-2/A. Plaintiff also produced documentary evidence i.e. copy of Jamabandi for the years 2003-04 Ext. PB, notice under S.80CPC Ext. PC, postal receipts Exts. PD to PG, Notifications Ext. PH and PJ, AD receipts Exts. PK to PN. Defendants also examined one ShriD.R. Shashani, Executive Engineer, Public Works Department Division No. II, Mandi, as DW-1.

6. Learned trial Court, on the basis of the pleadings adduced on record and evidence, be it documentary or oral, decreed the suit of the plaintiff and held him entitled for the relief of mandatory injunction and accordingly, vide judgment and decree dated 21.11.2011, directed the defendants to initiate acquisition proceedings in accordance with law within the specified period.

7. Being aggrieved and dissatisfied with the judgment and decree passed by learned trial Court, the defendants, preferred an appeal under Section 96 CPC in the court of learned District Judge Mandi, District Mandi, which also came to be dismissed vide judgment and decree dated 31.10.2012. In the aforesaid background, defendants have approached this court in the instant proceedings, praying therein for dismissal of the suit for mandatory

injunction, having been filed by the plaintiff, after setting aside impugned judgments and decrees passed by learned Courts below.

8. Aforesaid appeal having been filed by the defendants came to be admitted on 22.7.2013, on the following substantial question of law:

> "Whether the findings of the Courts below are result of complete mis-reading, mis-interpretation of the evidence and material placed on record and against the settled position of law?"

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

10. Having heard learned counsel appearing for the parties and perused the material available no record vis-à-vis the reasoning assigned by first appellate Court, while passing impugned judgment and decree, upholding the judgment and decree passed by learned trial Court, this court finds no force in the submissions made by Mr. Arvind Sharma, learned Additional Advocate General that the judgment and decree passed by learned first appellate Court are not based upon proper appreciation of evidence adduced on record by respective parties rather, this court finds that both courts below have carefully examined the evidence and have arrived at a right conclusion that once the land of the plaintiff stand utilized by the defendants for the construction of road in question, plaintiff is entitled to adequate compensation after initiation of acquisition proceedings under Land Acquisition Act.

11. Pleadings adduced on record by respective parties, clearly reveal that there is no dispute inter se parties qua the fact that the suit land stands utilized for the construction of road known as Nalsra-Chunahan by the defendants. Defendants have categorically admitted in their written statement, the factum with respect to utilization of the land by them for the construction of road in question. Though the defendants have attempted to carve out a case that since use of the aforesaid land for construction of road was with the

consent and permission of the plaintiff, he is not entitled to any compensation, but evidence be it ocular or documentary adduced on record by respective parties, nowhere suggests that the factum, if any, with respect to consent and permsision given by plaint qua construction of road through his land could be proved by the defendants by leading cogent and convincing evidence.

12. Revenue record adduced by the plaintiff shows him to be the owner of the suit land. Plaintiff, while appearing before learned trial court as PW-1 categorically deposed on oath that construction of road Nalsar Chunahan road was carried out by defendants long ago, with the assurance that the acquisition proceedings shall be initiated soon. He further deposed that acquisition proceedings, though were initiated but could not materialize. Said statement of PW-1 Munshi Ram was further corroborated by PW-2 Rirku son of Chuhru, who also stated that Nalsra Chunahan road was constructed by the defendants through the land of the plaintiff and he was assured that acquisition proceedings shall commence soon. No doubt, plaintiff, while admitting in his cross-examination, that the road in question is about 25-30 years old and connects 4-5 villages fairly stated that no objection was raised by him at the time of construction of the road, but he further explained that he was assured that the land shall be acquired by Government and amount of compensation shall be paid to him. Plaintiff, while fairly admitting that he never prayed for compensation from the Government, clarified that he had applied to the department concerned for payment of compensation,

13. DW-1 D.R. Shashni, Executive Engineer, admitted in his cross-examination that no written consent was ever obtained or given by the plaintiff for the construction of the road. He was unable to place on record any oral or written consent given by the plaintiff. There is no evidence be it ocular or documentary, led on record by the defendants, suggestive of the fact that the suit land was given voluntarily by the plaintiff to the defendants and he had

given consent to the Defendants for the construction of road through his land without payment of any compensation.

14. Though, in the case at hand, defendants have set up a case that since buses are plying on the road in question since the year 1975, and road stood constructed in the year 1970, suit having been filed by t[he plaintiff in the year 2008 for mandatory injunction, directing the defendants to initiate acquisition proceedings, is not maintainable being time barred but such plea of the defendants cannot be accepted for the reason that land of the plaintiff stands utilized for the construction of road without there being any payment of compensation. When it stands established that the land of the plaintiff was utilized unauthorizedly by the defendants, without paying compensation under the Land Acquisition Act, for the construction of road, and there is no evidence worth credence available on record suggestive of the fact that the owner/plaintiff had given consent voluntarily, plea of limitation as raised by the defendants cannot come in the way of the plaintiff for claiming compensation through acquisition proceedings.

15. As has been taken note herein above, defendants failed to give details of consent if any, ever given by plaintiff and as such, courts below rightly concluded that the plaintiff could not be deprived of his right to property enshrined under Article 300A of the constitution of India. If land of the plaintiff is used by defendants/State, it is bound to compensate him by initiating acquisition proceedings. (See HLJ 2009 (1) 101 HP HC)

16. Reliance is also placed upon judgment reported in **Geeta Vidhyapeeth Palampur and others** vs. **State of H.P. and others** 1992(1) Shimla Law Cases 374, wherein it has been held as under:

> 10. Having found in the instant case that the property has not vested in the State and the same is being used and utilized by it and petitioner No.1 has not been paid any compensation for deprivation of the possession, the question which remains to be decided is the relief which

can be granted in the facts and circumstances of the case. Whether the petitioners can be allowed the relief of restoration of possession in these proceedings or not. The respondents have contended that the petitioners have atleast acquiesced in their possession and as such, are not entitled to the relief. We find that the conduct of the petitioner sin having passed resolution Annexure P-8 amounts to acquiescence in the respondents continuing in occupation, but of course, subject to settlement of terms. They further allowed a Committee to be set up to go into the entire aspect and make its recommendations. They further allowed the respondents to continue developing the property. In view of this we have no doubts in our mind that such a conduct disentitles the petitioners from claiming back possession. It also cannot be agitated by the petitioners that respondents ought not have utilized the property for any other purpose, other than that for which they acquiesced in the respondents in making use of it. No fetters can be placed as to the manner of use of the property. In the facts and circumstances, the petitioners can only claim to be compensated suitably. Since the material facts in the instant case have not been disputed, the petitioners can be allowed appropriate relief in these proceedings for issuance of a Writ of mandamus against the respondents No. 1 to 3. Since we have held petitioners entitled to the amount of compensation and since the petitioner having approached this Court in its extra ordinary jurisdiction, it is but proper to consider as to for what equitable compensation the petitioners are entitled for use and occupation for property till payment of compensation, the petitioners have claimed use and occupation charges of the property from 29th April, 1978 onwards alongwith interest thereupon. As the petitioners will be entitled to the amount of compensation in accordance with the provisions of Land Acquisition Act alongwith compulsory acquisition

charges and interest in accordance with law from 29th April, 1978, therefore, we do not feel that an order deserves to be passed for payment of use and occupation charge to the petitioners separately from 29th April, 1978 onwards. The reason which has prevailed with us in holding this view is that while taking over the management of the College, respondent No.1 also took over its liabilities including absorbing the staff of the College. Otherwise to adjust equities by allowing use and occupation charges to petitioners, respondents would have been relieved of obligation in taking over liabilities and absorbing staff."

17. True it is that as per Section 311 of the Limitation Act, it is duty of court to see whether case is within limitation or not, but since in the case at hand, relief of possession has not been claimed by the plaintiff, rather mandatory injunction has been prayed for by the plaintiff in continuing cause of action, plea of limitation as raised by defendants is of no consequence. Since plaintiff on account of use of land by defendants, without payment of compensation, is incurring continuous loss, as such, rightly approached learned trial Court by way of suit for mandatory injunction directing defendants to initiate acquisition proceedings.

18. Had the defendants successfully proved on record that the road was constructed with the consent and permission of the plaintiff, they were well within their right to raise plea of limitation and acquiescence but since in the case at hand there is no evidence worth credence, suggestive of the fact that in the year 1970, land of the plaintiff was used by the defendants after obtaining his consent, rather, documentary evidence available on record reveals that after use of land of the plaintiff, though defendants initiated acquisition proceedings and issued Notification under Section 4 of Land Acquisition Act, Notifications under Ss. 6 and 4 Ext. PJ and PH, but for extraneous reasons,

such proceedings were not allowed to continue rather, were dropped in between. Issuance of Notifications under Ss.6 and 4 of Land Acquisition Act itself suggests that the plaintiff at no point of time had given permission/consent to the defendants to use his land for the construction of road without acquisition proceedings, rather, issuance of Notifications under Ss.4 and 6 of the Land Acquisition Act, Exts. PG and PH, substantiate the stand taken by the plaintiff in his plaint as well as deposition made before learned trial court that he did not object to construction of road in his land in the year 1970 as he was assured by the defendants that he would be paid adequate compensation through acquisition proceedings.

19. Having carefully sifted entire evidence on record, this court finds no illegality and infirmity in the judgments and decrees passed by learned courts below, which otherwise appears to be based on proper appreciation of record.

20. Substantial question of law is answered accordingly.

21. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining concurrent findings returned by both the Courts below. Learned counsel for the defendants, invited the attention of this Court to the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold

that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

22. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Court, while exercising powers under Section 100 CPC, is restrained from re-appreciating the evidence available on record.

23. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

"14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal."

24. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has

been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, deserve to be upheld.

25. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly dismissed. Judgments and decrees passed by both the learned Courts below are upheld.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Kumari Poonam Thakur .....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 3850 of 2019
Reserved on: July 7, 2021
Decided on: July 13, 2021

Constitution of India, 1950 - Reservation for distinguished sportsperson – Held - Once it is not in dispute that game of Kabaddi stands included in list of games as provided under existing notification of year 1999, and the petitioner after having participated/ won medal in National Sports Festival for Women cannot be debarred from availing the benefit of reservation of 3% quota meant for distinguished sports persons- Petition allowed. (Paras 8, 9 & 13)

For the Petitioner : Mr. Ravinder Singh Chandel, Advocate, Advocate.

For the Respondents : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur, Deputy Advocate General.

THROUGH VIDEO-CONFERENCING

Sandeep Sharma, Judge (oral):

The moot question which has arisen/fallen for determination in the case at hand is, "whether the petitioner, who had not only participated in the national level *Kabaddi* championship in 2005 but had also won various medals, is debarred form claiming benefit of reservation in public employment under 3% reservation for distinguished sportsperson in light of the Notification No. YSS-A(4)1/2018-loose dated 10.1.2011/10.2.2011 (Annexure P-3), whereby Government decided to reserve 3% posts to medal winners of All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions under category No. IV(II).

2. For having bird's eye of the matter, certain undisputed facts as emerge from record are that the respondent No.1 vide Notification No. 2-11/72-DP(A-II) dated 28.5.1999 (annexure P-2) issued instructions for providing 3% reservation to distinguished sportsperson in posts/service to be filled in by way of direct recruitment, contents whereof are reproduced herein below:

"A. EXTENT OF RESERVATION

I) 3% Reservation in direct recruitment posts in lass=-III and Class –IV categories in all the State Government Department, Boards, Corporations and autonomous Bodies other than High Court, Himachal Pradesh Administrative Tribunal, governor Secretariat, Himachal Pradesh Public Service Commission and Himachal Pradesh Vidhan Sabha will be provided under article 16(1)of the Constitution, which will be treated as "Horizontal Reservation".

II) 3% reservation to the defined categories with respect of Class-I and Class-II posts in the following Departments:

- Department of Youth Services and Sports.
- Institute of Mountaineering and Allied Sports Manali
- Home Guards
- School Cadre DPE and PET
- College Cadre Lecturers in Physical Education

The Government may with the approval of the cabinet and in consultation with HPPSC appoint distinguished sportsperson of category I, II and selective sportspersons in category III to Class I and II posts in Departments, boards, corporations autonomous bodies other than those mentioned above. These appointments will however, be limited to 3% of the vacancies.

iii) 3% reservation in Class-I and Class-II in other departments will be given in special cases specifically approved by the Council of Ministers.

B. ELIGIBILITY:-

Sportspersons participating games as per Annexure (A) and falling within categories I to IV Annexures (B) will be the distinguished sportsperson. Sportspersons falling in these categories only will be eligible to claim benefit of reservation.

C. REGULATION OF RESERVATION:- ....

x x x x x x

FIRST APPENDIX TO ANNEXURE 'B'

x x x x x x

Annexure-A

List of games/sports which qualify meritorious sportspersons for consideration for appointment to Class-I to IV posts/services under State Government/Boards/Corporations, etc.

1. Archery
2. Athletics(Track and Field events)
3. Atya/patya
4. Badminton
5. Ball Badminton
6. Basketball
7. Billiards & Snooker
8. Boxing
9. bridge
10. Carrom
11. Chess
12. Cricket
13. Cycling
14. Equestrian sport
15. football
16. golf
17. gymnastics (including body-building)
18. Handball
19. Hockey
20. Judo
21. Kabaddi
22. Karate-do
23. Kayaking& Canoeing
24. Kho-Kho
25. Polo
26. Power Lifting
27. Rifle Shooting
28. Roller Skating
29. rowing
30. softball
31. squash
32. swimming
33. table Tennis
34. Taekwondo
35. Tenni-koit
36. tennis
37. volleyball
38. weightlifting

39. wrestling
40. Yachting

Annexure-B

Criteria for selection of Outstanding Sportspersons who will be eligible for employment in Government Departments/Boards/ Corporations and Universities

The various sports competitions will be classified as follow:_

Category No. I	I. Medal winners of Olympic Games/Winter Olympics II. Commonwealth Games III. Medal Winners of Asian Games/Winter Asiad
Category No. II	I. Participation in Olympic Games II. Participation in Commonwealth Games. III. Participation in Asian Games.
Category No. III	I. Medal winners in National Games II. Medal winners in recognized Senor national Championship
Category No. IV	I. Medal winners in All India Inter-Versity Sports Tournament II. Medal Winners in All India National School Games. III. Medal winners in recognized Jr. National Sports Championship. “

3. Though, in the aforesaid instructions, *Kabaddi* stands included in the list of games but medal winners in All India National School Games, All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions were not declared to be eligible for claiming reservation as sportsperson for employment in Government departments/boards/ corporations and universities against 3% quota fixed for distinguished sportsperson in the aforesaid instructions. However, subsequently, respondent No.2 vide Notification dated 10.2.2011 issued clarification regarding providing reservation to distinguished sportsperson in various services under the government (Annexure P-2). Perusal of aforesaid clarification reveals that Government decided to extend benefit of earlier granted 3% reservation to the medal wieners of All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions under category No. IV(II) of PYKKA. (Annexure P-3), abstract of which is reproduced herein below:

> "I am directed to say that in order to encourage the sportsmen taking part in international, national and inert-State Tournaments, the matter regarding providing of reservation in services to the distinguished sportsperson was under active consideration of the Government for some time past. After careful consideration, it has now been decided that henceforth 3% reservation will be provided to the Distinguished sportsperson in the posts/services to be filled in by direct recruitment as under:
>
> A. EXTENT OF RESERVATION
>
> I) 3% reservation in direct recruitment posts in Class-III and Class-IV categories in all the State Government Departments, Boards/ Corporations and autonomous bodies other than High Court, Himachal Pradesh Administrative Tribunal, governor's Secretariat, Himachal Pradesh Public Service

Commission and Himachal Pradesh Vidhan Sabha, will be provided under Article 16(1) of the Constitution which will be treated as "Horizontal Reservation.":

II) 3% reservation to the defined categories with respect of Class-I and Class-II posts in the following Departments:

- Institute of Mountaineering and Allied Sports, Manali
- Home Guards
- School Cadre DPE and PET
- College Cadre Lecturers in Physical Education

Government may with the approval of the Cabinet and in consultation with HPPSC appoint Distinguished sportspersons of category I, II and selective sports persons in category to Class I & II post in Departments, Boards, Corporations, autonomous bodies other than those mentioned above. These appointments will, however, be limited to 3% of the vacancies.

III) 3% reservation in Class-I and Class-II in other departments will be given in special cases specifically approval by the Council of Ministers.

B. ELIGIBILITY

Sportspersons participating in games as per Annexure (A) and falling within categories I to IV of Annexure (B) will be the distinguished sportspersons. Sportspersons falling in these categories only will be eligible to claim benefit of reservation.

C. REGULATION OF RESERVATION:

a) distinguished sportspersons will have to fulfill educational and other professional qualification prescribed for the post.

b) Department of Youth Services and Sports will act as nodal agency for implementation for reservation in all classes of posts.

c) The sports persons belonging to category-I will be eligible for direct employment in various Government Department/Boards/ corporations etc. against reserved posts. The interested department will be free to offer employment directly without any interview or any other formality. This offer will, however, have to be made within one month of winning of medal in case no department comes forward the director, Youth Services and Sports will sponsor name to any department against any post available under sports quota depending upon the suitability and choice of the candidate.

d) The Department of Youth Services and Sports will set in sports persons employment cell and maintain a live register with respect of all eligible sportspersons. The Department of Youth Services and Sports will frame rules and guideline for determining the priority etc. and choice and suitability of such candidate. The recruiting department will send requisition tot eh department of Youth Services and Sports for sponsoring names against sports quota whenever recruitment is to be made. The sportspersons recruitment cell will sponsor one name per vacancy from live register according to priority as per rules from category I, II, III. The requisitioning Department will then have to recruit that person only. In case no suitable candidate is available in category I, II & III, the sportsperson employment cell will issue non-availability certificate.

e) After non-availability certificate is obtained for categories I, II & III, the recruiting department will be free to fill up the sports vacancy out of categories IV through HP Public Service

Commission/subordinate Staff Selection Board or Departmental Recruitment Committee in accordance with the recruitment procedure laid down but they will give preference in category IV to Gold Medal winner over Silver medal winner and silver medal winner over Bronze medal winner. The relaxation regarding employment exchange will be applicable and so there will be no need for getting the names sponsored from employment exchange. The recruiting departments will try to involve Youth Services and Sports Department at the time of recruitment against sports quota. In case the vacancy is not advertised through media by recruiting agency, requisition will be sent to the debarment of Youth Services and Sports who will sponsor candidates from category IV.

f) With respect to categories I and II, or selective outstanding sports persons from category III, the Department of Youth Services and Sports, if need be, will present proposal before Council of Ministers for providing jobs against Class I and II posts in various departments, but in no case will such appointments exceed 3% of the total post in that department, this will be done in consultation with HP Public Service Commission. This provision will be particularly sued for sports persons with professional qualifications who do not fit into post defined in A(II) above.

g) The distinguished sports persons who have participated in recognized sports event i.e. Olympics, Commonwealth and Asian Games and the distinguished sportspersons who have been awarded Gold Medal in National Games will be eligible for availing reservation in PET, DPE School cadre and Lecturers in Physical Education provided for the post. The participation in

national events and winning of Gold Medal in National Game will be treated at par with professional qualification required for these posts. In case, it is required, such candidate will undergo in service professional training.

h) The recruiting department will have a right to specify the sports for which they want candidates so that they have competitive teams.

2. To give effect to the above reservation, the instructions issued by the Government vide Department of Personnel Letter No. Per.(AP)-C-B(12)-1/98, dated 20.8.1998 regarding maintenance of post-based reservation roster, the first appendix to Annexure ;"B" and "C" covering "Horizontal reservation" may be deemed to have been amended to the following extent: ..."

4. After issuance of aforesaid clarification dated 10.1.2011/10.2.2011, petitioner who had admittedly won medal in National Sports Festival for Women organized under PYKKA Competitions, in the year 2005 prior to issuance of clarification/Notification dated 10.1.2011/10.2.2011, applied for registration being outstanding sportsperson under sports quota in the Directorate of Youth Services and Sports, Himachal Pradesh. (Annexure p-4). Since no response if any ever came to be given to aforesaid representation made by petitioner, she filed fresh representation dated 19.3.2019 (Annexure P-5) requesting therein that her name be considered against 3% quota reserved for distinguished sportsperson on the basis of her having won medal in National Sports Festival for Women organized under PYKKA Competitions in the year 2005. But the fact remains that the respondents vide communication (Annexure P-6) rejected the aforesaid prayer of the petitioner on the ground that since the petitioner won first place in National Sports Festival for Women in 2005 and had participated in National Sports Festival for Women in the

year 2004-05, she is not eligible to claim benefit of reservation against 3% quota on the basis of clarification issued by respondent No.2 (Annexure P-6). In the aforesaid background, petitioner has approached this court in the instant proceedings for following relief(s):

> "ii) That in view of the submissions as made in detailed above, the respondents may kindly be directed to make requisite entries/registration of the sports certificate of the outstanding sports persons under the sports quota in the office of respondent No.3, the petitioner being fulfilling the requisite criteria for the same and further the respondents may kindly be directed to recruit the petitioner against the available vacancies in the departments as pe her eligibility under the sports quota so that the petitioner should get the benefit of serving the state as sports persons and the mandate of the Notifications issued by the respondents is complied with in letter and spirit."

5. I have heard and parties and gone through the record.

6. It is not in dispute inter se parties that in the initial Notification dated 28.5.1999 (Annexure P-2), persons having participated and won medals in All India National School Games, All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions, were not entitled to claim benefit of reservation in Government service against 3% quota reserved for distinguished sportspersons. It is also not in dispute that subsequently vide clarification dated 10.1.2011/10.2.2011 issued by respondent no.2, Annexure P-3, sportspersons having participated in All India National School Games/ All India Rural Sports Tournament and National Sports Festival for Women organized under PYKKA Competitions, were included in the category of distinguished sportspersons eligible to claim reservation provided in Government /public employment against 3% quota

reserved for distinguished sportspersons. Respondents Nos. 1 to 3 in their reply have admitted that petitioner has won medal in National Sports Festival for Women organized under PYKKA Competitions but have claimed that she is not eligible for registration of her name with the respondent Department for the reason that the category of the petitioner came to be declared eligible for reservation in public employment under 3% quota in the year 2011, vide Notification dated 10.1.2011/10.2.2011 (Annexure P-3). Reply of respondents further reveals that the respondent No.2 after issuance of clarification dated 10.1.2011/10.2.2011, Annexure P-3 requested the Government to seek legal advice from LR-cum-Principal Secretary (Law) to the Government of Himachal Pradesh that "whether the players who have won medals in the All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions prior to 10 February, 2011 should be considered eligible under the departmental scheme "providing reservation to the distinguished sportsperson in various services undr the Government of not?" Vide letter No. YSS-B(15)-1/2019 dated 18.11.2019 (Annexure R-2), Secretary (Youth Services and Sports) to the Government of Himachal Pradesh intimated the respondent No.2 that the matter was taken up with Law Department and it has observed as under

> "Examined in Law Deptt. The perusal of case record shows that the YSS Deptt. Letter dated 10.02.2011 has extended the benefits of reservation to the medal winners of another two categories i.e. All India Rural Sports Tournaments and National Sports Festival for Women organized under PYKKA Competitions by incorporating these two category No. IV(II) of Annexure –'B" of the already existing instructions of 1999 of the Personnel Department.
>
> Now, the YSS Deptt. Has referred the instant matter for seeking the opinion of this department on the point as to whether the players who have won the medals in the All India Rural Sports Tournaments

and National Sports Festival for Women organized under PYKK competitions prior to inclusion of these two categories should also be considered eligible under the department scheme "Providing Reservation to the distinguished sports persons in various services under the Government" or not.

In this behalf, it is stated that the provisions/instructions made vide letter No. YSS-A(4)1/2008-[Loose dated 10.02.2011 appears to be prospective in operation. Moreover, it is now well settled l legal proposition that operation of any statute/instructions is generally presumed to be prospective in nature unless otherwise given retrospective effect either by way of expressions or by necessary implication."

7. Having carefully perused aforesaid legal opinion, rendered by Law Department, this court is of the view that either the respondents have not placed true facts before this Court or legal opinion of the law department is not conclusive. Law Department, while fairly stating that vide letter dated 10.1.2011/10.2.2011, respondent Department has extended benefit of reservation to medal winner of two categories i.e. All India National School Games and National Sports Festival for Women organized under PYKKA Competitions by incorporating two categories IV (II) of Annexure B in already existing instructions of 1999 of the Personnel Department, side-tracked the real question that "whether the petitioner having won medal/participated in National Sports Festival for Women organized under PYKKA Competitions in 2005 is entitled to claim benefit of 3% reservation quota in public employment, on the strength of clarification/amendment made in existing instructions of the year 1999 of the Department vide letter dated 10.1.2011/10.2.2011. Law Department instead of answering specific question posed to it, opined that "*operation of any statute/instructions is generally*

presumed to be prospective in nature unless otherwise given retrospective effect either by way of expressions or by necessary implication".

8. There cannot be any quarrel with the aforesaid proposition of law, stated by Law Department because, admittedly any statute/instructions is to be given effect prospectively not retrospectively. However, in the case at hand, dispute is not with regard to date of application of clarification /instructions dated 10.1.2011/10.2.2011, rather question which needs determination is whether the petitioner who had participated/won medal in National Sports Festival for Women organized under PYKKA Competitions in the year 2005, is entitled to claim benefit under 3% quota reserved for distinguished sportspersons or not, in terms of the aforesaid clarification/Notification.

9. Since, the categories of participants/medal winners of National Sports Festival for Women organized under PYKKA Competitions and All India Rural Sports Tournaments stand included in the list of distinguished sportspersons eligible to claim benefit of reservation of 3% quota meant for the distinguished sportspersons, action of the respondents in rejecting the case of the petitioner is not sustainable.

10. No doubt, aforesaid category of sportsperson came to be included in the list mentioned in the already existing instructions of 1999, vide clarification dated 10.1.2011/10.2.2011 (Annexure P-2) but that does not mean that sportspersons, who had participated and had won medals in aforesaid categories of games prior to inclusion of these categories in already existing instructions of 1999 are estopped from claiming benefit of 3% reservation meant for the distinguished sportspersons.

11. Otherwise also, careful perusal of clarification /instructions dated 10.1.2011/10.2.2011 nowhere suggests that sportspersons having participated/won medals in All India National School Games and National Sports Festival for Women organized under PYKKA Competitions prior to issuance of clarification /instructions dated 10.1.2011/10.2.2011 shall not be

eligible to claim benefit of reservation under 3% quota meant for distinguished sportsperson hence, application made by petitioner for registering her name for availing benefit of reservation under 3% quota ought to have been accepted by the Department.

12. Prospectivity, if any of instructions/clarification dated 10.1.2011/10.2.2011, by which admittedly two categories i.e. All India National School Games and National Sports Festival for Women organized under PYKKA Competitions came to be declared eligible to avail benefit of reservation against 3% quota meant for distinguished sportsperson is not qua the date of holding of such competitions rather same is to be applied prospectively qua the posts advertised after the date of Notification.

13. Once it is not in dispute that the game of Kabaddi stands included in the list of games as provided under existing Notification of the year 1999, and petitioner after having participated in National Sports Festival for Women organized under PYKKA Competitions has also won medal, petitioner cannot be debarred from getting herself registered with the respondent Department to avail benefit of reservation of 3% quota meant for distinguished sportsperson.

14. Consequently, in view of above, present petition is allowed and respondents are directed to make requisite entry/registration of petitioner being distinguished sportsperson under the sports quota forthwith, enabling her to avail benefit of 3% reservation meant for distinguished sportsperson.

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

BETWEEN:-

SMT. MANJU RANI
WIFE OF SHRI DEVINDER DUTT,
RESIDENT OF HOUSE “AKASH GANGA”
NEAR SHIV MANDIR, PUCCA TANK, NAHAN,
POST OFFICE NAHAN,
TEHSIL NAHAN, DISTRICT SIRMAUR (H.P.)

... PETITIONER

(BY MR. VARUN THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
ITS PRINCIPAL SECRETARY (POWER & ELECTRICITY)
H.P. SECRETARIAT CHHOTA SHIMLA-171002
(H.P.)

2. THE SECRETARY, H.P. STATE ELECTRICITY BOARD,
VIDYUT BHAWAN, SHIMLA-4 (H.P.)

3. THE SUPERINTENDING ENGINEER (OP),
CIRCLE HPSEBL, SHAKTI NAGAR, NAHAN,
POST OFFICE NAHAN, TEHSIL NAHAN,
DISTRICT SIRMAUR, (H.P.)

4. THE SUPERINTENDING ENGINEER , (GEN.),
CIRCLE HPSEBL, SHAKTI NAGAR, NAHAN,
POST OFFICE NAHAN, TEHSIL NAHAN,
DISTRICT SIRMAUR (H.P.)

5. THE DEPUTY DIRECTOR (PERSONNEL) HPSEB,
VIDUT BHAWAN, SHIMLA-4

6. THE SUB DIVISIONAL MAGISTRATE, NAHAN
TEHSIL NAHAN, DISTRICT SIRMOUR, (H.P.)

7. THE DISTRICT EMPLOYMENT OFFICER,
DISTRICT SIRMOUR AT NAHAN,
TEHSIL NAHAN, DISTRICT SIRMOUR (H.P.)

8. SH. NAVEEN KUMAR BANSAL
SON OF LATE SH. HARI CHAND BANSAL,
RESIDENT OF RANI TAL NAHAN,

POST OFFICE NAHAN, TEHSIL NAHAN,
DISTRICT SIRMOUR (H.P.)

9. EXECUTIVE DIRECTOR (PERSONNEL) CUM
APPOINTING AUTHORITY, H.P.S.E.B LTD.
VIDYUT BHAWAN, SHIMLA-171004

10. PERSONNEL OFFICER,
HPSEBL LTD., VIDYUT BHAWAN,
SHIMLA 171004

11. SECTION OFFICER, OFFICE OF
OFFICE OF SUPERINTENDING ENGINEER (OP)
CIRCLE HPSEB LTD., NAHAN,
DISTRICT SIRMAUR H.P)
VIDYUT BHAWAN, SHIMLA-4 (H.P.)

.. RESPONDENT

(MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATE GENERAL
WITH MR. R.P. SINGH AND MR. NARINDER THAKUR,
DEPUTY ADVOCATES GENERAL,
FOR R-1, R-6 & R-7

MS. RUMA KAUSHIK, ADVOCATE
FOR R-2 TO R-5 AND R-9 TO R-11

MR. ASHOK K. TYAGI, ADVOCATE,
FOR R-8)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 3807 OF 2019
DECIDED ON:27.08.2021

Constitution of India, 1950 - Article 226 - Penalty of removal from service under the provisions of Rule 11(VIII) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Held - Inquiry Officer failed to appreciate the evidence in the right perspective - Evidence on record, suggests that no fraud was committed by the petitioner for obtaining

Scheduled Caste Certificate and further that with a view to procure public employment, produced a false certificate of her belonging to scheduled caste community - Imposing major penalty of removal from service is quashed and set aside - Petition allowed.

Cases referred:

Corporation of City of Nagpur and Anr. Vs. Ramachandra, 1981 (3) SCR 22;
Indian Oil Corporation Limited and another versus Ashok Kumar Arora, (1997) 3 SCC 72;
Nelson Motis Vs. Union of India and Anr., AIR 1992 SC 1981;
State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya (2011)4 SCC 584;
State of Andhra Pradesh Vs. Chitra Venkata Rao, 1976(1) SCR 521;
State of Andhra Pradesh Vs. S.Sree Rama Rao, 1963 (3) SCR 25;
Union of India v. P. Gunasekaran (2015)2 SCC 610;

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

O R D E R

Being aggrieved and dissatisfied with order dated 18.6.2012 (Annexure P/22) issued by the Executive Director (Personnel) cum Appointing Authority, Himachal Pradesh State Electricity Board Limited imposing therein penalty of removal from service under the provisions of Rule 11 (viii) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter, 'Rules'), petitioner has approached this court in the instant proceedings filed under Art. 226 of the Constitution of India, praying therein for the following main relief(s):

"i)` That the writ of certiorari may kindly be issued against the Respondents and in favour of the petitioner to quash and set aside the disciplinary proceedings and **Annexure P/7, Annexure P/8, Annexure P/9 and Annexure P/10, Annexure P/13.**

ii) That the writ of certiorari may kindly be issued against the respondents and in favour of the petitioner to set aside the removal orders dated at **Annexure P/22** issued by the Respondent No-9.

iii) That Writ of mandamus may kindly be issued in favour of the petitioner and against the respondents to issue directions to the respondents to take back the petitioner in service giving full benefits of the service and retire her from the service at the age of 60 years.

iv) That the respondents may be directed to pay all the consequential benefits/arrears to the petitioner in a time bound manner along with prevailing rate of interest from time to time."

17. Briefly stated the facts which may be relevant for the adjudication of the case at hand are that the petitioner herein though originally belonged to *Baniya* Caste, sub caste *Aggarwal*, but since in the year 1975, she solemnized marriage with a person belonging to *Lohar* community, which was declared a Scheduled Caste in the State of Himachal Pradesh, she on 30.5.1978, made an application to the Sub Divisional Magistrate Nahan, District Sirmaur, praying therein for issuance of caste certificate. Sub Divisional Magistrate being the competent authority, taking cognizance of aforesaid application submitted by the petitioner, issued certificate dated 30.5.1978 (Annexure P/1) stating therein that Smt. Manju Rani wife of Devender Dutt belongs to *Lohar* community, which has been declared as a Scheduled Caste in the State of Himachal Pradesh. In the year 1982, respondent-Board notified 16 posts of Clerks/MLC's/MR's to be filled in by direct recruitment as per Recruitment and Promotion Rules and as such, called upon the Employment Exchanges of District Sirmaur to sponsor the names of eligible candidates. Out of 16 vacancies, 5 were reserved for Scheduled Castes, 1 for Scheduled Tribe, 2 for ex-servicemen, 1 Backward Class, 6 for Weaker Sections and 1 for the general category. On 24.1.1983, District Employment Officer sponsored the name of the petitioner and called upon her to contact the employer in the office of Executive Engineer

(Electrical) Nahan with the interview card at 10.00 am on 27.1.1983 (Annexure P/2). One note came to be appended in the aforesaid interview card issued by the Employment Exchange that "*CERTIFICATES RELATING TO ANY ANNUAL INCOME NOT EXCEEDING RS.7,500 AND NO FAMILY MEMBER SERVICE IN ORGANIZED SECTOR SHOULD NOT BE SIX MONTHS OLD*"

18. On 27.1.1983, petitioner appeared before interview board, who on 5.2.1983 prepared a category-wise panel for the posts of Clerks. On 30.5.1983, Superintending Engineer Trans. And Const. Circle, HPSEB, Shaktinagar, Nahan issued appointment letter to the petitioner against the post of clerk (Annexure A annexed with the reply filed by respondents Nos. 2 to 5 and 9 to 11 at page-136). Pursuant to aforesaid appointment letter, petitioner herein submitted her joining and since then she has been continuously rendering her services in the respondent-Board without there being any complaint, till issuance of impugned order dated 18.6.2012, (Annexure P/22) issued by the Appointing Authority, imposing penalty of removal from service. Material available on record reveals that in the year 2010, one person namely, Naveen Kumar Bansal (respondent No.8), who happens to be brother of the petitioner, wrote an application (Annexure P/15) to the Sub Divisional Magistrate, Nahan, praying therein to supply copy of certificate of caste issued in favour of his sister, i.e. the petitioner. In response to aforesaid application, Executive Magistrate/Sub Divisional Magistrate, Nahan issued certificate of upper caste dated 31.3.2011 (Annexure P/16), certifying that Manju Rani daughter of Hari Chand Bansal, belongs to *Baniya* caste, sub caste *Bansal* as per report of Patwari, Patwar Circle, Nahan. Allegedly after having received aforesaid information, above named Naveen Kumar Bansal, reported the matter to the respondent Board, that the petitioner fraudulently obtained appointment against the post of Clerk in the year 1983, on the strength of a false caste certificate. It appears that after having received aforesaid complaint, respondent Board issued show cause

notice dated 29.3.2011 (Annexure P/5) to the petitioner to clarify her position with regard to submission of fake Scheduled Caste Certificate at the time of her initial appointment. Vide communication dated 19.4.2011 (Annexure P/6), petitioner replied to the Show Cause Notice, stating therein that she had not submitted the Scheduled Caste Certificate at the time of interview for the post of clerk, rather the appointment was made on the basis of no income and unemployment certificates, as were otherwise required to be submitted in terms of conditions contained in the appointment order. She claimed that she never availed benefit of Scheduled Caste in her entire service. She stated that Scheduled Caste certificate was submitted by her at the time of joining with Superintending Engineer, Trans. Circle, Nahan as per requirement of appointment order. She claimed that as per report of Sub Divisional Magistrate, Nahan, conveyed vide letter dated 10.6.2010, Scheduled Caste certificate was issued in her favour on 30.5.1978 when she married a person belonging to a Scheduled Caste. While admitting that her parentage is of *Baniya* caste, petitioner claimed before the respondent-Board that in the year 1975 she married in a Scheduled Caste family and as such filed application to competent authority for issuance of caste certificate, which was ultimately issued in her favour. She stated that the clarification stands given by Sub Divisional Magistrate Nahan vide letter dated 8.9.2010, that Scheduled Caste Certificate was issued in her favour vide No. 188, dated 30.5.1978 and same was neither forged nor fake. She stated that since in FIR No. 43 of 2011, dated 16.10.2011, matter is being investigated by the Police, coupled with the fact that she had not submitted a false caste certificate at the time of her appointment, Show Cause Notice issued against her, be dropped.

19. Respondent-Board, being not satisfied with the aforesaid explanation rendered on record by the petitioner, issued memorandum (Annexure P/7) stating therein that respondent-Board proposes to hold an enquiry under Rule 14 of Central Civil Services (Conduct) Rules, 1964.

Alongwith said memorandum, substance of imputation of misconduct/misbehaviour, qua which enquiry was proposed to be held also came to be supplied to the petitioner in the shape of articles of charge, which reads as under:

> "That the said Smt. Manju Rani Sr. Asstt. Presently working in (OP) Circle, HPSEBL, Nahan at the time of her interview for the post of clerk followed by appointment has produced false certificate of her belonging to Scheduled Caste community to draw undue benefit of reservation against the quota for reserve category of Scheduled Caste and further deemed the benefit of promotion of Sr. Asstt. Against reserved post for Scheduled Caste.
>
> Smt. Manju Rani has therefore, violated the provision contained in CCS(Conduct) Rules 1964 under rule 3(i) (ii) and (iii) thus liable for disciplinary action under CCS (CC&A) Rule 1965."

20. Respondent-Board, called upon the petitioner to, within ten days of the receipt of the memorandum, file written statement of defence. In response to aforesaid memorandum, petitioner submitted her written arguments/brief in her defence (Annexure P/12), specifically denying therein charge imputed against her.

21. Vide order dated 28.5.2011(Annexure P/13), Superintending Engineer, (OP) Circle, HPSEBL, Nahan, pending the enquiry, placed the petitioner under suspension and vide office order dated 16.6.2011 (Annexure P/14) appointed Deputy Director (Personnel) HPSEBL , Shimla to enquire into charges framed against petitioner. In the meantime, vide order dated 30.5.2011 (Annexure P/17), SDO (Civil) Nahan, Sirmaur having taken note of reference received from Himachal Pradesh State Electricity Board, ordered cancellation of Scheduled Caste Certificate dated 30.5.1978 issued in favour

of the petitioner, advising the petitioner not to make use of aforesaid certificate in future, failing which legal proceedings, shall be initiated against her.

22. Inquiry Officer, after having followed due procedure, proceeded to record statements of witnesses adduced on record by delinquent official (petitioner) as well as respondent-Board and found the petitioner guilty of misconduct and submitted his report vide letter dated 15.12.2011 to Disciplinary Authority-cum-Superintending Engineer (OP) Circle, Nahan, who on receipt of enquiry report, supplied same to the petitioner vide letter dated 10.1.2012, advising her to make representation. Petitioner submitted detailed representation to the disciplinary authority/Superintending Engineer (OP) Nahan but since the Appointing Authority of petitioner was Executive Director (Personnel), Superintending Engineer Circle, Nahan vide letter dated 31.12.2011 forwarded the report of Inquiry Officer with representation of the petitioner to Executive Director (personnel)-cum-Appointing Authority. Appointing authority after having considered gravity of charge, found report of Inquiry Officer and after having appreciated oral and documentary evidence brought on record by respective parties, recorded following findings:

> "**AND WHEREAS** the appointing authority considered the gravity of the charge framed against the delinquent official, findings of the ld. Inquiry Officer and also appreciated the oral as well as the documentary evidence brought on record by the respective parties. The Appointing Authority after having perused the inquiry report and considered d the findings as also material available on record proceeds as under:
>
> 1. That at the very out-set it may be noted that the standard of proof in the departmental inquiries is "preponderance of probabilities" while in the criminal proceedings, it is the "strict proof" which weighs. In the instant matter, the charge levelled

against Smt. Manju Ran, Sr. Assistant was that she produced false certificate of her belonging to scheduled caste community to seek appointment as Clerk in HPSEB Ltd. The name of delinquent official was sponsored by the employment exchange for the post of Clerk against the quota of Scheduled caste and her name was considered against the category of Scheduled Caste in the select panel prepared by the Department and was offered appointment as Clerk on the basis of caste certificate having been produced by her at the time of interview/appointment. Though the said certificate of her belonging to Scheduled Caste was issued by the then SDM, Nahan, yet on receipt of complaints that the delinquent have obtained the certificate by fraudulent means, the matter was referred to the Sub Divisional Magistrate, Nahan for verification, who after verification ivied his letter bearing No. 4806 dated 10/6/2010 made it clear that no person who was not in Scheduled Caste or a Scheduled Tribe by birth will be deemed to be a member of a Scheduled Caste or a Scheduled Tribe. Accordingly, the Certificate No. 188, dated 30.05.1978 issued by Sub Divisional Magistrate, Nahan in favour of Smt. Manju Rani was withdrawn vide his latter dated 30.05.2011. In this regard notification of Govt. Circular letter No. 35/1/72-RU9SCT.V) dated April, 1975 under point No.3 was relied upon by him. Consequent upon the receipt of aforesaid report from the SDM Nahan, the delinquent official was charge-sheeted for her acts of omissions and commissions amounting to misconduct. During the course of enquiry ample and adequate opportunity was afforded to her to prove innocence. The ld. Inquiry Officer has

held the charge levelled against the delinquent official-Smt. Manju Rani as proved.

2. The representation tendered by the delinquent official-Smt. Manju Rani, Sr. Assistant has also been considered by the undersigned being the Appointing Authority and after having carefully perused the gravity of charge, findings returned by the ld. Inquiry Officer as also evidence available /brought on record, completely agrees with the findings of the Inquiry Office in the facts and circumstances of the case and comes to the conclusion that the delinquent is guilty of producing false certificate of her belonging to the scheduled caste community and has thus drawn undue benefit of reservation against the quota meant for reserved category of scheduled caste which makes her appointment to the post of Clerk and consequent promotion as Sr. Assistant as *void-abinitio.*

IN VIEW OF ABOVE facts and circumstances, the undersigned being the Appointing Authority considers that the delinquent-Smt. Manju Rani is not a fit person to be retained in service and she is hereby imposed the penalty of removal from service of the HPSEB Ltd. with forthwith under the provisions of Rule-11(viii) of the CCS(CC&A) Rules, 1965."

23. Though the Appointing Authority after having scanned the entire material placed before him, observed in the order that the certificate of petitioner's belonging to Scheduled Caste was issued by then Sub Divisional Magistrate, Nahan, on the basis of prayer made by the petitioner after her marriage with the person belonging to Scheduled Caste category, but yet proceeded to accept the finding of the Inquiry Officer and imposed penalty of removal from service in terms of rule 11 (viii) of the Rules.

24. Being aggrieved and dissatisfied with Annexure P/22, imposing of penalty of removal from service, petitioner has approached this court in the instant proceedings, praying therein for the reliefs, as reproduced herein above.

25. I have heard the parties and gone through the record.

26. Before ascertaining the correctness and genuineness of the submissions made by learned counsel representing the parties vis-à-vis prayer made in the instant petition, it would be apt to elaborate upon the scope of judicial review in departmental inquires/proceedings while exercising power under Article 226 of the Constitution of India.

27. By now it is well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. However, courts can interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala-fide or based on extraneous considerations. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya (2011)4 SCC 584,*** wherein it has been held as under:-

> "7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in 5 (2011) 4 SCC 584 8 the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the

evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B. C. Chaturvedi vs. Union of India - 1995 (6) SCC 749, Union of India vs. G. Gunayuthan - 1997 (7) SCC 463, and Bank of India vs. Degala Suryanarayana - 1999 (5) SCC 762, High Court of Judicature at Bombay vs. Shahsi Kant S Patil - 2001 (1) SCC416).

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12. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several

years, challenge the decision on the ground that subsequently, the criminal court has acquitted him."

28. Reliance is also placed upon the latest judgment rendered by Hon'ble Apex Court in ***The State of Karnataka and another versus N. Ganga Raj,*** Civil Appeal No.8071 of 2014, wherein Hon'ble Apex Court while taking into consideration aforesaid law laid in earlier judgments has held as under:-

> "13. In another judgment reported as ***Union of India v. P. Gunasekaran*** (2015)2 SCC 610 , this Court held that while reappreciating evidence the High Court cannot act as an appellate authority in the disciplinary proceedings. The Court held the parameters as to when the High Court shall not interfere in the disciplinary proceedings:
>
> "13. Under Article 226/227 of the Constitution of India, the High Court shall not:
>
> (i) re-appreciate the evidence;
> (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
> (iii) go into the adequacy of the evidence;
> (iv) go into the reliability of the evidence;
> (iv) interfere, if there be some legal evidence on which findings can be based.
> (v) correct the error of fact however grave it may appear to be;
> (vii) go into the proportionality of punishment unless it shocks its conscience."
>
> 14. On the other hand learned counsel for the respondent relies upon the judgment reported as ***Allahabad Bank v. Krishna Narayan Tewari (***2017)2 SCC 308 , wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the

findings recorded by the disciplinary 6 (2015) 2 SCC 610 7 2017 2 SCC 308 10 authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.

29. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Indian Oil Corporation Limited and another versus Ashok Kumar Arora,*** (1997) 3 Supreme Court Cases 72, wherein it has been held as under:-

> "20 At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/Authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are base on no evidence, and or the punishment is totally disproportionate to the proved misconduct of an employee. There is catena of judgments of this Court which had settled the law on this topics and it is not necessary to refer to all these decisions. Suffice it to refer to few decisions of this Court on this topic viz., ***State of Andhra Pradesh Vs. S.Sree Rama Rao,*** 1963 (3) SCR 25, ***State of Andhra Pradesh Vs. Chitra Venkata Rao,*** 1976(1) SCR 521, ***Corporation of City of Nagpur and Anr. Vs. Ramachandra***, 1981 (3) SCR 22 and ***Nelson Motis Vs. Union of India and Anr.,*** AIR 1992 SC 1981."

30. Now being guided by aforesaid law laid down by Hon'ble Apex Court with regard to scope of interference in disciplinary proceedings, this Court proceeds to decide the controversy at hand.

31. Though, in nutshell the case of the petitioner as has been stated in the petition at hand is that, that after her marriage in the year 1975 with a person belonging to Scheduled Caste category, she applied for Scheduled Caste certificate and same was issued by competent authority in her favour on 30.5.1978, Annexure P/1 but her initial appointment as Clerk in the respondent-Board, was not on the strength of her Scheduled Caste certificate rather, she was selected against general category. However, such plea of the petitioner is not acceptable on account of specific note made in the appointment letter dated 27.1.1983, annexure RA, annexed with the reply of respondent-Board that, since she has been appointed against reserved vacancy of Scheduled Caste, she is therefore, required to produce a certificate to this effect issued by competent authority"

32. Though, interview letter issued by District Employment Officer, Nahan, (Annexure P/2), whereby the petitioner was advised to appear in the interview at 10.00 am, on 27.1.1983 in the office of Executive Engineer (Electrical) Nahan, nowhere suggests that the petitioner herein was sponsored as Scheduled Caste candidate but reply filed by respondent No. 7 i.e. Employment Exchange, reveals that initially before marriage, petitioner had registered herself in general category, but after marriage, she had submitted certificate of caste to the Employment Exchange and such fact was entered in record, in the year 1978, however, such record, probably could not be made available since it was weeded out as per instructions. Respondent No. 7 has categorically stated in reply that petitioner was appointed against Scheduled Caste as is evident from annexure P/18 (appointment letter). Since there is ample material available on record that initial appointment of the petitioner was against post reserved for Scheduled Caste category, there appears to be

no reason for his court to go into that aspect of the matter. However, after having scanned entire material, i.e. led on record by parties to the lis, during disciplinary proceedings, this court finds force in the argument of learned counsel for the petitioner, that no false/forged certificate of caste was submitted by the petitioner with a view to obtain employment, rather, she after being sponsored by concerned Employment Exchange, appeared in the interview and thereafter being selected, submitted her caste certificate which was issued in her favour on 30.5.1978 annexure P/1. It is not in dispute that the petitioner after having been appointed as Clerk, in respondent-Board, in the year 1983, kept on serving the respondent-Board till her removal from service vide order dated 18.6.2012 and during her service span of 29 years, she also received one promotion to the post of Senior Assistant. While the petitioner was in service for 29 years, neither any complaint was lodged nor questions if any were raised qua authenticity of the Scheduled Caste Certificate submitted by her at the time of her selection. It is only in the year 2011, that too on the complaint of brother of the petitioner, who had strained relations with the petitioner on account of her marriage in a Scheduled Caste family, respondent-Board sent a reference to Sub Divisional Magistrate, Nahan for verifying Scheduled Caste Certificate dated 30.5.1978 (Annexure P/1). It is also not in dispute that pursuant to reference sent by the respondent-Board, office of Sub Divisional Magistrate investigated the matter and found that petitioner after her marriage with the person belonging to the Scheduled Caste had applied for Scheduled Caste Certificate and the then Sub Divisional Magistrate issued Scheduled Caste Certificate No. 188, dated 30.5.1978 in favour of the petitioner. Respondent No.6 i.e. Sub Divisional Magistrate in his reply has categorically admitted that the Scheduled Caste Certificate dated 30.5.1978 stands issued by the then Sub Divisional Magistrate, Nahan in favour of the petitioner as per entries made in the certificate register available with the office of the said respondent, however,

aforesaid authority after having received various references from respondent-Board, cancelled aforesaid certificate vide order dated 30.5.2011 (Annexure R-6/A) annexed with the reply filed by respondent No. 6 after holding due enquiry.

33. Since there is no dispute inter se parties that as per law, no person becomes a Scheduled Caste on account of his/her marrying a person belonging to the Scheduled Caste category, it cannot be disputed that the petitioner merely due to her marriage with a person of Scheduled Caste, could not have been issued Scheduled Caste Certificate. However, in the case at hand, relevant fact is that the petitioner after having married a person belonging to the Scheduled Caste category in 1975, applied to competent authority for issuance of caste certificate and competent authority vide certificate dated 30.5.1978, certified that the petitioner belongs to Lohar community which has been declared as a Scheduled Caste in the State of Himachal Pradesh. Petitioner after having got aforesaid caste certificate, updated her status with the Employment Exchange, which subsequently after having received requisition from respondent-Board sponsored her name against the post of Clerk under Scheduled Caste category.

34. Record reveals that at no point of time, petitioner denied factum with regard to issuance of Scheduled Caste Certificate in her favour in the year 1978 and her having submitted such certificate to the authority concerned at the time of her joining in the respondent-Board, rather, her simple claim throughout has been that though she had submitted Scheduled Caste Certificate at the time of joining in terms of conditions of appointment letter but she was selected against post meant for general category and respondent-Board with a view to accommodate one person namely Suman Gupta, who could not make into merit of general category subsequently asked her to submit Scheduled Caste Certificate at the time of joining so that she can be considered against the Scheduled Caste post. Petitioner also claimed in

the disciplinary proceedings that during her service span of 35 years, she was promoted to the post of Senior Assistant that too in general category.

35. Be that as it may, having carefully perused evidence led on record by the respective parties, especially by the respondent-Board, it is quite apparent that there was no clarity to the officials of the respondent-Board with regard to category against which petitioner was initially appointed but yet if it is presumed to be correct that petitioner was appointed against the post reserved for Scheduled Caste category, even then charge framed against the petitioner that she produced false certificate of her belonging to Scheduled Caste community to draw undue benefit of reservation against the quota reserved for the Scheduled Caste, is not tenable at all for the reason that respondent-Board in the disciplinary proceedings has not been able to prove that Scheduled Caste Certificate dated 30.5.1978 (Annexure P/1) was procured/obtained fraudulently by the petitioner with a view to draw undue benefit of reservation against the posts reserved for Scheduled Caste, rather, Inquiry Officer after having scanned entire material produced before him, has arrived at a conclusion that there is no evidence that the petitioner fraudulently obtained Scheduled Caste Certificate and thereafter used the same for securing appointment but yet found her guilty of misconduct.

36. At this stage, it is relevant to take note of the fact that qua aforesaid allegation, FIR No. 43 of 2011 dated 16.2.2011 under Ss. 420, 467, 468 and 471 IPC was also lodged against the petitioner, wherein police after completion of investigation filed Challan in the competent court of law. Learned Judicial Magistrate First Class, Nahan, District Sirmaur, Himachal Pradesh after having found no evidence against the petitioner acquitted her of charges framed against her under aforesaid provisions of law, vide judgment dated 31.3.2015. Being aggrieved and dissatisfied with the aforesaid judgment of acquittal recorded by Judicial Magistrate First Class, respondents filed Cr. Appeal No. 40/2010/2015 in the court of learned Sessions Judge, Sirmaur at

Nahan. However, fact remains that such appeal was dismissed vide judgment dated 10.2.2016. Learned Sessions Judge, after having perused entire evidence categorically recorded in judgment that, "considering case of prosecution from any angle, it is not possible to hold that petitioner committed offence of criminal forgery in consonance with respondent No.2. Since no appeal came to be filed against judgment of acquittal in superior court of law, same has attained finality.

37. Since courts of law in criminal proceedings, after having considered entire material placed before them have held that the petitioner has not committed any offence of forgery, allegation of forgery leveled by the respondent-Board in departmental proceedings, is otherwise not proved.

38. Reliance in this regard is placed on **S. Bhaskar Reddy** v. **Supt. Of Police**, (2015) 2 SCC 365, wherein Hon'ble Apex Court has held that when criminal case and departmental proceedings are based on same set of evidence, and delinquent official is acquitted by trial court honourably, dismissal order passed against the delinquent is not sustainable. Hon'ble Apex Court has held as under:

> "25. The High Court has not considered and examined this legal aspect of the matter while setting aside the impugned judgment and order of the Tribunal. The Tribunal has also not considered the same. We have examined this important factual and legal aspect of the case which was brought to our notice in these proceedings and we hold that both the High Court and Tribunal have erred in not considering this important undisputed fact regarding honourable acquittal of the appellants on the charges in the criminal case which are similar in the disciplinary proceedings.

26. We have answered the alternative legal contention urged on behalf of the appellants by accepting the judgment and order of the Sessions Judge, in which case they have been acquitted honourably from the charges which are more or less similar to the charges levelled against the appellants in the Disciplinary proceedings by applying the decisions of this Court referred to supra. Therefore, we have to set aside the orders of dismissal passed against the appellants by accepting the alternative legal plea as urged above having regard to the facts and circumstances of the case."

39. Another charge framed by respondent-Board that the petitioner produced false certificate of her belonging to Scheduled Caste community as is evident from report of Sub Divisional Magistrate Nahan, District Sirmaur, issued vide order dated 10.6.2010 and further clarified vide order dated 8.9.2010, could not be proved in view of report of Sub Divisional Magistrate, Nahan, dated 10.6.2010 and 8.9.2010, wherein at no point of time, the authority concerned stated that the petitioner obtained Scheduled Caste certificate fraudulently, rather the concerned authority has clarified that such certificate was issued on the application filed by the petitioner after her marriage with the person belonging to Scheduled Caste category. Sub Divisional Magistrate in his reply-affidavit has categorically stated that the Scheduled Caste certificate No. 188, dated 30.5.1978 (Annexure P/1) stands issued by the then Sub Divisional Magistrate, Nahan in favour of the petitioner, as per entries of certificates register available with said office. Though the aforesaid authority, after having received references from the respondent-Board, cancelled the Scheduled Caste Certificate issued in favour of the petitioner vide order dated 30.5.2011, but at no point of time, found her guilty of concealment of facts as well as forgery. Once it stands proved that the petitioner on her marriage with person belonging to Scheduled Caste

category, had applied to the competent authority for issuance of caste certificate and such certificate was issued by the competent authority, after having obtained report from the field, by no stretch of imagination, petitioner can be said to have procured said Scheduled Caste certificate fraudulently and thereafter submitted the same to the authorities with a view to secure public employment, rather, she, believing herself to be belonging to Scheduled Caste category after her marriage, rightly supplied such information to the Employment Exchange concerned, which subsequently sponsored her name for appointment to the post reserved for the Scheduled Caste category.

40. If the entire evidence led on record by the respective parties is read vis-à-vis the findings recorded by the Inquiry Officer, while holding petitioner guilty of misconduct, this court has no hesitation to conclude that the Inquiry Officer failed to appreciate the evidence in its right perspective and without going into the root of the case, proceeded to hold the petitioner guilty of misconduct, in a most casual manner. Once there was ample evidence available on record, suggestive of the fact that no fraud was committed by the petitioner for obtaining Scheduled Caste certificate, Disciplinary Authority had no occasion to return the finding that the petitioner, with a view to procure public employment, produced a false certificate of her belonging to Scheduled Caste community. Since there is/was no concrete evidence to prove the charges, which otherwise stand falsified on the face of record, enquiry report otherwise being totally contrary to evidence, be it ocular or documentary, cannot be allowed to sustain.

41. Interestingly, in the case at hand, Appointing Authority, while imposing penalty of removal from service though was totally convinced as is evident from one of the paragraphs of its order, as has been reproduced herein above, that the certificate of Scheduled Caste was issued by Sub Divisional Magistrate, Nahan but yet he, after having taken note of the complaint received by respondent-Board that the petitioner obtained Scheduled Caste

certificate by fraudulent means, proceeded to impose major penalty of removal from service. Though in the said order, Appointing Authority talks about representation of the petitioner, wherein she admittedly gave true narration of facts, which led her to apply for the Scheduled Caste certificate and thereafter submission thereof to the authority at the time of her appointment but yet, without going into merits of the representation, it proceeded to accept the report of Inquiry Officer and imposed major penalty of removal from service.

42. True it is that at the time of passing of Annexure P/22, judgment of acquittal recorded by court of law in criminal proceedings, which was further upheld vide judgment dated 2.8.2016 passed by learned Sessions Judge, Sirmaur, was not in the knowledge of the Appointing Authority but yet material available on record, especially the one collected during disciplinary proceedings, is/was not such, which could compel the Appointing Authority to accept the findings of the Inquiry Officer that the petitioner is guilty of misconduct, rather it is a case, where the petitioner, for no fault of hers, has been visited with major penalty, which, by no stretch of imagination, could have been imposed in the given facts and circumstances. There is no material available on record suggestive of the fact that the Sub Divisional Magistrate Nahan, after having received reference from the respondent-Board with regard to issuance of fake certificate of caste, initiated enquiry, if any, against the erring officials, rather, it categorically owned the responsibility by stating that such certificate was issued on the application of petitioner made in the year 1978. Had the petitioner obtained aforesaid certificate fraudulently by misrepresenting the facts, it was open for the Sub Divisional Magistrate to lodge criminal case against the petitioner, but the fact remains that no criminal case ever came to be instituted at the behest of Sub Divisional Magistrate, which clearly suggests that the certificate in question was not procured fraudulently by the petitioner, rather the same was issued by the Sub Divisional Magistrate concerned, may be due to inadvertence, for which

petitioner cannot be held guilty, that too after having rendered unblemished service for 29 years.

43. Since it is quite apparent from the record that Scheduled Caste certificate furnished by the petitioner at the time of her appointment was issued by Sub Divisional Magistrate concerned on her application, it cannot be said that either the petitioner misrepresented the facts to the competent authority i.e. Sub Divisional Magistrate or got the Scheduled Caste certificate forged with a view to secure public employment, especially when such allegation has not been proved against the petitioner in the criminal proceedings initiated against her in private complaint lodged by one Smt. Sahi Rani.

44. No doubt, post against which the petitioner stood selected was meant for reserved category of Scheduled Caste and in view of the fact that no Scheduled Caste certificate could have been issued in her favour, she was not entitled to the post reserved for Scheduled Caste, but yet she could not be removed from service, after a long span of 29 years, that too for no fault of hers and as such, penalty of removal from service imposed by the Appointing Authority, being totally illegal in the given facts and circumstances, cannot be allowed to sustain. Since this court, after having scanned the record of the disciplinary proceedings, is of definite view that the findings recorded by the inquiry officer, on the basis of which, major penalty of removal from service, came to be imposed against the petitioner, are based on no evidence, coupled with the fact that the charge(s) framed against the petitioner of submitting forged certificate for securing public employment, is/are not made out, especially when the Sub Divisional Magistrate concerned has admitted the factum with regard to issuance of Scheduled Caste certificate in favour of the petitioner and thereafter no evidence was led by the respondent-Board to prove the aforesaid charge(s), this is a fit case for exercise of the extraordinary

jurisdiction by this Court, to undo the injustice done to the petitioner at the hands of the respondent-Board.

45. In view of detailed discussion made herein above, Annexure P/22, order dated 18.6.2012, imposing major penalty of removal from service upon the petitioner, is quashed and set aside, alongwith all the disciplinary proceedings undertaken against her. Petitioner is ordered to be treated in service from the date of her suspension and thus also held entitled to all the benefits attached to her being in service from the date of suspension, till the date of attainment of age of superannuation. She is also held entitled to all other consequential benefits of pay, increments, retirement benefits including pension, if applicable, from due date(s).

All pending applications also stand disposed of.

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

Shankar Dass .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr. Revision No. 206 of 2011
Decided on July 30, 2021

Code of Criminal Procedure, 1973 - Section 397 read with Section 401 Cr.P.C. - Probation of Offenders Act, 1968- Petitioner held guilty of having committed offence punishable under Section 325 IPC and sentenced to undergo one year simple imprisonment and to pay fine of Rs.2000- Judgments of conviction and order of sentence passed by Learned Courts below are based on correct appreciation of evidence, no scope to interfere with the same- Revision petition dismissed- Benefit of Section 4 of Probation of Offenders Act, 1968 granted.

Cases referred:

Hari Kishan & Anr vs. Sukhbir Singh & Ors, 1988 AIR (SC) 2127;
Ramesh Kumar @ Babla vs. State of Punjab 2016 AIR (SC) 2858;
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58;

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

For the respondent Mr. Sudhir Bhatnagar and Mr. Desh Raj Thakur, Additional Advocates General with Mr. Narinder Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant criminal revision petition lays challenge to judgment dated 29.9.2011 passed by learned Additional Sessions Judge-II, Kangra at Dharamshala, Himachal Pradesh in Crl. RBT Appeal No. 26-K/10/2007, affirming judgment of sentence and order of conviction dated 6.7.2007/7.7.2007, passed by Judicial Magistrate First Class, Kangra in Cr. Case No. 40-II/2002 titled State of Himachal Pradesh vs. Shankar Dass and others, whereby learned court below though held the petitioner accused guilty of having committed offences punishable under S.325 IPC and accordingly convicted and sentenced him to undergo one year simple imprisonment of one year and to pay fine of Rs.2,000/- and in default, to further undergo simple imprisonment for three months, but acquitted all the other accused namely Bimla Devi, Paramjeet Kaur alias Pammi, Sukhvinder Singh and Kuldep Singh.

2. Precisely, the facts of the case as emerge from the record are that FIR Ext.W-9/B dated 5.10.2004 came to be lodged on the basis of statement of Shashi Devi, PW-1, complainant, wife of the injured Satpal, recorded under S.154 CrPC, Ext. PW-1/A, that on 6.5.2001, at 6/7 pm, she alongwith her husband Satpal had gone to their fields and thereafter having seen, accused Shankar Dass, who at the relevant time was ploughing the joint land, raised

objection but the petitioner-accused Shankar Dass administered blow of *Kahi* (an iron instrument used for digging of land) on the head of Satpal. In the meantime, sons of petitioner-accused, Skhvinder and Kuldeep, also reached the spot and they alongwith Bimla Devi wife of the petitioner and Paramjeet Kaur, daughter of the petitioner, gave beatings to Satpal husband of complainant, as a consequence of which injured Satpal, suffered serious injuries and he was removed to the hospital for medical treatment. Injured was taken to Tanda Hospital, from where he was further referred to Pathankot and then to IGMC Shimla for medical treatment. After completion of investigation, police presented challan under Ss.323, 506 and 34 IPC, against all the accused named herein above, in the competent court of law. Learned trial Court after having found prima facie case against the accused, proceeded to frame charges under Ss.323 and 34 IPC against all the accused, who pleaded not guilty and claimed trial.

3. Prosecution with a view to prove its case examined as many as ten witnesses in all, whereas, accused despite opportunity having been afforded to them, failed to lead any evidence in their defence. However, all the accused, in their statements recorded under S.313 CrPC, denied the prosecution case and claimed that they have been falsely implicated.

4. Learned trial Court on the basis of evidence adduced by prosecution though acquitted the accused BImla Devi, Paramjeet Kaur alias Pammi, Sukhvinder Singh and Kuldeep Singh, but held the petitioner-accused Shankar Dass guilty of having committed offences punishable under S.325 IPC and convicted and sentenced him as per description given herein above. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by learned trial Court, petitioner preferred an appeal under S.374 CrPC, in the court of learned Additional Sessions Judge-II Kangra at Dharamshala, but same was dismissed vide judgment dated 29.9.2011. In the aforesaid background, the petitioner-accused has approached this court in the

instant petition, praying therein for his acquittal after setting aside judgments of conviction and order of sentence recorded by learned Courts below.

5. I have heard the parties and gone through record meticulously.

6. Before ascertaining correctness of submissions of learned counsel for the parties, it would be apt to take note of the fact that no appeal whatsoever came to be filed against the acquittal of other accused on behalf of the respondent State and as such, this court need not examine the correctness of findings recorded by learned trial Court qua acquittal of the accused, other than the present petitioner-accused, Shankar Dass.

7. Having carefully perused the evidence led on record by prosecution vis-à-vis reasoning assigned by learned courts below while holding the petitioner guilty of having committed offence punishable under S.325, this court finds no force in the submission of learned counsel for the petitioner, Mr. Divya Raj Singh, that the learned courts below have failed to appreciate the evidence in its right perspective, as a consequence of which findings to the detriment of petitioner have come on record, rather, this Court having carefully perused the statements given by material prosecution witnesses, is of the view that the prosecution successfully proved beyond reasonable doubt that the petitioner, while taking law in his hands, administered blow of *Kahi* on the head of injured Satpal, as a consequence of which he suffered serious injuries, hence, there appears to be no justification for this Court to interfere with the judgment of conviction and order of sentence recorded by learned trial Court. There is overwhelming evidence available on record, suggestive of the fact that the petitioner had caused head injury to Satpal on 20.5.2001. Medical evidence adduced on record clearly proves that Satpal sustained injuries on his head on account of blow of Kahi, administered by the accused, which were grievous in nature.

8. PW-4 Satpal deposed categorically that on 20.5.2001, at 6.00 pm while he was coming back to fields with his wife and daughter, accused

Shankar Dass was ploughing the joint land, as such he raised objection. This witness further deposed that there was an understanding between the parties not to cultivate the joint land till its partition, however, Shankar Dass, who at the relevant time was carrying *Kahi* in his hands, administered blow of *Kahi* on his head, as a result of which he fell down. If the statement made by aforesaid witness is read in its entirety, it though suggests that he was given beatings by other accused but since they stand acquitted and no appeal whatsoever, has been filed against their acquittal, there appears to be no reason to refer to that part of the statement.

9. Aforesaid version of Satpal stands corroborated by PW-Shashi Devi and PW-2 Bulbul, who are wife and daughter of the injured Satpal. Both of them categorically deposed that when they saw the petitioner cultivating the joint land, Satpal raised objection on which the petitioner, administered blow of *Kahi* on his head due to which injured sustained injuries and fell down. While referring to the statements made by PW-1, PW-2 and PW-3, Shri Divya Raj, learned counsel for the petitioner vehemently argued that since all the above three witnesses admitted in their cross-examination that the relations inter se the complainant and petitioner, were not cordial on account of dispute of land, learned courts below ought not have placed reliance on the statements of these witnesses, while concluding guilt, if any of the petitioner, Shankar Dass. Mr. Divya Raj Singh, Advocate further argued that otherwise also, statements of aforesaid witnesses could not be taken into consideration by learned courts below being interested witnesses.

10. True it is that all the material prosecution witnesses relied upon in the case at hand, by prosecution are closely related to each other, but statements having been made by these witnesses cannot be brushed aside solely on account of their relationship, especially in view of the fact that the version put forth by them is duly corroborated by each other as well as PW-3 Kapoor Singh, who was not present on the spot, but having received

information, he reached at the spot and found that the injured Satpal had suffered head injuries. Otherwise also, it is well settled by now that the statements/version of interested witnesses cannot be brushed aside solely on the ground of relationship rather, court below while taking into consideration statements of closely related /interested witnesses needs to be more careful and diligent and in case, there are no contradictions and inconsistencies in the statements made by closely related witnesses, their version cannot be ignored on account of close relation.

11. In the case at hand, if statements of all the witnesses are read in conjunction, they prove the story of the prosecution beyond doubt that on the date of alleged incident, petitioner Shankar Dass after being objected by Satpal, attacked him with *Kahi* and administered blow of same on his head, due to which he suffered serious injuries. As per prosecution witnesses, there was an understanding between the parties that the joint land shall not be cultivated till partition. Since petitioner breached the understanding/agreement, Satpal was well within his right to raise objection qua the cultivation of joint land and the petitioner-accused had no reason whatsoever to use criminal force against injured

12. PW-3 Kapoor Singh deposed that he after having received information qua quarrel between Satpal and Shankar Dass, reached the spot, where he saw Satpal in injured and unconscious condition. This witness stated that the injured was removed to hospital Version put forth by this witness, who is an independent witness also corroborates version of prosecution with regard to administration of blow of *Kahi* on the head of injured by petitioner. Since at the time of alleged incident, none apart from PW-1 PW-2 and PW-3 was present and all these witnesses in unequivocal terms have stated that the petitioner Shankar Dass gave blow of *Kahi* on the head of Satpal, version put forth by PW-1 to PW-3 cannot be discarded on account of non-association of independent witnesses by the prosecution.

Cross-examination of aforesaid witnesses nowhere suggests that the opposite party was able to extract from this witness anything contrary, to what they stated in their examination-in-chief, rather, evidence available on record clearly reveals that the statements of PW-1 to PW-3 inspire confidence and they being trustworthy could not be ignored by learned Courts below, while determining guilt of the petitioner.

13. Perusal of Ext.PW-5/A MLC proved in accordance with law by Dr. R.K. Abrol, clearly reveals that the petitioner was subjected to x-ray of skull and CT scan of head and there was a lacerated would of 1x1 cm over parietal region with abrasion. On the basis of X-ray and CT Scan, injury was declared to be grievous. Medical evidence fully corroborates the version of injured and other witnesses. Though Dr. RK Abrol admitted in his cross-examination that the injury sustained by Satpal could be caused by fall on hard surface but there is no evidence /material available on record that the injured suffered injuries as detailed in MLC, Ext.PW-5/A on account of fall on the hard surface.

14. Since statements made by other witnesses are not relevant for determining guilt if any of the petitioner, this court sees not reason to refer to the same.

15. Consequently in view of detailed discussion made herein above, this court is of the view that judgments of conviction and order of sentence passed by learned Courts below are based on correct appreciation of evidence, as such, there is no scope, for this court to interfere with the same, present revision petition is dismissed.

16. Since, this court having heard matter at length, called for the report of probation officer with regard to conduct of the petitioner, learned counsel for the petitioner states that accused is 65 years old person having a family to support and in case at this fag end of his life is sent behind bars pursuant to judgments and order of conviction and sentence, grave prejudice

would be caused to him and his family. Mr. Divya Raj Singh, Advocate, further states that more than twenty years have passed after alleged incident and during this period, accused has also suffered trauma on account of pendency of case against him firstly before trial Court then before appellate court and now before this court, as such, he deserves to be extended benefit of Probation of Offenders Act.

17. In support of the aforesaid arguments, learned counsel for the petitioner-accused also invited the attention of this Court to the judgment passed by this Court in **Yudhbir Singh** versus **State of Himachal Pradesh** 1998(1)S.L.J. 58, wherein it has been held as under:

> "9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons."

18. In this regard, reliance is placed upon judgment of the Hon'ble Apex Court in **Ramesh Kumar @ Babla** versus **State of Punjab** 2016 AIR (SC) 2858, wherein it has been held as under:

> "7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.
> 8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

19. Reliance is also placed upon judgment passed by Hon'ble Apex Court **Hari Kishan & Anr** versus **Sukhbir Singh & Ors**, 1988 AIR (SC) 2127, wherein it has been held as under:

> "8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible

contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.

9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-

"357. Order to pay compensation:

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

Xxxxxxxxxxxxx

Xxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.
>
> 11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

20. In view of above law and submissions made by learned counsel for the petitioner, and taking into consideration facts of the case, I am of the considered opinion that petitioner can be granted benefit of S.4 of Probation of Offenders Act 1968. Probation Officer i.e. Tehsil Welfare Officer, Kangra, Himachal Pradesh in his report submitted pursuant to order dated 8.3.2021, has nowhere adversely commented against behaviour and conduct of the petitioner-accused, who has reported that offender's family has no previous record of crime and family belongs to low income group. It has also come in the report that no other case, save and except present case, stands registered against the petitioner/accused. Probation Officer has reported that as per Panchayat representatives, behaviour of petitioner is good in the society.

21. Accordingly, in view of above, petitioner-accused is ordered to be released on probation in terms of Section 4 of the Probation of Offenders Act, subject to depositing an amount of `25,000/- with the trial Court within four weeks, which, in turn, shall be disbursed to the complainant as compensation. He is further directed to furnish bonds in terms of Section 4(3)

and (4) of the Act to the satisfaction of the trial Court, within ten days, from the date of passing of this order. Needless to say that accused will abide by the terms and conditions of the bond in its letter and spirit, failing which, respondent-State shall be at liberty to approach the appropriate Court of law to make the beneficiary of the Act i.e. accused to serve the sentence as imposed by the Court below and further upheld by this Court. Record be sent forthwith alongwith copies of the judgment/order.

22. The petition stands disposed of in the above terms, alongwith all pending applications. Interim orders, if any, stand vacated. Bail bonds, if any, furnished by the petitioner shall also stand cancelled.

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

Paras Ram and others ...Petitioners

Versus

State of Himachal Pradesh ...Respondent

Cr. Revision No. 243 of 2012
Decided on July 6, 2021

Code of Criminal Procedure, 1973 - Section 397 read with Section 401 Cr.P.C. - Petitioner held guilty of offence punishable under Section 148, 323, 325, 452 and 506 read with Section 149 of Indian Penal Code, 1860- Judgments and order assailed- Evidence in criminal cases need to be evaluated on the touchstone of consistency- Evidence of eyewitness requires careful assessment and needs to be evaluated for its credibility- Neither motive nor common intention established on record- Old enmity is a double edged weapon and there is always a presumption that on account of old enmity, complaint may make an attempt to falsely implicate other party with a view to harass them- Statements of all the prosecution witnesses including the complainant are contradictory and not creditworthy- Major flaws in the investigation and prosecution story does not appear to be believable-

Judgments/ orders of conviction and sentence are quashed and set aside - Petition allowed.

Cases referred:

C. Magesh and others versus State of Karnataka (2010) 5 SCC 645;

For the petitioners Mr. Prem P. Chauhan, Advocate.

For the respondent Mr. Kunal Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Cr. Revision petition filed under S.397 read with S.401 CrPC, lays challenge to judgment dated 14.10.2012 passed by learned Sessions Judge in Cr. Appeal No. 10/2009 (RBT No. 94-2012) affirming judgment/order of conviction and sentence dated 28.3.2009 by learned Judicial Magistrate 1st Class, Manali, District Kullu, Himachal Pradesh passed in Cr. Case No. 424-1/07-36-II/2008, whereby learned trial Court, while holding petitioners/accused (hereinafter, 'accused') guilty of having committed offences punishable under Ss. 148, 323, 325, 452 and 506 r/w S.149 IPC convicted and sentenced them as under:

1 year simple imprisonment and fine of Rs.500/- each (with the stipulation in case of default in paying fine, 2 months simple imprisonment)	148 r/w 149
3 months simple imprisonment and to pay a fine of 500/- each and in default of payment of fine amount to undergo simple imprisonment for a period of 1 month	323 r/2 149
1 year simple imprisonment and to pay fine of 500/- each in default of the payment of fine amount to undergo simple imprisonment for a period of 2 months	325 4r/2 149
1 year simple imprisonment and to pay a fine of Rs.1000/- each and in default of payment of fine	452

amount to undergo simple imprisonment for a period of 2 months	
6 months simple imprisonment and to pay of fine Rs.500/- each and default of payment of fine amount to undergo simple imprisonment for a period fo 1 month	506 r/2 149

2. Precisely, the case of the prosecution, as emerges from the record is that on 23.9.2007, complainant Jindu Ram, PW-1, filed complaint, Ext. PW-1/A, alleging therein that on 23.9.2007, at about 9.30 am, while he was getting ready to go to school, he after having heard noise in the courtyard of his house, came to the door of his room and saw that the accused namely Rewat Ram, Neerat Ram, Kunj Lal, Ram Chand, paras Ram, Bati Devi, Bholi Devi, Gyan Chand and Joginder, were standing in the courtyard carrying dandas and sickles in their hands, whereas, accused Neerat Ram, Kunj Lal, and Ram Chadn were carrying darat in their hands and other accused were also carrying some weapons. Complainant alleged that when he was present on the door of house, all the accused firstly extended threats and thereafter, forcibly came to door of room and threw him in the courtyard. Complainant alleged that firstly accused persons gave beatings to him with kicks and blows but, thereafter, they tried to attack him with sickle, however, he warded off the attack by getting himself back. When complainant was being attacked by the accused named herein above, son of complainant namely Khayali Ram reached the spot and accused persons also gave beatings to him with kicks and fist blows. Complainant also alleged that accused Neerat Ram, Kunj Lal, Ram Chand and Joginder while carrying dandas and sickles in their hands ran behind them and on account of beatings given by aforesaid persons, they suffered injuries on their heads, faces as well as other internal organs of their persons.

3. Prior to filing of complainant, Ext. PW-1/A, complainant had filed an application against accused persons at Patlikuhal but since no action was taken, on 23.9.2007, he presented the application/complainant Ext. PW-1/A to In charge Police Station Manali., on the basis of which FIR Ext. PW-6/A came to be registered against the accused persons. After completion of investigation, police presented Challan in the competent Court of law.

4. Prosecution with a view to prove its case examined as many as 7 witnesses whereas, accused in their statements recorded under S.313 CrPC, denied the case of prosecution in toto and claimed that the police asked them to produce axe, sickle etc. after purchasing them from market. However, accused did not lead any evidence in their defence. On the basis of the evidence collected on record, learned trial Court held accused guilty of commission of the offences punishable under aforesaid provisions of law and accordingly convicted and sentenced them to undergo imprisonment, as detailed herein above.

5. Being aggrieved and dissatisfied with the judgment/order of conviction and sentence recorded by learned trial Court, accused preferred an appeal before learned Sessions Judge, Kullu, which came to be dismissed vide judgment dated 14.10.2012. In the aforesaid background, accused have approached this Court in the instant proceedings, praying therein for their acquittal after setting aside impugned judgments/order of conviction and sentence.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by learned Courts below, while holding accused guilty of having committed offences punishable under aforesaid provisions of law, this court finds considerable force in the submissions of Mr. Prem P. Chauhan, Advocate that the learned Courts below have failed to appreciate the evidence in its right perspective, as a

consequence of which, erroneous findings have come on record to the detriment of the accused

7. Though, Mr. Kunal Thakur, learned Deputy Advocate General, while making this court peruse the statements of prosecution witnesses made a serious attempt to persuade this Court to agree with his contention that on the date of alleged incident, accused having found complainant alone in the house, not only extended threats to him but gave beatings also but, having carefully examined the entire evidence adduced on record, this Court does not see any reason to agree with the aforesaid submission made by Learned Deputy Advocate General.

8. Though, in the case at hand, prosecution examined as many as 7 witnesses in all, but to determine correctness of the judgments impugned before this Court in the instant petition, statements of PW-1 Jindu Ram, PW-2 Khayali Ram, and PW-5 Kehar Singh only are material., who are otherwise closely related to each other, being father and sons. Though, in the case at hand, prosecution has tried to carve out a case that since no independent witnesses were available on account of apple season, they were unable to associate any independent witness but, it is none of the case of the prosecution that there was no house in and around the house of Khayali Ram, where he was allegedly attacked by the accused. Moreover, if the statement of PW-1, Jindu Ram recorded before the learned trial Court is perused juxtaposing his initial statement given to the police (Ext. PW-1/A), on the basis of which formal FIR Ext. PW-6/A, came to be recorded, entire case of prosecution falls to the ground. At the time of lodging of FIR, Ext. PW-6/A, precise allegation levelled by the complainant was that on 23.9.2007, at 9.30 am, while he was going to school, to attend seminar, he after having heard noise, went near door of his house and there he saw accused namely Rewat Ram, Neerat Ram, Kunj Lal, Ram Chand, paras Ram, Bati Devi, Bholi Devi, Gyan Chand and Joginder, standing in the courtyard carrying dandas and

sickles in their hands. Complainant at the first instance disclosed to the police that firstly accused named herein above extended threats to him and thereafter forcibly kicked the door of his room and pulled him out to courtyard of house and gave beatings. In the first version given to the police, complainant alleged that when he was being given beatings by accused named herein above, his son, Khayali Ram reached the spot and he was also given beatings. Complainant also disclosed to the police that on account of beatings given by accused, he suffered injuries on his head and face, however, complainant, while deposing as PW-1, in the trial court, gave altogether a different version wherein he stated that on 23.9.2007, at 9.30 am, while he was getting ready to go to school to attend seminar there, he heard noise and went to the door of his house and found that his son Khayali Ram was being given beatings by the accused and when he objected and tried to save his son, accused also gave him beatings with danda and sickles. This witness before the learned trial Court deposed that subsequently, his another son PW-5 Kehar Singh reached the spot and saved him as well as his son from the clutches of the accused. If aforesaid version given by the accused in the trial court is taken into consideration vis-à-vis initial complaint given to the police, on the basis of which FIR Ext. PW-6/A came to be recorded, story put forth by prosecution becomes highly doubtful.

9. PW-2 Khayali Ram, though has supported the version put forth by PW-1 in the court, but in his statement he contradicted PW-1 by stating that immediately after alleged incident, they went to Police Station to lodge report, whereas PW-1 in his statement given to the court deposed that after being attacked by accused, he and his son firstly went to the hospital.

10. Interestingly, in the case at hand, all the material prosecution witnesses are closely related to each other and no attempt whatsoever, has been made by the prosecution to associate the independent witnesses. Reasons rendered on record qua non-association of independent witnesses

are not at all plausible. Prosecution has attempted to carve out a case that since at the time of alleged incident all the residents of the area were away to their orchards on account of apple season, none heard noise or cries if any made by the complainant and his son, while they were being attacked by the accused. But, such plea taken by the prosecution cannot be accepted on its face value for the reason that it is none of the case of the prosecution that the courtyard/house of the complainant, where they were allegedly attacked by the accused, was not surrounded by other houses, rather, photographs Exts. PA1 to PA5 adduced on record by the prosecution themselves suggest that the house and courtyard of the complainant is/are surrounded by a number of houses. It cannot be believed that all the residents of nearby houses had gone to apple orchards leaving their houses. Most importantly, it has come on record in the statement of PW-5 Kehar Singh that he and his uncle Bhag Chand, saved the complainant and injured Khyali Ram, from the clutches of the accused but, interestingly, neither complainant PW-1 nor injured PW-2 made any mention with regard to presence of Bhag Chand on the spot, while they were being attacked and given beatings by the accused.

11. PW-1, in his initial complaint given the police neither disclosed to the police that he was rescued by his son PW-5 Kehar Singh nor he stated that brother, Bhag Chand was also present on the spot. It is not understood that why Bhag Chand, was given up by the prosecution especially when he could be a material prosecution witness to prove the story put forth by the prosecution.

12. Though, Learned Deputy Advocate General contended that above named Bhag Chand was given up for the reason that prosecution had already examined three spot witnesses PW-1, PW-2 and PW-5, but, as has been taken note herein above, all the aforesaid three witnesses are closely related to each other and as such, prosecution ought to have examined Bhag Chand, being an independent witness.

13. No doubt, version put forth by interested witnesses, cannot be brushed aside solely on the ground of relationship, but by now it is well settled that evidence of interested witnesses is not to be accepted on face value, rather same is to be tested in light of probabilities and previous statement and surrounding circumstances.

14. In the instant case, if the aforesaid analogy is applied, the statements of PW-1, PW-2 and PW-5, could not be made basis by learned Courts below to conclude guilt of the accused. In this regard reliance is placed upon judgment rendered by Hon'ble Apex Court in State of Punjab vs. Jit Singh and another, 1995 SCC (Crl) 156, wherein Hon'ble Apex Court has held as under:

> "3. The Division Bench of the High Court having examined the evidence of the two eyewitnesses came to the conclusion that they were highly interested witnesses and whether their presence can be accepted at all, is the question. P.W. 3 is in no way related to the deceased or to the P.W. 2. He gave an explanation for his visit to the tubewell along with P.W. 2 before the Police Station was to irrigate the land of PW 2 whereas in the present deposition he prevaricated and deposed that he went to the tubewell of the deceased to inform him about the collection of meagre amount of money for presenting the same to the contesting candidate. The High Court noticed that this prevarication shows that he has deliberately improved his version from stage to stage. When interested witnesses are examined it is well settled that the evidence has to be tested in the light of the probabilities and the previous statements and the surrounding circumstances. We arc satisfied that their evidence does not inspire any confidence. In the F.I.R. it is stated that P.W. Nos. 2 and 3 went to irrigate the field from that tubewell

> water but while giving statements at the trial they deposed that only P.W. 2 was to irrigate the field by working the tubewell while P.W. 3 had accompanied him to the tubewell to meet the deceased as mentioned above. Their presence thus becomes doubtful from the fact that they have not come forward with a proper explanation for giving two versions. In these circumstances we cannot say that the High Court went wrong in ordering acquittal. These appeals are dismissed accordingly."

15. Interestingly, in the case at hand, this court having carefully examined entire evidence finds no allegation, if any, against the accused namely Banti Devi and Bholi Devi, save and except that they also had come to courtyard of house of complainant carrying dandas in their hands. If statement of PW-1 and PW-2 are read in conjunction, there is no allegation that the above named accused Banti Devi and Bholi Devi gave any kind of beatings to the complainant and injured but yet, learned Courts below merely on account of their presence on the spot proceeded to hold them guilty of having committed offences punishable under aforesaid provisions of law.

16. Interestingly, this court finds from the record that though prosecution charged accused with S.149 IPC, but not bothered at all to prove common object/common intention of the accused to cause harm to the complainant and his son. To invoke provisions contained under S.149 IPC, it is/was incumbent upon the prosecution to prove that unlawful assembly had a common intention and they had common object but in the instant case, neither motive nor common intention *inter se* accused for attacking complainant and injured, have been established on record, rather, prosecution has attempted to carve out a case that there is old enmity *inter se* parties on account of litigation between the parties. By now it is well settled that plea of old enmity is a doubled edged weapon, it cannot be only used in favour of

complainant rather, there is always a presumption that on account of old enmity, complainant may make an attempt to falsely implicate other party with a view to harass them.

17. Though, medical evidence adduced on record, which subsequently came to be proved on record with the statements of PW-3, Dr. Rakesh Negi MO, Community Health Centre Manali and PW-4 ML Bandhu, Zonal Hospital Kullu, suggests that complainant and his son Khayali Ram suffered injuries but since prosecution has not been able to connect accused with the injuries allegedly suffered by complainant and injured in the alleged incident, medical evidence, if any, adduced on record may not have much relevance. Moreover, cross-examination conducted upon aforesaid witnesses suggests that both the doctors have opined/stated in their examination that the injuries suffered by complainant and his son could be on account of fall on hard surface.

18. In the case at hand, accused, allegedly after having purchased danda, sickle and axe etc. handed over to police that too on 5.10.20007 i.e. after 12 days of alleged incident, whereas, recovery if any, was to be effected in terms of S.27 of the Indian Evidence Act, whereby police after having recorded disclosure statement ought to have visited the spot where the accused had kept/hidden the weapons used by them to attack the complainant.

19. Reliance is placed upon judgment rendered by this Court in Cr. Appeal No. 75 of 2005 titled **Dev Raj alias Raj and another** vs. **State of Himachal Pradesh**, decided on 22.5.2017, wherein it has been held as under:

> "14. Be that as it may, the prosecution was enjoined, with an obligation, to relate the user of Gupti by accused Dev Raj by its proving that its recovery at the instance of accused Dev Raj, stood efficaciously effectuated by the Investigating Officer, by the latter hence revering the mandate of Section 27 of the Indian Evidence Act. The Investigating Officer concerned, stood enjoined

with a dire legal necessity "to prior to" effectuating recovery of the relevant weapon of offence, his during the course of holding the accused to custodial interrogation hence recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872, provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon, an admissible besides a relevant custodial confessional statement of the accused assuredly making its emergence, in sequel whereto the subsequent recovery of the weapon of offence, at the instance of the accused, would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remained unrecorded, thereupon any bald recovery of any weapon of offence by the investigating Officer at the instance of the accused, would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery, at the instance of the accused not under a composite recovery memo rather warrants recording prior thereto, an admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior to his effectuating, any recovery at the instance of the accused, is preemptory, its embodying the custodial confessional statement of the accused, omission to

record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo."

20. Having minutely perused the evidence, be it ocular or documentary led on record by the prosecution, this Court has no hesitation to conclude that the statements made by PW-1, PW-2 and P-5 could not be made basis to hold accused guilty, being totally contradictory. All the prosecution witnesses including complainant, with a view to improve their initial version, have made contradictory statements before learned Courts below.

21. By now it is well settled that in a criminal trial evidence of eye-witness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story;

> consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

22. In view of the aforesaid discussion and law laid down by the Hon'ble Apex Court as well as this Court, there are major flaws in the investigation of the prosecution and prosecution story does not appear to be believable as such, learned Courts below have erred in law, while holding the accused guilty of the commission offences punishable under aforesaid provisions of law.

23. Consequently in view of detailed discussion made above present petition is allowed. Judgments/order of conviction and sentence passed by learned Courts below are quashed and set aside. All the accused are acquitted of the charges framed against them. Bail bonds, if any, furnished by the accused are cancelled.

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

Between:-

1. PANO DEVI

WIFE OF LATE SH. CHAMAN LAL,

2. KUMARI PREETI
D/O LATE SH. CHAMAN LAL,
BOTH R/O VILL. JAGINDER NAGAR,
P.O. & TESIL & POLICE STATION JOGINDER NAGAR,
DISTT. MANDI (H.P.)

... APPELLANTS

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

AND

1. SH. GAUTAM NATH
S/O KARAM CHAND
R/O VILL & P.O. PREENI, TEHSIL MANALI,
DISTT. KULLU, H.P.
(OWNER OF THE TIPPER NO. HP.58-1710.)

2. SH. LEELA PRAKASH
S/O SH. SOHAN SINGH,
R/O VILL. CHHAMYAR, P.O. TEHSIL SADAR,
DISTT. MANDI, H.P.
(DRIVER OF THE TIPPER NO. HP.58-1710.)

3. NATIONAL INSURANCE COMPANY LIMITED
THROUGH ITS BRANCH MANAGER,
MANDI TOWN MANDI, DISTT. MANDI,
H.P. (INSURER OF THE TIPPER NO. HP.58-1710.)

RESPONDENTS

4. SH. DUNI CHAND
S/O LATE SH. CHAMAN LAL,
R/O VILL. JAGINDER NAGAR,
P.O. & TESIL & POLCIE STATION
JOGINDER NAGAR, DISTT. MANDI (H.P.)

PROFORMA RESPONDENT

(MR. SUNIL KUMAR, ADVOCATE
FOR R-1 & R-2)
MR. I.N. MEHTA, ADVOCATE,
FOR R-3
NEMO FOR R-4)

FIRST APPEAL FROM ORDER
NO. 266 OF 2012
DECIDED ON: 01.09.2021

Motor Vehicle Act, 1988 - Section 173 - Appeal by claimants for enhancement of award- Held, Learned Tribunal below has wrongly assessed the income of the deceased to be Rs.3000/- per month, whereas Learned Tribunal below ought to have assessed his income on the basis of minimum wages to the daily wagers and part timers in the State of Himachal Pradesh at the relevant time, income assessed to be Rs.6000/- per month.

A. Award under Conventional heads not as per judgment rendered by Hon'ble Apex Court in Pranay Sethi's case- Award modified. (Para 19)

B. **Code of Civil Procedure, 1908** - Order 41 Rule 33 - Power of Appellate Court - Additional award- The amount of compensation can be enhanced by an Appellate Court, while exercising power under Order 41 Rule 33 of CPC even if there are no cross objection/ appeal. (Para 21)

Cases referred:

Govind Yadav vs. New India Assurance Company Limited, 2012 (1) ACJ 28;
National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017 SC 5157;
Ranjana Prakash and others vs. Divisional Manager and another (2011) 14 SCC 639;
Sarla Verma vs. Delhi Transport Corporation, (2009) 6 SCC 121;
Smt. Pappi Devi and others vs. Kali Ram and others, Latest HLJ 2008 (Himachal Pradesh) 1440;

This appeal coming on for orders this day, the court delivered the following:

J U D G M E N T

By way of instant appeal filed under S.173 of the Motor Vehicles Act (hereinafter, 'Act'), challenge has been laid to Award dated 19.1.2012

passed by learned Motor Accident Claims Tribunal-II, Mandi, District Mandi, Himachal Pradesh in MACT No. 38 of 2007, whereby learned Tribunal below, while allowing the claim petition, having been filed by the appellants-claimants (hereinafter, 'claimants'), held respondents Nos. 2 and 3 jointly liable to pay a sum of Rs.2,36,000/- alongwith interest at the rate of 7.5 per annum from the date of filing of the petition, till the date of deposit.

2. Precisely, the facts of the case as emerge from the record are that a claim petition under S.166 of the Act, came to be instituted at the behest of the claimants, claiming therein compensation to the tune of Rs.15.00 Lakh, on account of death of Chaman Lal in a motor-vehicle accident involving vehicle bearing registration No. HP-58-1710 on 10.10.2006. As per claimants, on 10.10.2006, deceased was coming from Village Bagla to Mandi on his motorcycle bearing registration No. HP-29-1-0586. He stopped his motorcycle at Chakkar on the left hand side of the road. A vehicle bearing registration No. HP-58-1710 came form Mandi, which was being driven by respondent No.2 in rash and negligent manner and hit firstly the motorcycle and thereafter the deceased, as a consequence of which, deceased suffered injuries and died on the spot. Claimants, being dependent upon the deceased, file claim petition, as referred to above, stating therein that the deceased was working as a contractor and his monthly income was more than Rs.50,000/- per month. Claimants also claimed that that the motorcycle was totally damaged in the accident and sine they have been left with no source of income, they be awarded compensation to the tune of Rs.15.00 Lakh.

3. Aforesaid claim put forth by the claimants came to be resisted on behalf of respondents Nos. 1 and 2, who though admitted the factum of accident involving vehicle bearing registration No. HP-58-1710 and motorcycle bearing registration No. HP-29A-0586, but asserted that the accident took place on account of the negligence of the deceased, who was driving the motorcycle in a rash and negligent manner and hit the tipper. Respondent No.2 specifically

denied that the vehicle was stopped at Chakkar on left side of the road and Tipper had hit the stationery motorcycle.

4. Respondent No.3 i.e. insurance company, opposed the claim on the ground that the driver of the offending vehicle was not having a valid and effective driving licence and the vehicle in question was being driven in violation of the terms and conditions of the insurance policy.

5. On the aforesaid pleadings of the parties, learned Tribunal below framed following issues for determination on 16.5.2008:

1. Whether the deceased Chaman Lal died due to rash and negligent driving of Tipper No. HP-58-1710 by respondent Leela Prakash as alleged? OPP
2. If issue No.1 is proved in affirmative, whether the petitioners are entitled for compensation, if so to what amount and from whom? OPP
3. Whether there was breach of terms and conditions of insurance policy? OPR.
4. Whether the driver was not holding valid and effective driving licence. At the time of accident? OPR-3
5. Relief"

6. Learned Tribunal below, on the basis of evidence adduced on record by respective parties, held respondents Nos. 1 and 2 jointly and severally liable to pay compensation to the tune of Rs.2,36,000/- to the claimants, alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till realisation.

7. Being aggrieved and dissatisfied with the impugned award, claimants have approached this Court in the instant proceedings, praying therein to set aside the impugned award and to enhance the same. Similarly, respondent No. 1 Gautam Nath, filed FAO No. 120 of 2012, titled Gautam Nath and another vs. Shri Duni Chand and others, against the award passed by learned Tribunal below, which has been allowed vide judgment dated 16.12.2016, whereby respondent No.3 Insurance company has been held liable to satisfy

the award, otherwise, so far other findings are concerned, same have attained finality till this court.

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

9. Precisely, the challenge has been laid to the award by the claimants on the ground that learned Tribunal below wrongly considered the income of the petitioner to the tune of Rs.2,000/- per month, especially when it stood duly proved on record that the deceased being a contractor was earning Rs.50,000/- per month. It has been further claimed by the claimants that since the age of the deceased was 58% years, learned Tribunal below ought to have granted an addition of 10%, while determining the loss of future prospects, in terms of **National Insurance Company Limited** vs. **Pranay Sethi and others**, AIR 2017 SC 5157, as such, an addition of 10% of the established income should be awarded on account of loss of future prospects, in view of **Pranay Sethi** (supra), wherein it has been held as under:-

> "59. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) xxxxxxx.
>
> (ii) xxx.
>
> (iii) xxx.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the

deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) xxxx.

(vi) xxx.

(vii) xxxx.

14. xxxx."

10. Besides above, it has been further claimed by the claimants that the impugned award passed by learned Tribunal below under conventional heads i.e. funeral expenses, loss of estate and loss of consortium is not as per judgment rendered by Hon'ble Apex Court in **Pranay Sethi** (supra), hence, the impugned award deserves to be enhanced on these accounts also.

11. Having scanned the material available on record, this court finds that though the claimants claimed compensation to the tune of Rs.15.00 lakh on the ground that the deceased was earning Rs.50,000/- per month on account of his being a contractor, but since no specific evidence of income of the deceased ever came to be led on record, learned Tribunal below, applying guess work, proceeded to consider the income of the deceased at Rs.3,000/- per month.

12. It is not in dispute that the claimants failed to prove on record that the deceased was a contractor by profession as such, in the absence of specific proof of his income, learned Tribunal below ought to have assessed his income on the basis of minimum wages payable to the daily wagers and part timers in the State of Himachal Pradesh at the relevant time.

13. Reliance is placed upon judgment rendered by Hon'ble Apex Court in **Govind Yadav** vs. **New India Assurance Company Limited**, 2012 (1) ACJ 28, wherein it has been held as under:

> "17. A brief recapitulation of the facts shows that in the petition filed by him for award of compensation, the appellant had pleaded that at the time of accident he was working as Helper and was getting salary of Rs.4,000/- per month. The Tribunal discarded his claim on the premise that no evidence was produced by him to prove the factum of employment and payment of salary by the employer. The Tribunal then proceeded to determine the amount of compensation in lieu of loss of earning by assuming the appellant's income to be Rs.15,000/- per annum. On his part, the learned Single Judge of the High Court assumed that while working as a Cleaner, the appellant may have been earning Rs.2,000/- per month and accordingly assessed the compensation under the first head. Unfortunately, both the Tribunal and the High Court overlooked that at the relevant time minimum wages payable to a worker were Rs.3,000/- per month. Therefore, in the absence of other cogent evidence, the Tribunal and the High Court should have determined the amount of compensation in lieu of loss of earning by taking the appellant's notional annual income as Rs.36,000/- and the loss of earning on account of 70% permanent disability as Rs.25,200/- per annum.
>
> The application of multiplier of 17 by the Tribunal, which was approved by the High Court will have to be treated as erroneous in view of the judgment in Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121. In para 42 of that judgment, the Court has indicated that if the age of the victim of an accident is 24 years, then the appropriate multiplier would be 18. By applying that multiplier, we hold that the compensation payable to the appellant in lieu of the loss of earning would be Rs.4,53,600/-.

14. Reliance is also placed upon judgment rendered by this Court in **Smt. Pappi Devi and others** vs. **Kali Ram and others**, Latest HLJ 2008 (Himachal Pradesh) 1440, wherein it has been held as under:

> "6. It has come in the statement of claimant Smt. Kala Devi (PW-1) that the deceased, while working as a labourer and also selling milk was having an income of Rs.4000/- per month. Importantly, there is no cross-examination on this point at all. But the fact of the matter is that no documentary evidence has been placed on record to prove the income. This is the only evidence with regard to income of the deceased on record.
>
> 7. It has come on record that the deceased was illiterate and working as a labourer. In my view, his income determined by the Tribunal i.e. Rs.50/- per day, is on the lower side. Taking the deceased to be employed as a daily wager, the minimum wages paid by the government in the year 2001 to the labourers was more than Rs.70/- per day. This is not disputed at the Bar. Therefore, the same can be made the basis for determining the income of the deceased. Thus, the monthly income of the deceased is determined as Rs.70 x 30 = Rs.2100/- and after deducing 1/3rd of the amount i.e. Rs.700/-, for the purpose of dependency is determined as Rs.1400/-."

15. As per revision of rates of wages to daily wagers and part timers in the State of Himachal Pradesh, deceased being an unskilled person, must be earning at least Rs.200/- per day, meaning thereby that his monthly income must have been around Rs.6,000/-, as such, learned Tribunal below has erred in taking income of the deceased as Rs.3,000/-, which is hereby assessed at Rs.6,000/- per month.

16. So far deduction of 1/3rd amount towards personal expenses is concerned, same is in conformity with the judgment of Hon'ble Apex Court in **Sarla Verma** vs. **Delhi Transport Corporation**, (2009) 6 SCC 121, wherein it has been held that where number of dependents is 2-3, 1/3rd deduction is

required to be made from the assessed income of the deceased, while determining loss of dependency.

17. So far as claim of the claimants that 10% addition is required to be made to established income of deceased on account of loss of future prospects is concerned, this court finds that in view of **Pranay Sethi** (supra), 10% addition to the established income of the deceased is required to be made since he was in private employment and at the time of death, his age was 58 years. Similarly, keeping in view the age of the deceased, multiplier of '9' has rightly been applied by learned Tribunal below, which calls for no interference.

18. Thus, the loss of dependency for the claimants can be assessed as below:

Established income of the deceased	6000
Income after 10% increase on account of loss of future prospects	6600
Income after 1/3rd deduction	6600-2200 = 4400
Multiplier	9
Loss of dependency	4400x 12 x 9 = 475200

19. Having carefully perused the judgment rendered by Hon'ble Apex Court in **Pranay Sethi** (supra), this Court finds that the tribunal below has wrongly awarded sums of Rs.5,000/- each under the heads of funeral expenses and loss of estate, which as per **Pranay Sethi** (supra), ought to have been Rs.15,000/- each, as such, impugned award deserves interference on this count also.

20. Though learned Tribunal below has awarded consortium in favour of claimant No.1(wife-Pano Devi) to the tune of Rs.10,000/-, but not only the amount is on lesser side, rather, an amount of Rs.40,000/-, each is required to be awarded in favour of other claimants viz. Duni Chand and Kumari Preeti, who are the son and daughter of late Chaman Lal, and who have lost care and guidance of a father. As such, an amount of Rs.40,000/- each is required to

be awarded in favour of all the claimants. Reliance in this regard is placed on **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018.

21. At this stage, learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the amounts already awarded by learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

22. In view of detailed discussion made hereinabove, award passed by Tribunal below is modified in the following manners:-

Head	**Amount (Rs.)**
Loss of dependency	475200
Loss of estate	15000
Funeral charges	15000
Total	**505200**
consortium @Rs.40,000/- each to all the claimants i.e. Rs.40,000 x 3	120000
Total compensation	**625200**

23. So far interest rate awarded by learned Tribunal below is concerned, same is commensurate as per prevailing rate of interest on the fixed deposits, therefore, calls for no interference.

24. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned Award passed by learned Tribunal below is modified to the aforesaid extent only. Apportionment of the award amount shall remain as has been directed by learned trial Court i.e. 60% to claimant/appellant No.1 and 40% to claimant/appellant No.2, out of Rs.5,05,200/- and Rs.40,000/- each to three claimants i.e. appellants Nos. 1 and 2 and proforma respondent No. 4.

25. However, since already this court, in FAO No. 120 of 2012, has held the respondent No.3 Insurance company liable to pay the amount of compensation to the claimants, aforesaid enhanced amount shall be paid by the respondent No.3-insurance company.

26. All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

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

Ashwani Kumar and another .....Appellants

Versus

Smt. Shama ....Respondent

RSA No. 274 of 2019
Decided on : July 15, 2021

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal against concurrent findings- When there are concurrent findings of fact returned by both the Courts below in favour of the plaintiff and against the defendants and these findings are clearly borne out from the record of the Case- No perversity- Appeal dismissed.

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264;

For the appellants Mr. Lakshay Parihar, Advocate.

For the respondent: Mr. Sunny Modgil, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under S.100 CPC, lays challenge to judgment dated 11.2.2019 passed by learned District Judge Una, District Una, Himachal Pradesh in Civil Appeal No. 93/2018, affirming judgment and decree dated 11.6.2018 passed by learned Civil Judge, Court No.II Una, in Civil Suit No. 514/17/12 titled, Shama vs. Ashwani Kumar and another, whereby suit for injunction having been filed by the plaintiff came to be decreed.

26. Brief facts, germane for the adjudication of the appeal at hand are that the plaintiff filed a suit for permanent prohibitory injunction, restraining defendants from causing interference, taking forcible possession and changing nature by raising construction or in any other manner of the land measuring 0-02-79 square metres, comprised in Khewat No. 147, Khatauni No. 300, Khasra No. 677, as entered in the Jamabandi for the years 2008-09, situate in Mohal Ajnoli, Tehsil and District Una, Himachal Pradesh (hereinafter, 'suit land'), and in the alternative, for mandatory injunction with a direction to the defendants to restore the suit land to its original. Plaintiff claimed before learned court below that suit land is exclusively owned and possessed by her alongwith other co-shares and defendants being total strangers to the suit land has no right to interfere in the same. She further alleged that defendants being strangers to the suit land, with a view to grab land of the plaintiff are threatening to make interference, change nature and character by raising construction on the suit land and since they did not desist from doing so, despite repeated requests, she is compelled to file suit.

27. Defendants by way of written statement besides raising preliminary objections qua maintainability of suit claimed before learned court below that the plaintiff has not approached learned court below with clean hands and has made an attempt to suppress material facts. Defendants also claimed that no cause of action, if any, has accrued in favour of the plaintiff enabling her to file the suit as such, same deserves dismissal on this ground. On merits, defendants submitted before learned court below that the land in Khasra Nos. 2381/642, 2382/642, 2383/642 and land in Khasra Nos. 1379/641 and 1380/641 is owned and possessed by defendants alongwith other co-shares and land in Khasra Nos. 2373/632, 2377/639, 640 and 647 is owned by Himachal Pradesh Government and at present this land is being used as path by inhabitants of the village. Defendants claimed that a *Gair Mumkin Rasta* exists between the land of the plaintiff and the defendants and plaintiff under

the garb of suit, wants to block that passage and at no point of time, they extended threats to the plaintiff and as such, suit deserves dismissal.

28. On the basis of the pleadings adduced on record by the respective parties, following issues came to be framed by learned trial Court on 8.5.2013:

1. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
2. Whether in the alternative is entitled to the relief of mandatory injunction, as prayed? OPP
3. Whether there is Gair Mumkin Rasta between the land of plaintiff, as alleged? OP
4. If issue No. 3 is decided affirmative, then whether the defendants are entitled to use the aforesaid Gair Mumkin Rasta as alleged? OPD
5. Whether plaintiff's suit is not maintainable as alleged? OPD
6. Whether the plaintiff has no cause of action and locus standi, as alleged? OPD
7. Whether the plaintiff has not approached with clean hands and concealed the material facts, as alleged? OPD
8. Whether plaintiff has not affixed proper court fee by proper valuation and jurisdiction, as alleged? OPD
9. relief"

29. Plaintiff with a view to prove her case, besides examining herself as PW-1 also examined Suresh Raj (PW-2). Plaintiff also placed on record documentary evidence i.e. Ext. P1 *Fard Jamabandi* for the years 2008-09, whereas, defendants while examining defendant No.1 as DW-1 tendered in evidence various Jamabandis as Exts. D1, to D6. Court below, in the totality of the evidence collected on record by respective parties, decreed the suit of the plaintiff and restrained the defendants from causing interference in any manner over suit land.

30. Being aggrieved and dissatisfied with judgment and decree aforesaid, passed by learned court below, defendants preferred an appeal under S.96 CPC before learned District Judge Una, which came to be dismissed vide judgment and decree dated 11.2.2019. In the aforesaid background, defendants have approached this Court in the instant proceedings praying therein for dismissal of suit for injunction filed by the plaintiff after setting aside judgments and decrees passed by learned courts below.

31. Aforesaid appeal having been filed by the defendants came to be admitted on 22.9.2013, on the following substantial question of law:

> "Whether the findings of the learned trial Court as well as first appellate Court are result of complete misreading and misinterpretation of the evidence and material on record and against the settled position of law?"

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

33. Having heard learned counsel appearing for the parties and perused material available on record vis-à-vis the reasoning assigned by learned Courts below, while passing impugned judgments and decrees, this court finds it difficult to agree with learned counsel appearing for the defendants that evidence led on record by respective parties has not been read in right perspective as a consequence of which findings to the detriment of the defendants have come on record.

34. Plaintiff while deposing as PW-1 categorically stated before learned court below that the defendants being utter strangers to the suit land, are threatening to cause interference and encroachment over the suit land by way of raising construction. In her cross-examination, she specifically denied the factum with regard to existence of any path beyond her land and that beyond that path, there is land of defendant-Ashwani. She stated that the land of defendants is 100-150 metres away from the path. This witness categorically

deposed before learned court below that the land of defendants is not adjoining to the suit land. While admitting that there is a path adjoining to her land, PW-1 specifically denied that she has blocked the path.

35. Suresh Raj, PW-2 while supporting aforesaid version of PW-1 specifically stated before learned court below that the suit land is owned and possessed by the plaintiff alongwith other cosharers and the defendants have no right in the suit land. This witness also supported the version of PW-1 that the defendants threatened to cause interference over the suit land. In his cross-examination, PW-2, while admitting that there is a path adjoining to land of the defendant Ashwnai, stated that the suit land owned by plaintiff is beyond the land of defendant Ashwani. This witness also stated in his cross-examination that the dispute inter se plaintiff and defendants arose after purchase of land by defendant Ashwani. This witness specifically denied the suggestion put to him that the plaintiff wants to take possession of path at the spot, rather this witness stated that it is defendants who want to take possession of the path. This witness also stated that the defendants want to grab land of the plaintiff.

36. Defendant Pushpa Devi, while deposing as DW-1 deposed that the plaintiff had filed a suit against the defendants which is pending adjudication and in that suit, defendants, contested the suit by filing written statement wherein factum with regard to existence of *Gair Mumkin Rasta* between the land of plaintiff and the defendants has been denied. However, in the present suit, defendants have taken altogether a contrary plea by claiming that there is a path between the land of the plaintiff and the defendants. Cross-examination of aforesaid witness clearly reveals that the relations inter se plaintiff and defendants are not very good on account of pending litigation inter se them. This witness also admitted in her cross-examination that Panchayats were convened and upon demarcation, pillars were fixed at spot. She further stated that the President of Gram Panchayat stated that pillars

have been wrongly erected on the path. She admitted that pillars were erected by plaintiff on her own land but during demarcation, pillars on one side were found to be standing on path. This witness further deposed that the plaintiff had filed suit because defendants had uprooted pillars at the spot. She admitted that quarrel took place inter se plaintiff and the defendants on account of pillars erected on path. She further stated that no written statement has been filed by her in the present case. Interestingly, this witness admitted that pillars erected by plaintiff on the spot were uprooted by defendants and as such, suit has been filed.

37. It is quite apparent from bare reading of statement made by DW-1, Pushpa that there is dispute inter se plaintiff and the defendants qua the path existing between the lands of plaintiff and defendants. Prior to filing of suit at hand, Panchayat was convened and pillars were found to have been erected on path. Since defendants uprooted the pillars erected by plaintiff, she approached the court in the instant proceedings and as such, it cannot be said at no point of time, defendants made effort to encroach over the land or extend threats to the plaintiff. Similarly admission on the part of DW-1 that defendants uprooted pillars erected by plaintiff clearly establishes that the plaintiff has cause of action to file the suit at hand.

38. If the statements of PW-1 and PW-2 are read in conjunction, they clearly establish the factum with regard to ownership of the plaintiff qua the suit land, and existence of disputed path adjoining to the land of the defendants, which is admittedly at 100-150 metres away from path in question. Copy of Jamabandi Ext. P1 produced on record suggests that the suit land is owned and possessed by plaintiff and defendants have no concern with the suit land and as such, plaintiff has rightly claimed that the defendants in the absence of any right, title and interest have no right to interfere in her peaceful possession over the suit land.

39. Though the defendants have denied aforesaid allegation of the plaintiff but have categorically admitted that there is path between land of the plaintiff and the defendants, which is on Government land. As per defendants path is intended to be grabbed by the plaintiff but no evidence has been led on record by the defendants to prove blockage/obstruction if any by the plaintiff over Government path, which is being used by defendants and other inhabitants of village to go to their fields. Presumption of truth is attached to Jamabandi, which shows that the plaintiff is owner-in-possession of the suit land. Defendants have failed to rebut entries existing in favour of plaintiff in the revenue record and as such, no illegality can be found in the judgments and decrees passed by learned Courts below, holding plaintiff to be owner-in-possession of the suit land.

40. Copy of map Ext. D7 produced on record clearly shows that adjoining to suit land path owned by the Government of Himachal Pradesh exists over Khasra Nos. 640 and 647 i.e. as per Ext. D1 Jamabandi. Beyond Khasra No. 640 there is Khasra No. 641. Aforesaid map has been produced by defendants and there is no dispute *inter se* parties that there is a path between the lands of the plaintiff and the defendants, rather, DW-1 admitted in her statement that the demarcation was made and pillars were erected on suit land. This witness stated in her statement that during demarcation on one side pillar was found to be erected on path and defendants asked plaintiff to demolish that pillar. Once defendants admitted that dispute regarding erection of pillars on the suit land and government path coupled with the fact that she categorically deposed that the defendants uprooted the pillars erected by plaintiff on the path and as such, obstruction/interference allegedly caused by the defendants on land owned and possessed by plaintiff stands duly proved, thus, the learned courts below cannot be said to have committed any illegality in decreeing the suit.

41. Interestingly, DW-1 admitted that in earlier case, dispute inter se parties was with regard to pillars and path and her land is not adjoining to the suit land. She also admitted that they filed a case under Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against the plaintiff and her husband and daughter, which is pending in the court of Sessions Judge, Una. Besides above, there is ample material on record that on account of dispute inter se parties qua the path, which is not on land of the plaintiff, complaint was filed with the police. Ext. D1 is Jamabandi of Khasra Nos. 2373/632, 2377/639, 640 and 647, which shows that aforesaid land is in the ownership and possession of Government. Ext. D2 is Jamabandi of Khasra Nos. 676 and 678, which has no concern with present suit. Ext. D3 is Jamabandi of Khasra Nos. 2381/642, 2382/642 and 2383/642, which is shown to be in the ownership of defendants alongwith other co-shares. Ext. D4 is Jamabandi of Khasra Nos. 2379/641 and 2380/641, which is owned and possessed by the defendants alongwith other co-sharers. Similarly Exts. D5 and D6 are Jamabandis of land which has no relevance in the case at hand. Ext. D7 is Aks Musabi, which shows that there exists Khasra Nos. 640, between the land of the plaintiff and the defendants and is owned by Government of Himachal Pradesh.

42. Since the plaintiff by leading cogent and convincing evidenced has successfully proved on record that the defendants have uprooted pillars erected by plaintiff on her land, after demarcation, both the learned courts below rightly decreed the suit of the plaintiff. Once DW-1 specifically stated that path exists on the land of the plaintiff, which statement of her is contrary to pleadings and revenue record, factum with regard to interference being caused by defendants in the suit land stands established and as such, learned courts below rightly decreed the suit.

43. Having perused entire evidence, this court finds no illegality of infirmity in judgments and decrees passed by learned courts below, which otherwise

appear to be based on proper appreciation of evidence led on record by the respective parties, hence, no interference is called for.

44. Substantial question of law is answered accordingly. .

45. Now, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining concurrent findings of law and facts returned by both the Courts below. Learned counsel for the defendants, invited the attention of this Court to the judgment passed by Hon'ble Apex Court in **Laxmidevamma and Others** vs. **Ranganath and Others**, (2015)4 SCC 264, wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

46. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid

observation made by the Apex Court and true it is that in normal circumstances High Court, while exercising powers under Section 100 CPC, is restrained from re-appreciating the evidence available on record.

47. The Hon'ble Apex Court in **Parminder Singh** versus **Gurpreet Singh**, Civil Appeal No. 3612 of 2009, decided on 25.7.2017, has held as under:

> "14) In our considered opinion, the findings recorded by the three courts on facts, which are based on appreciation of evidence undertaken by the three Courts, are essentially in the nature of concurrent findings of fact and, therefore, such findings are binding on this Court. Indeed, such findings were equally binding on the High Court while hearing the second appeal."

48. It is quite apparent from aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned Courts below can not be interfered with unless same are found to be perverse to the extent that no judicial person could ever record such findings. In the case at hand, as has been discussed in detail, there is no perversity as such in the impugned judgments and decrees passed by learned Courts below, rather same are based upon correct appreciation of evidence as such, deserve to be upheld.

49. Consequently, in view of detailed discussion made herein above, I find no merit in the appeal at hand, which is accordingly dismissed. Judgments and decrees passed by both the learned Courts below are upheld.

Pending applications, if any, are disposed of. Interim directions, if any, are vacated.

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

United India Insurance Company Limited ...Appellant

Versus

Jagdish Kumar and others .... Respondents

FAO No. 421 of 2017
Decided on: July 26, 2021

Motor Vehicle Act, 1988 - Section 173 - Appeal by Insurer on the ground to set aside the award as the deceased was gratuitous passenger at the time of accident – Held - Insurer failed to prove the factum of gratuitous passenger.

A. Award under Conventional heads not as per judgment rendered by Hon'ble Apex Court in Pranay Sethi's case- Award modified. (Para 19)

B. Code of Civil Procedure, 1908 - Order 41 Rule 33- Power of Appellate Court- Additional award- The amount of compensation can be enhanced by an Appellate Court, while exercising power under Order 41 Rule 33 of CPC even if there are no cross objection/ appeal. (Para 21)

Cases referred:

Arun Kumar Aggarwal v. National Insurance Company Ltd., AIR 2010 SC 3426;

National Insurance Company Limited vs. Pranay Sethi and others, AIR 2017, SC 5157;

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

For the Appellant Dr. Lalit Kumar Sharma, Advocate..

For the Respondents: Mr. Ashok Kumar Verma, Advocate, for respondents Nos.1 to 3.

Nemo for respondent No.4

Sandeep Sharma, Judge *(oral):*

By way of instant appeal filed under S.173 of the Motor Vehicles Act ***(for short 'Act'***), challenge has been laid to award dated 24.6.2017, passed by learned Motor Accident Claims Tribunal(I), Kangra at Dharamshala, District Kangra, H.P. in MACP (RBT) No.133-K/II/13/10, titled Jagdish Kumar and others vs. Sh. Jagdish Chand & another, whereby claim petition having been filed by respondents Nos. 1 to 3/claimants (***hereinafter 'claimants')***

under S.166 of the Act, praying therein for compensation to the tune of Rs. 10.00 Lakh with interest at the rate of 12% per annum, from the date of accident, came to be allowed and an amount of Rs.5,67,000/- came to be awarded in favour of the claimants with interest at the rate of 7.5% per annum from the of filing of the petition till realization.

2. Precisely, the facts as emerge from the record are that the claimants, on account of death of their mother, Mehri Devi, who unfortunately, died in a road accident, filed claim petition under S.166 of the Act for compensation. Facts, emerging from the record reveal that on 21.06.2009, deceased Mehri Devi, mother of the claimants had gone to Mata Kunal Pathri temple, Dharamshala, to pay obeisance along with others. After paying obeisance in the temple, deceased alongwith many other persons was standing on the roadside. Record further reveals that the offending truck bearing registration No. HP-40-6982, which was being driven by its driver (deceased Ajay Kumar), suddenly came towards the deceased and the other persons standing on the road and struck against them, as a consequence of which, many persons died including the deceased Mehri Devi, mother of the claimants, whereas, many other persons sustained injuries. The claimants claimed before the learned Tribunal below that their mother, Mehri Devi, was earning an amount of Rs. 5000/- per month, from sale of milk and from agriculture pursuits and as such, they are entitled to compensation of Rs. 10,00,000/- from the respondents with interest at the rate of 12% per annum from the date of accident till the date of realization. FIR bearing No. 140/2009, also came to be registered against respondent No.4, Jagdish Chand as well as driver of the vehicle, deceased Ajay Kumar on 21.6.2009.

3. The aforesaid claim put forth by claimants, came to be resisted on behalf of respondents, who in their reply claimed that on the day of accident, they were going to Pathankot, for bringing bricks. Driver of the vehicle had parked it at Kunal Pathri Mandir complex and unfortunately, some children,

who had gathered near the truck opened the cabin of the driver and mishandled the gear lever, as a result of which, the truck fell down in the Nallah. They further submitted before learned Tribunal below that the deceased Ajay Kumar had parked the truck carefully on the road and never hoped that the children would come near the truck and mishandle it. Precisely, the case of the respondents, before the learned Tribunal below was that accident took place due to mishandling of gear lever by the children.

4. Appellant/Insurance Company, who being insurer of the offending vehicle, came to be saddled with the liability to pay compensation, opposed the claim of the claimants on the ground that the driver of the truck, Ajay Kumar was not having a valid and effective driving licence on the date of accident and as such, it is not liable to pay compensation to the claimants. Besides above, Insurance Company, also claimed that since the offending vehicle was being plied in violation of terms and conditions of the policy, it cannot be fastened with liability to pay compensation, if any, to the claimants. Appellant-Insurance Company, specifically submitted before learned Tribunal below that the petition is not maintainable against it as the deceased alongwith other passengers was travelling as a gratuitous passenger in the offending vehicle. Besides above, appellant/insurance company averred in the reply that the claimants were not dependent on the income of the deceased and as such, they are not entitled to get any compensation.

5. On the basis of pleadings adduced on record by respective parties, learned Tribunal below vide order dated 28.11.2013, framed following issues:-

1. Whether Smt. Madhu Devi, had died due to rash and negligent driving of vehicle No. HP40-6982 by respondent No.1, on 21.6.2009, at 4.30 p.m. at Kumal Pathari Mandir? OPP
2. If issue No.1, is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP .

3. Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident? OPR

4. Whether the deceased was traveling in the vehicle as gratuitous passenger? OPR

5. Relief."

6. Subsequently, vide award dated 24.6.2017, learned Tribunal below, while allowing the claim petition, saddled the appellant-Insurance Company with liability to pay compensation on behalf of respondent No.2 with interest at the rate of 7.5% per annum from the date of filing of the petition till the date of actual payment. In the aforesaid background, appellant-Insurance Company has approached this Court in the instant proceedings, praying therein to set aside the aforesaid award passed by learned tribunal below.

7. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis the reasoning assigned by learned Tribunal below, while passing the impugned award, this Court finds that primarily challenge to the award in the case at hand has been laid on following grounds:-

(i) Once it stood proved on record vide Inquiry Report Ext. RW-1/A that the deceased as well as other passengers were travelling in the ill-fated truck as gratuitous passengers, appellant-Insurance Company could not be fastened with liability to pay compensation on account of death of deceased Mehri Devi.

(ii) Award has been passed in violation to the judgment rendered by Hon'ble Apex Court in Sarla Verma vs. Delhi Transport Corporation, (2009) 6 SCC 121.

8. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that on the basis of pleadings adduced on record by the respective parties, learned Tribunal below framed specific issue that, "whether the deceased was travelling in the vehicle as gratuitous passenger."

9. PW-1, Jagdish Kumar, tendered his statement by way of affidavit in examination-in-chief, in which he deposed that on 21.6.2009, his mother and her daughter-in-law, Madhu had gone to pay obeisance to Mata Kunal Pathri temple and at about 4.30 pm, they were injured by the truck, which hit them. In his cross-examination, he admitted that 12 persons had died and 56 persons lost their lives in the accident and as many as 56 persons were injured. However, this witness admitted that the accident did not take place in his presence and he came to know about the accident from the magisterial inquiry.

10. Similarly, PW-2, Tarsem Kumar, has tendered his evidence by way of affidavit, wherein he deposed that on 21.6.2009, he had gone to Mata Kunal Pathari Temple to pay obeisance and after paying obeisance, he was standing outside the temple on roadside. He further deposed that at 4/4.30 pm, driver of truck bearing registration No. HP-40-6982 was turning the truck, but it went out of control and rolled down and many persons, including Mehri Devi and Madhu Devi, came under the truck. He stated that the accident took place due to negligence of truck driver. In his cross-examination, this witness deposed that all the persons were in the truck at the time of accident. This witness specifically denied the factum that the driver was taking lunch and children opened the cabin of truck and mishandled the gear lever resulting into accident.

11. Magisterial enquiry report, RW-1/A, duly proved by RW-1 Swaroop Kumar, Personal Assistant of Additional District Magistrate Kangra at Dharamshala, clearly establishes on record that the accident took place on

account of rash and negligent driving of Driver, Ajay Kumar as he had parked the truck on a sloppy ground facing a wall. He had not applied *Gutka* with a view to prevent self movement of the vehicle due to gravity or any internal fault. This report suggests that the passengers of the truck, especially the ladies and children were boarding the truck and the driver had left it unattended and even the cabin of the truck, where the technical control panel and gear of truck exist, was open and passengers in the cabin might have caused gear lever to come to its neutral position, resulting into rolling down of the vehicle. But if the report of the enquiry officer is read in its entirety, it nowhere suggests that deceased Mehri Devi was traveling in the truck as a gratuitous passenger. Statements of PW-1 and PW-2 clearly reveal that at the time of accident, Mehri Devi (mother of the claimants) was standing on the road.

12. Mr. Lalit K. Sharma, Advocate, for the appellant-Insurance Company, placed heavy reliance upon enquiry report RW-1/A to demonstrate that the deceased, who happened to be mother of the claimants was traveling in the truck as a gratuitous passenger and accident took place due to negligence of the driver of the truck, but as has been taken note herein above, evidence adduced on record by respective parties, especially enquiry report RW-1/A nowhere suggests that the deceased and other passengers had gone to Kunal Pathri to pay obeisance to deity in the ill-fated truck.

13. Moreover, if the reply filed by owner of the vehicle, respondent No.2, Jagdish Chand is perused in its entirety, it clearly suggests that the ill-fated vehicle was actually going to Pathankot to fetch some construction material and near Kunal Pathri, driver of the vehicle had parked the vehicle on the roadside. As per owner of the vehicle, accident took place on account of mishandling of the gear by children. On account of overwhelming evidence available on record, as has been discussed in above, it is difficult to conclude that the deceased was travelling as a gratuitous passenger at the time of

accident. Hence, no interference, if any, is called for qua the findings given by the learned tribunal below on issue No.4.

14. Similarly, this Court finds that the claimants has specifically pleaded that the deceased was earning a sum of Rs. 5000/- from agricultural pursuits and from sale of milk. Though, the aforesaid assertion made in the claim petition has not been specifically denied by the respondents including appellant/insurance company, but otherwise also, no illegality, if any, can be found in the findings of the Court whereby, it has proceeded to assess monthly income of deceased mother of the claimants as Rs.6,000/-.

15. Hon"ble Apex Court in case title as **Arun Kumar Aggarwal** v. **National Insurance Company Ltd.**, AIR 2010 SC 3426 has categorically held that it is not always possible to quantify any amount in lieu of the services rendered by a wife/mother to the family, but for the purpose of awarding compensation to the dependants, some pecuniary assessment is to be made about the services of the housewife/mother. While making pecuniary assessment on account of death of wife/mother, term "services" is required to be given broader meaning. It must be construed by taking into account the loss of personal care and attention given by deceased to her children as a mother and to her husband as a wife.

16. In the case at hand, record reveals that at the time of accident, age of deceased was 60 years, as has been deposed by the claimants, which statements to that effect remained unrebutted, and as such, it can be easily presumed that she was earning Rs. 5,000/- per month from agricultural pursuits and also by selling milk. But since, Hon'ble Apex Court in aforesaid judgment has categorically held that the services rendered by wife and mother are required to be given broader meaning and it also includes loss of personal care and attention given by them to their children as a mother and to the husband as a wife, learned Tribunal below has rightly assessed income of deceased wife to be Rs.6,000/- per month and as such, no interference, if any,

is called for qua that finding as also qua the deduction of 1/3rd on account of personal expenses.

17. Learned counsel representing the claimant while referring to judgment passed by Hon'ble Apex Court in **Pranay Sethi** (supra), argued that since the deceased was self-employed and was 60 years of age, as such, an addition of 10% of the established income should be awarded on account of loss of future prospects, in view of **Pranay Sethi** (supra), wherein it has been held as under:-

> "59. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) xxxxxxx.
>
> (ii) xxx.
>
> (iii) xxx.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) xxxx.
>
> (vi) xxx.

(vii) xxxx.

15. xxxx."

18. So far multiplier applied by learned Tribunal below is concerned, same has been rightly applied as '9' since the deceased was 60 years of age, as such, this court finds no reason to interfere with the same.

19. Thus, the loss of dependency would be calculated as under:

Income of the deceased	Rs.6000
Income after 1/3rd deduction	Rs.4000
Income after 10% addition	Rs.4400
Loss of dependency	4400x9x12= 475200

20. Having carefully perused the judgment rendered by Hon'ble Apex Court in **National Insurance Company Limited vs. Pranay Sethi and others,** AIR 2017, SC 5157, this Court finds that the tribunal below has erred, while granting compensation under the conventional heads. In light of the judgment passed in **Pranay Sethi** (supra), no amount could have been awarded under the head, 'loss of love and affection'. Further, the amount awarded under the heads of funeral charges has been awarded on higher side, which should be Rs.15,000/- only. Also, since no evidence was led on record by the claimants, qua transportation charges, if any, incurred by them on the transportation of dead body of their mother, as such, amount of Rs.10,000/- has also been awarded wrongly. Also, as per **Pranay Sethi** (supra), claimants are entitled to a sum of Rs.15,000/- on account of loss of estate. Besides this, the claimants, who have lost the care and guidance of their mother, due to her untimely death, are also entitled to parental consortium in light of in **Magma General Insurance Co. Ltd.** v. **Nanu Ram and Ors.**, Civil Appeal No. 9581 of 2018 decided on 18.9.2018.

21. At this stage, learned counsel for the appellant-Insurance Company argued that this Court has no power to award any extra amount/enhance the

amounts already awarded by learned Tribunal below, since no cross-objections/appeal has been filed by the claimants. On the issue of power of an appellate court to make additional award, reference may be made to a judgment rendered by Hon'ble Apex Court in **Ranjana Prakash and others** vs. **Divisional Manager and another** (2011) 14 SCC 639, whereby, it has been held that amount of compensation can be enhanced by an appellate court, while exercising powers under Order 41 Rule 33 CPC. It would be profitable to reproduce following para of the judgment herein:-

> "Order 41 Rule 33 CPC enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 CPC can be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, alongwith the owner, even though the claimants had not challenged the non-grant of relief against the insurer."

22. In view of detailed discussion made hereinabove, award passed by Tribunal below is modified in the following manners:-

Head	**Amount (Rs.)**
Loss of dependency	**475200**
Loss of estate	15000
Funeral charges	15000
Parental consortium @Rs.40,000/- each	120000
Total compensation	**625200**

23. So far interest rate awarded by learned Tribunal below is concerned, this court does not see any reason to interfere with the same, which is accordingly upheld.

24. Consequently, in view of detailed discussion made herein above and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and impugned Award passed by learned Tribunal below is modified to the aforesaid extent only. Apportionment of the award amount shall remain as has been directed by learned trial Court.

25. All pending miscellaneous applications, if any, are disposed of. Interim directions, if any, are vacated.

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

1. CWP No. 2176 of 2021

Dr. Manoj Sharma ....Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

2. CWP No. 2289 of 2021

Dr. Mahender Singh Rana ....Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

3. CWP No. 2473 of 2021

Dr. Sohil Chauhan ....Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

4. CWP No. 2712 of 2021

Dr. Varun Jaswal ....Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

5. CWP No. 2724 of 2021

Dr. Aarti Dhatwalia ....Petitioner

Versus

State of Himachal Pradesh and others ..Respondents

CWP No. 2176, 2289, 2473, 2712 and 2724 of 2021
Reserved on: July 16, 2021
Decided on: July 19, 2021

Constitution of India, 1950 - Condition of mandatory period of service as provided under Clause 6.1 and 11.1.2 of "The Post Graduation/ Super specialty policy for regulating admission to various Post Graduate and Super Specialty Courses in Medical Education Applicable in the State of Himachal Pradesh, 2019"- Held- Conditions cannot be arbitrary and unreasonable - Very purpose and loud object of the policy is to provide super specialist to the public at large- Period of mandatory service of 4/5 years provided under clause 6.1 unreasonable and as such, same deserves to be reduced to two years - Petition disposed of.

Cases referred:
Assn. of Medical Superspeciality Aspirants & Residents v. Union of India, 2019 8 SCC 607;
Modern Dental College & Research Centre v. State of M.P. (2016) 7 SCC 353;
See: Paschim Banga Khet Mazdoorsamity vs State Of West Bengal & Anr (1996) 4 SCC 37 ;
State of M.P. v. Gopal D. Tirthani (2003) 7 SCC 83;

For the petitioner(s)	Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, for the petitioners in CWP's Nos. 2176 and 2473 of 2021. Ms. Sheetal Vyas, Advocate, for the petitioner in CWP No. 2289 of 2021. Mr. Sunny Modgil, Advocate, for the petitioner in CWP No. 2712 of 2021 Mr. Sanjeev Bhushan, Senior Advocate with Mr. Ravinder Singh Chandel, Advocate, for the petitioner in CWP No. 2724 of 2021.
For the respondents	Mr. Ajay Vaidya, Senior Additional Advocate General, for the respondent-State in all the petitions. Mr. Adarsh K. Vashista, Advocate, for respondent No.5 in CWP No. 2176 of 2021. Mr. Rajinder Thakur, Central Government Counsel, for respondent No. 3 in CWP No. 2289 of 2021.

Sandeep Sharma, Judge

Since in all the above captioned petitions questions of facts and law are common, same were heard together and are being disposed of by this common judgment.

2. Precisely, the challenge in the instant petition has been laid to condition of mandatory period of service as provided under Clauses 6.1 and 11.1.2 of "the Post-Graduation/Super Specialty Policy for Regulating Admission to various Post Graduation and Super Specialty Courses in Medical Education Applicable in the State of Himachal Pradesh" (for short, 'Policy'), formulated by the respondent-State, whereby it has been provided that the General Duty Officers (for short, 'GDOs'), seeking sponsorship, besides being in regular service of the State should have completed mandatory period of service of 4/5 years in the State after post-graduation (for short, 'PG'), if the candidate had pursued PG as a sponsored candidate.

3. For having bird's eye view of the matter, certain undisputed facts, which may be relevant for the adjudication of the case are that at present there are seven Government Medical Colleges and one private medical college in the State, which impart medical education. Two medical colleges i.e. Indira Gandhi Medical College and Hospital (for short, 'IGMC') and Dr. Rajendra Prasad Government Medical College and Hospital, Tanda (for short, 'RPGMC') being well established and old medical colleges have sufficient provision and infrastructure to provide PG degrees and super-specialty courses in certain disciplines, whereas, remaining five medical colleges are at the stage of infancy and as such, do not have the requisite infrastructure and faculty to provide an opportunity to the medical graduates to improve their qualifications by doing PG and super-specialty courses. Since, in two well established government medical colleges at Shimla and Tanda PG courses as well as super-specialty courses in all disciplines of medical sciences are not available, State of Himachal Pradesh, with a view to train/impart higher education to its in-service candidates formulated/notified a policy for sponsoring GDOs for doing PG/MS degree/diploma in masters courses from the Colleges/Institutions outside the State, vide Notification dated 3.10.2017 (Annexure P-2 of CWP no.

2176 of 2021, titled Manoj Sharma vs. Sate of Himachal Pradesh and others), which is reproduced as under:

"Government of Himachal Pradesh
Department of Medical Education

File No: HFW-B(F)4-9/2017 dated: Shimla the 03/10/2017

Notification

In continuation of this Department's Notification No.: HFW-B(B(14-3/2009-Loose dated 20.03.2017 the Governor, Himachal Pradesh is pleased to notify a policy for sponsoring General Duty Officers for doing PG(MD/MS) Degree/Diploma & Master Courses outside the State as per the **ANNEXURE –'A'.**

The Governor, Himachal Pradesh in suppression of all previous Policies notified for sponsoring GDOs for doing Super specialty DM/MCh Courses, DNB Courses within and outside the State is pleased to notify a fresh policy in this behalf as per the **ANNEXURE-'B'** and **ANNEXURE-'C'.**

By order,
(Onkar C. Sharma)
Principal Secretary (Health) to the
Government of Himachal Pradesh

Endst. No.: As above dated: Shimla-2, the 03/10/2017

Copy forwarded for information and necessary action to:-

1. The Special Secretary (GAD) to the Government of Himachal Pradesh w.r.t. item No.-156, Cabinet meeting dated 18.09.2017.
2. The Deputy Secretary (Health) to the Government of Himachal Pradesh.
3. The Director Health Services, Himachal Pradesh, Shimla-9.

4. Director, Medical Education and Research, Himachal Pradesh, Shimla-9.
5. Director, Dental Health Services, Himachal Pradesh, Shimla-9.
6. The Principal, IGMC, Shimla, Himachal Pradesh
7. The Principal, Dr. RPGMC, Kangra at Tanda, Himachal Pradesh
8. The Principal, Dr. YSPGMC, Sirmour at Nahan, Himachal Pradesh
9. The Principal, Pt. JLNGMC, Chamba, Himachal Pradesh
10. The Principal, Sh. LBSGMC, Ner Chowk, Mandi, Himachal Pradesh
11. The Principal, HP Government Dental College, Shimla-1.
12. File No.:HFW-B(B)14-3/2009-Loose w.r.t. this Department's Notification dated 20.03.2017. The original file number of this Notification is HFW-B(B)12-4/2013-I(Loose).
13. Guard File.

(Pankaj Rai)
Special Secretary (Health) to the
Government of Himachal Pradesh

ANNEXURE-'A'

POLICY FOR PURSUING PST GRADUATE (MD/MS) DEGREE/DIPLOMA AND MASTER COURSES OUTSIDE THE STATE;-

(A) SPONSORED SEATS:

1. **ELIGIBILITY AND SELECTION CRITERIA IN RESPECT OF GDOs-**

1.1 The GDOs shall be entitled for grant of 'No Objection Certificate' for pursuing PG degree/PG diploma course on completion of three years regular/contract service in the State. The period of

three years shall be reckoned from the date of actual joining on the post upto the date of issuing of NOC.

1.2 In case, the GDO seeks NOC for the course from the Government/private institute duly recognized by MCI, outside the State, the same shall be issued as per the requirement of the Prospectus of that institution subject to the condition that NOC will not be given before three years of service notwithstanding the requirement of lesser service in the Prospectus.

2. **FOR FIRST PG COURSE**

The GDOs who have been issued NOC, on their selection for their first course shall be governed with the following conditions:-

2.1 The regular GDOs shall be treated on duty for the actual duration of their respective course and shall be paid their full pay and allowances. 3(b)

2.2 The contractual GDOs shall be treated on duty for the actual duration of their respective course and shall be paid their contractual emoluments, without any incentives.

3. **FOR SECOND PG COURSE:-**

The GDOs who have been issued NOC, on their selection for their second course shall be governed with the following conditions:

3.1 The GDOs who have completed PG Degree in one specialty will not be granted NOC for PG Degree in other specialty unless he/she has served the State for at least five years after completion of the flrst PG Degree.

3.2 The GDOs who have completed PG Diploma in one specialty will not be granted NOC for PG Diploma in other specialty unless

he/she has served the State for at least three years after completion of first PG Diploma.

3.3 The GDOs who have completed PG Diploma in one specialty will not be granted NOC for PG Degree in same or any other specialty unless he/she has served the State, at least for a period of three years after completion of first PG Diploma.

3.4 The GDOs who have completed DNB in one specialty will not be granted NOC for PG Degree in same or any other specialty unless he/she has servecl the State, at least for a period of five years after completion of DNB Course.

3.5 GDOs for their second PG Course, will have to avail study leave or the leave of kind due and admissible, as the case may.be, and will be entitled for leave salary.

4. **REQUIREMENT OF BOND BY WAY OF BANK GUARANTEE:-**

4.1 The GDOs (regular/contract) shall have to furnish a bond to serve the State at least for five years (in case of PG Degree course) and atleast for three years (in case of PG Diploma course) after completion of their respective courses. The Bond shall be in the form of Bank guarantee of Rs.10 Lakhs for PG degree and 7 Lakhs for PG diploma to be executed prior to joining the said course and no one shall be relieved to join the course without execution of the bond.

4.2 In case the GDO is selected for doing second PG course shall have to again furnish a bond to serve the State similar to 4.1 above.

4.3 In case the GDO is selected for doing second PG course during the bonded period of service, he/she shall have to serve the balance period of earlier bonded service in addition to the bonded

service of second PG course as the duration of second PG course shall be excluded from the bonded period of service.

4.4 In the event of the GDOs rescinding on the terms of the bond, the State Government shall have the right to forfeit the amount of Bank Guarantee with a simultaneous request for cancellation of registration of their Degree course to be made to the MCI.

5. **FOR GDOs LEAVING COURSE MIDWAY:-**

5.1 The GDOs who after being granted NOC as a sponsored candidate leave the PG degree/diploma course midway shall stand debarred to re-appear as a sponsored candidate in the PG degree/diploma entrance.

5.2 The period of five years for the purpose of de-barring shall be reckoned from the date of leaving the course midway.

5.3 (i) In case, the GDO who has been sponsored and treated as on duty (with full pay and allowances), leaves the course midway, the period involved shall be converted into/debited from regular leave standing at his credit on the date on which he proceeded to " join such course. In case of shortfall of leave, the recovery of amount of pay and allowances falling short of leave will be made/deducted from the salary of such GDO.

5.4 (ii) In case, the GDO who has been granted study leave, leaves the course midway, the study leave availed by him/her shall be converted into regular leave standing at his credit on the date on which the study leave commenced. The recovery of amount of leave salary, falling short of leave, will be recovered from the salary of GDO concerned.

6.

6.1 In respect of Master in Public Health(MPH), or any other Master Course, if the institution and course is not recognized by the MCI, but the course to which NOC is sought, is found necessary for the Sate Health Services in larger public interest, the NOC shall be issued subject to fulfilling the minimum requirement of mandatory service of three years on regular/contract basis in the State.

6.2 The GDOs (regular/contract) doing Master Courses shall have to furnish a bond to serve the State at least for three years after completion of their respective courses. The Bond shall be in the form of bank guarantee of Rs.7 Lakhs, to be executed prior to joining ' the said course and no one shall be relieved to join the course without execution of the bond.

6.3 In the event of the GDOs rescinding on the terms of the bond, the State Movement shall have the right to forfeit the amount of bank guarantee with a simultaneous request for cancellation of registration of their Degree Course to be made to the MCI.

6.4 In case of another Master Course or PG Degree after the first Master Course, the conditions specified at Sr. N0. 4 with all its sub-clauses above for the second PG Course shall prevail.

(B) **UNSPONSORED SEATS**:

1. The GDO working on contract basis shall have to resign on their selection against direct/open seats before joining such courses.
2. In case, a regular GDO wisheq to do a PG Degree/Diploma outside the State as a direct candidate, he/she will be granted leave of the kind due and admissible. The period not covered by any kind of leave shall be treated as dies-non without any interruption."

ANNEXURE-'B'

POLICY FOR PURSUING SUPER SPECIALTY DM/MCH COURSES WITHIN AND OUTSIDE THE STATE

A. SPONSORED SEATS

1. Allocation of seats (for courses within the State only)

1.1 50% of such seats shall be filled up from amongst the bonafide Himachali Candidates (including in service GDOs as well as direct candidates) and remaining 50% shall be filled up from open competition. All the seats will be filled up on merit.

Note:- In case, if seat(s) falling in the share of any of the group remained unfilled, the same shall be filled in from the eligible candidates of another group and vice versa.

1.2 All regular GDOs serving with the Government of Himachal Pradesh would be eligible for grant of No Objection certificate, subject to fulfilling the eligibility conditions as laid down in para 2 and on selection, would be eligible to join such courses.

2 ELIGIBILITY

All GDOs who have done Post Graduation during service shall be eligible for pursuing DM/Mch courses without any condition of serving the State after Post Graduation. However, GDOs who join HP Health Services directly after completion of Postgraduate Degree course will have to serve the State for a period of atleast Two years, for becoming eligible for DM/MCh Super Specialty courses as a sponsored candidate.

3 FOR FIRST DM/MCh COURSE

The GDOs who have been issued NOC, on their selection for their first course shall be treated on duty for the actual duration of their respective course and shall be paid their fuIl pay and allowances.

4 REQUIREMENT OF BOND BY WIAY OF BANK GUARANTEE

4.1 As the State Government incurs substantive expenditure on each GDO doing DM/ MCh Super Specialty Course and also pays full pay and allowances during the course, there will be a bond condition to serve the state at least for seven years after doing DM/ MCh Super Specialty Course. The Bond shall be in the form of bank guarantee of Rs. 15 lakhs to be executed prior to joining the said course and no one shall be relieved without execution of the bond.

4.2 In the event of the GDOs rescinding on the terms of the bond, the State Government shall have the right to forfeit the amount of bank guarantee. Simultaneously, request for cancellation of registration of their DM/ MCh Super Specialty Course shall be made to MCI.

4.3 In case the GDO is selected for doing DM/MCh course during the bonded period of service, he/she shall have to serve the balance period of earlier bonded service in addition to the bonded service of DM/MCh course as the duration of DM/MCh course shall be excluded from the bonded period of service.

5 FOR LEAVING THE COURSE MIDWAY

5.1 The GDOs who leave the DM/ MCh Super Specialty Course midway either within the State or outside the State of HP, shall stand debarred to re-appear as a sponsored candidate for pursuing DM/ MCh Super Specialty Course for next five years, for both within the State and outside the State of Hp.

5.2 The period of five years for the purpose of de-barring shall be reckoned from the date of leaving the course midway.

5.3 In case, the GDO who has been sponsored and treated as on duty (with full pay and allowances), leaves the course midway, the period involved shall be converted into/debited from regular leave standing at his credit on the date on which he proceeded to join such course. In case

of shortfall of leave, the recovery of amount of pay and allowances falling short of leave will be made.

6 UNSPONSORED SEATS:

In case, a regular GDO wishes to do a DM/MCh course as a direct candidate, he/she will be granted leave of kind due and admissible."

4. As per aforesaid policy, a GDO after having completed 3 years regular/contract service with the State could apply for no objection certificate from the State of Himachal Pradesh for pursuing PG diploma/degree courses from the government /private medical institutions duly recognized by the Medical Council of India (for short, 'MCI') outside the State and GDO while pursuing course after No Objection Certificate (for short, 'NOC') was treated on duty for actual duration of his/her course and he was to be paid full allowances/salary for that period. However, if aforesaid candidate after having finished his/her first PG intended to pursue second PG course, he/she was required to serve the State for atleast 5 years after completion of first PG degree. GDO who completed PG diploma in one specialty could not be granted NOC for another PG course, unless he/she serves the State for 3 years, after first PG diploma. In terms of aforesaid policy, GDO (regular/contract) was required to furnish bond for 5 years in case of PG degree course and at least 3 years in case of PG diploma course after completion of respective courses. Bond was to be in the form of bank guarantee of Rs.10.00 Lakh for PG degree and Rs.7.00 Lakh for PG diploma, which was to be executed prior to joining said course and no person could be allowed to join the course without execution of bond as mentioned above.

5. Similarly as per 2017 Policy, as has been taken note herein above, GDO serving with Government of Himachal Pradesh after having done his first PG course, could apply for NOC for pursuing super-specialty /DM/MCH courses

within and outside the State subject to fulfilling eligibility criteria as per para 2 of eligibility criteria for selection. As per eligibility condition (Annexure B as reproduced herein above), all GDOs who have done Post Graduation during service shall be eligible for pursuing DM/Mch courses without any condition of serving the State after Post Graduation. However, GDOs who join HP Health Services directly after completion of PG Degree course were required to serve the State for a period of atleast two years, for becoming eligible for DM/MCh Super Specialty courses as a sponsored candidate. The GDOs who were issued NOC, on their selection for their first course were treated on duty for the actual duration of their respective course and were entitled to be paid their full pay and allowances. However, before availing aforesaid incentive, they were to furnish a bond in form of bank guarantee in the sum of Rs.15,00,000 after completion of course undertaking therein that they would serve the State for at least seven years. Clause 4.3 of aforesaid policy contained in Annexure B, provided that the GDO selected for doing DM/MCh course during the bonded period of service, is required to serve the balance period of earlier bonded service in addition to the bonded service of DM/MCh course as the duration of DM/MCh course shall be excluded from the bonded period of service.

6. Aforesaid 2017 Policy, circulated by the State of Himachal Pradesh for sponsoring GDOs for doing PG(MD/MS) Degree/Diploma & Master Courses outside the State came to be superseded by a new Notification dated 27.2.2019, (Annexure P-3), which is also reproduced as under:

"Government of Himachal Pradesh

Department of Health & Family Welfare

File No. HFW-B(F)4-9/2017-II dated: Shimla-2, the 27/02/2019

In supersession of all previous notifications issued in this regard, the Governor of Himachal Pradesh is pleased to notify PG/Super specialty Policy

for regulating admissions to various Post Graduation and Super Specialty Courses in Medical Education applicable in the State of Himachal Pradesh as under:—

1. **Short Title**.—This policy may be called the 'Policy for regulating admissions to various Post Graduation and Super Specialty courses in Medical Education applicable in the State of Himachal Pradesh' in short 'PG/Super Specialty Policy'.

2. **Commencement**.—The policy shall come into effect from the date of notification.

3. **Definition**.—

Notwithstanding anything to the contrary—

3.1.1 'Autonomous Institutions' shall mean AIIMS Delhi, PGIMER Chandigarh and JIPMER Puducherry to which admissions in Post Graduation are made on the basis of separate entrance examination and not NEET-PG.

3.1.2 'Direct candidate' shall mean the doctor who is not claiming service benefits/ incentive benefit for pursuing Post Graduation in the State through NEET-PG and shall include candidates of State Quota (Non-GDOs)/ All India Quota.

3.1.3 'Director, Dental Health Services' in short DDHS shall mean the Director, Dental Health Services, Himachal Pradesh.

3.1.4 'Director, Health Services' in short DHS shall mean the Director, Health Services, Himachal Pradesh.

3.1.5 'Director, Medical Education & Research' in short DME shall mean the Director, Medical Education & Research, Himachal Pradesh.

3.1.6 'Field posting' shall mean the posting in various peripheral Health Institutions of the State including Primary Health Centre, Community Health Centre, Civil Hospitals, District Hospitals, Zonal Hospitals and Regional Hospitals. Teaching posts in Government Medical/Dental Colleges of the State

shall be excluded from the definition of field posting but shall include the posts of Casualty Medical Officers and Medical Superintendents.

3.1.7 'General Duty Officer', in short GDO shall mean the doctors under the establishment of the Director, Health Services, Himachal Pradesh and shall include the doctor appointed on regular/contract basis.

3.1.8 'Government' shall mean the Government of Himachal Pradesh.

3.1.9 'Incentive Certificate' shall mean the certificate which shall be issued by the Chief Medical Officer and countersigned by the DHS and which shall certify the actual period served by the GDO in a particular field posting and shall be required for calculation of incentive for serving in field postings for the purpose of drawing up of State Quota Merit list.

3.1.10 'Medical Faculty' shall mean the doctors under the establishment of DME working as regular Assistant Professor and above in the various Government Medical/Dental Colleges of the State.

3.1.11 'No Objection Certificate' in short NOC shall mean the No Objection Certificate issued by the Director, Health Services, Himachal Pradesh to pursue Post Graduation and Super specialty course as may be applicable.

3.1.12 'Post Graduation' shall mean the Post Graduate MD/MS/MDS/MHA/MPH/ DNB/Diploma courses or any such equivalent courses.

3.1.13 'Sponsorship' shall mean the payment of emoluments/pay/allowances along with due increments (if applicable) during the prescribed duration of the course of Post Graduation/Super Specialty Courses being pursued by the GDO. For all purposes, in case of a sponsored GDO, his/her Post Graduation/Super Specialty duration shall be considered on-duty. However, in case a GDO is sponsored, he/she shall not be entitled for drawing stipend during the course.

3.1.14 'Sponsorship Certificate' shall mean the certificate issued by the DHS after fulfilment of all the bond formalities.

3.1.15 'State' shall mean the State of Himachal Pradesh.

3.1.16 State Quota shall include the seats which are filled up through State counselling and shall include the unfilled seats of All India Quota which have been reverted to the State.

3.1.17 'Super Specialty Courses' shall mean the courses pursued after Post Graduation and shall include DM/MCh/DNB (Super Specialty) or any such equivalent courses.

4. **GDO Encadrement**.

The cadre of GDOs shall be built up by the following two methods:—

4.1 **Contractual basis:**

4.1.1 Campus Interviews shall be conducted in all the Medical Colleges by the DHS for field postings at least 3 months prior to the completion of internship and posting orders shall be issued to willing candidates before the completion of internship.

4.1.2 Walk-in-interviews shall be held in the office of the DHS as may be decided by the Government from time to time for various field postings.

4.1.3 Those Direct Candidates who serve the state beyond the mandatory period of peripheral service shall continue as GDOs (if willing) and shall be treated as contractual candidates for all practical purposes.

4.2 **Regular basis** :

4.2.1 The contractual GDOs may be regularized in accordance with the policy notified by the Government from time to time.

4.2.2 Recruitment may also be conducted through Himachal Pradesh Public Service Commission, Shimla on regular basis as may be decided by the Government from time to time.

5. **Incentive/NOC/Sponsorship for pursuing Post Graduation:**

5.1 **Incentive for pursuing Post Graduation within the State through NEET-PG :**

5.1.1 There shall be no requirement for a NOC to appear in NEET-PG for any of the GDO candidates.

5.1.2 There shall be requirement of an Incentive Certificate for availing the incentive for serving in the State as a GDO provided that such Incentive Certificate shall be issued to only those GDO who have completed at least one year of uninterrupted continuous service without any break or unauthorized absence on the date of declaration of result of NEET-PG. Further provided that this Incentive Certificate shall be valid only for appearing in the State Quota Counselling.

5.1.3 The application for issuance of Incentive Certificate shall be made by the desirous GDO to the concerned Chief Medical Officer under whom he/she is currently serving. The application shall be made on a prescribed format which shall be notified by the DHS separately. The concerned Chief Medical Officer shall verify the service particulars of the GDO from the maintained service record and send the Incentive Certificate for counter signature of the DHS.

5.1.4 The GDOs shall be entitled for incentive in terms of percentage of marks obtained in NEET-PG based on their services rendered in various field postings as per ANNEXURE-A. The percentage incentive shall be computed on prorata basis for the actual duration of service rendered in a particular field posting as per the following formula:

$$\text{Incentive percentage for a particular field posting} = \frac{\text{Duration served (in days)}}{365} \times \text{prescribed incentive for particular institution (Annexure-A)}$$

In case a particular GDO has been posted at one particular station but he is deputed for some period to another station, the actual duration served at a particular field posting will be taken into account for the calculation of incentive. This incentive shall be available to only those GDOs who are in the active service of the State in a continuous manner and for the purpose of computing the incentive, the present continuous service shall be taken into account; meaning thereby, any doctor who has served as a GDO in the past but has subsequently resigned from GDO ship shall not be eligible to avail benefit of this incentive on the basis of any previous service. Similarly, if he/she subsequently joins GDO ship again, the incentive will be calculated taking into consideration the latest period of service reckoned from the date when he/she is in continuous service without any break. This incentive will be subject to maximum of 30% in terms of judgment delivered by the Hon'ble Supreme Court of India on 16th August, 2016 in Civil Appeal No. 8047/2016—State of U.P. & Ors. Versus Dr. Dinesh Singh Chauhan and as per Medical Council of India Post Graduate Medical Education Regulations. 5.1.5 For the purpose of computation of incentive by the DHS, the cut off date shall be the date of declaration of NEET-PG result. 5.1.6 The date schedule for issuance of such Incentive Certificate shall be notified by the DME either as a part of Prospectus or separately.

5.1.7 No application for issuance of Incentive Certificate shall be entertained after the expiry of period mentioned in notification as per clause 5.1.6. If any GDO fails to make application before the expiry the last date prescribed for the purpose it shall be presumed that he/she is not interested in availing the benefit of the incentive.

5.1.8 The incentive applicable for each field posting for a particular candidate shall be calculated, summed up and rounded off to three decimal points by the DHS. The DHS shall compile the list of all candidates who have applied for issuance of Incentive Certificate alongwith their NEET-PG roll

number and communicate the entitled incentive (till three decimal points) in respect of each candidate to the DME for drawing up a combined merit list in respect of GDO and direct candidates. The individual original Incentive Certificate shall be filed in the personal record of the GDO.

5.1.9 No incentive shall be applicable for those GDOs who are appearing for the All India counseling.

5.2 **NOC/Sponsorship for pursuing Post Graduation against sponsored quota seats of autonomous institutions :**

5.2.1 NOC shall be issued only to GDOs desirous of pursuing Post Graduation from the autonomous institutions for appearing in their entrance examination against the sponsored quota of the autonomous institutes subject to the following conditions:—

(a) GDO should be regular and should have three years of uninterrupted continuous services without any break or unauthorized absence. His/her service record to this effect should have been verified by the concerned Chief Medical Officer as per maintained service record. Such verification shall be obtained by the concerned GDO from the Chief Medical Officer before making application to the DHS for NOC for appearing in examination.

(b) NOC will not be given before three years of service as required at 5.2.1(a) notwithstanding the requirement of lesser service in the prospectus of any particular autonomous institution.

5.3 Such candidates who have been granted NOC/Sponsorship for appearing in the entrance examination of autonomous institutions subject to conditions as laid down in 5.2.1 and are subsequently selected in the institutions shall apply to the DHS for relieving along with the result card. The DHS shall then complete all the formalities as prescribed in clause 6 and shall relieve the candidate only after furnishing of bond documents.

5.4 Sponsorship :

5.4.1 After the counseling, the GDOs desirous of pursing Post Graduation within or outside the State shall apply for sponsorship to the DHS. The pre-requisites for issuance of sponsorship certificate shall be the following:

5.4.1.1 For Post Graduation within the State : (a) The candidate should have applied and should have been issued Incentive Certificate prior to State counseling. (b) Fulfilment of all formalities as per clause-6

5.4.1.2 For Post Graduation outside the State through NEET-PG/ unsponsored quota of autonomous institutions:

(a) No GDO shall be sponsored for Post Graduation outside the state through NEET-PG or against non-sponsored quota of autonomous institutions.

(b) Such GDOs who secure admissions in Post Graduation courses outside the State through NEET-PG or against unsponsored quota of autonomous institutions may avail leave of kind due including Study Leave/ Extra Ordinary Leave, as may be otherwise admissible as per CCS (Leave) Rules.

(c) Such GDOs who secure admissions in Post Graduation courses outside the State through NEET-PG or against unsponsored quota of autonomous institutions shall apply to the DHS for relieving. If the candidate has sufficient leave of kind due as per clause (b) above, the same may be recommended to the Government subject to the conditions as per the leave being granted including bond period for Study Leave. If sufficient leave is not admissible as may be required for duration of the Post Graduation course, the GDO will have to resign if he/she wants to pursue the post graduation and accordingly his/her case shall be sent to the Government by the DHS alongwith recommendations.

5.5 If any GDO joins Post Graduation within or outside the state through NEET-PG exam/ Autonomous Institution Entrance Examination as a

direct candidate without due resignation/permission, in case of contractual GDO his/her services shall be deemed terminated and recovery shall be made as per terms of contract agreement and in case of regular GDO candidate, disciplinary proceedings shall be initiated besides writing to the concerned Head of Institute for cancellation of the admission.

6. Terms and conditions of Bond for Post Graduation :

6.1 As the Government incurs substantive expenditure on each candidate for doing Post Graduation and also pays them full pay along with all allowances and seniority during the course, every GDO (regular/contract) who have been sponsored to pursue Post Graduation within the State in Government Medical/Dental Colleges shall have to furnish a bond to serve the State for at least four years including mandatory first year of field posting after completion of their respective courses. Similarly, in case of GDOs sponsored for Post Graduation outside the State on sponsored quota seats of Autonomous Institutions, as the Government pays them full pay alongwith increments during the course and they are not even serving the state during the course, every such GDO (regular) shall have to furnish a bond to serve the State for at least five years including mandatory first year of field posting after completion of their respective courses. Since the direct candidate who pursues Post Graduation within the State in Government Medical/Dental Colleges on State/All India Quota stand on a different footing as they are not entitled to service benefits including full pay (with allowances and increments) and chances of regularisation to which their GDO counterparts are entitled; however, keeping in view the resources expended in their education by the government including payment of stipend, every such direct candidate shall have to furnish a bond to serve the State for at least two years including mandatory first year of field posting after completion of their respective courses.

6.2 The bond as per clause 6.1 shall be in the following form:

6.2.1 All the candidates as per clause 6.1 shall furnish a bond in the form of a legal undertaking to serve the State for prescribed period failing which the candidate shall have to pay the Rs. 40 Lacs to the State Government. The candidate shall also furnish an undated cheque from a scheduled bank amounting to Rs. 40 Lacs in the name of DHS. The DHS shall be at liberty to get the cheque encashed in event of violation of the bond conditions.

6.2.2 The candidates as per clause 6.1 shall also deposit their original bachelor degree with the DHS/DDHS (in case of GDOs) and DME (in case of direct candidates). The concerned issuing University/Institution shall be informed about such retention and the candidate shall be debarred from obtaining any duplicate degree. The original bachelor degree shall be released only after completion of the Bond Period or after deposition of the requisite amount and this shall be a part of the bond agreement.

6.2.3 The candidates shall also furnish undertaking as a part of bond that they shall complete the course prescribed failing which they shall be liable to pay Rs. 10 lakhs to the State government for wastage of seat.

6.2.4 The prescribed format of the bond shall be as per Annexure-B.

6.3 It shall be the sole responsibility of DHS/DDHS to ensure the furnishing of such documents from each GDO candidate who is being sponsored and the sole responsibility of the Principal of concerned Medical College to ensure collection of these documents at the time of admission of a direct candidate to the course. Any dereliction of duty in this end shall make the concerned liable for action.

6.4 The custodian of these three documents–Bond as legal undertaking, undated cheque and the original Bachelor's Degree shall be DHS/DDHS (in case of GDOs) and DME (in case of direct candidates through Principals of respective colleges). Two months before the tentative completion of the Post Graduation in every Medical/Dental College, the DHS/DDHS shall conduct

walk in interview in the concerned college and shall take options from all those candidates who are bonded to serve the State. Simultaneously, the DHS shall take over the custody of the documents including the Bond agreement, undated cheque and Original Bachelor degree in respect of direct candidates. The field posting orders of such candidates shall be issued by the DHS/DDHS within a month of declaration of PG results and successful clearing of the PG Exams subject to vacancy. The concerned Principals shall relieve the candidates (including GDOs and direct candidate) only after successful completion of the course with the direction to report to the DHS.

6.5 In no case, NOC will be granted for second Post Graduation Course/Super Specialty Course/Senior Residency to any candidate during the mandatory period of service of the State after first Post Graduation.

6.6 The following shall constitute a violation of the bond to serve the state as outlined in Clause 6.1.

6.6.1 Failure to join the given field posting within 10 days of issuance of orders.

6.6.2 Putting in request for EOL/study leave/request for NOC during the mandatory period of service of the State.

6.6.3 Putting in request for Senior Residency within the mandatory first year of field posting.

6.7 In the event of a candidate violating the terms of bond as outlined in clause 6.6, the following actions shall be initiated by the DHS:

6.7.1 The salary paid to the candidate during sponsorship shall be recovered through due process of law.

6.7.2 The bond amount shall be recovered through due process of law. The cheque submitted by the candidate as a part of bond documents shall be en-cashed.

6.7.3 Initiation of disciplinary proceedings against the GDO candidate.

6.7.4 The original bachelor degree shall not be returned and endorsement shall be made to the concerned University thereof.

6.7.5 Cancellation of registration from the concerned Medical Council.

6.8 **Exceptions**.—The condition of bond shall not be applicable in case of Direct candidate in the following scenarios:

6.8.1 Those direct candidates who do not choose to take any stipend during the post graduation in the state. Such candidates shall furnish such option on a prescribed affidavit before the start of course.

6.8.2 Those direct candidate in whose case the Government/DHS/DDHS fails to issue any orders for field postings within a month of their clearing the PG Exams. However, the DHS/DDHS would be answerable to the Government for this lapse.

7. **Remuneration during Post Graduation** :

7.1 GDOs appointed on contract basis and sponsored for pursuing post graduation within the State as per clause 5.3 shall be paid the contractual salary as per their contract agreement.

7.2 Regular GDOs sponsored for pursuing post graduation within the State and outside the State on sponsored quota seats of Autonomous Institutions as per clause 5.3 shall be treated on duty during the prescribed period of Post Graduation and he/she shall be paid the regular pay, allowances including increments for such prescribed period. In case, the sponsored GDO is not able to complete the Post Graduation within the prescribed time period, the extra period spent during Post Graduation beyond the prescribed period may be regularized against the leave of kind due. If there is no sufficient leave of kind due in his/her credit, that period shall be treated as EOL and the payment made to the person for this period shall be recovered from the candidates.

7.3 Direct candidates shall be paid stipend as applicable to them subject to the exception, if chosen for, as per clause 6.8.1.

8. **Remuneration during the mandatory field posting** :

8.1 The regular GDO shall continue to draw the emoluments and pay admissible to him/her with due allowances and increments during the period of mandatory field posting.

8.2 The contractual GDO shall continue to draw the salary as admissible to him as per terms of the contract.

8.3 The Direct candidates shall draw salary at the rate as admissible for contract and shall be treated as contractual GDOs for all practical purposes during the period of mandatory field posting. However, if the direct candidate subsequently joins as Senior Resident in any of the Medical Colleges after completion of mandatory first year of field posting, he shall draw the pay as prescribed for a Senior Resident.

9. Terms for leaving Post Graduation course midway :

9.1 If the GDO's who have been granted sponsorship for pursuing Post Graduation within the State or outside the State, leaves the Post Graduation course midway, he/she shall be debarred to re-appear in any entrance examination for Post Graduation for the next five years within and outside the State of Himachal Pradesh. The period of five years for the purpose of de-barring shall be reckoned from the date of leaving the course midway.

9.2 In addition to this, for those GDO's who leave post graduation course mid way, the period spent in the Medical Colleges during Post Graduation may be regularized against the leave of kind due. If there is no sufficient leave of kind due in his credit that period may be treated as EOL and the payment made to the person for this period shall be recovered from the candidates. In addition to this, the GDO shall have to pay Rs. 10 Lakhs in event of leaving the course midway as per terms of the bond.

9.3 In case of direct candidates who leave the course midway, they shall have to pay Rs. 10 lakh to the State Government as per the terms of the bond.

Information in respect of such cases shall be sent to the DHS by the concerned Principal along with bond and other documents.

10. **Terms for second Post Graduation Course**.—The GDOs who have been sponsored to pursue Post Graduation within or outside the state earlier and who are desirous of pursuing a second Post Graduation Course shall be governed by the following conditions:

10.1 The GDOs who have completed PG Degree in one specialty shall not be granted sponsorship/NOC for pursuing PG Degree in any other specialty. However, such candidates may pursue their second PG degree course only after the grant of EOL by the Government as per CCS Leave Rules.

10.2 The GDOs who have completed PG Diploma/DNB in one specialty may be given NOC for pursuing PG Degree in the same specialty, only after serving the state for at least five years (either in field postings or in Government Medical/Dental Colleges) after completion of PG Diploma/DNB.

10.3 The GDOs who have completed PG Diploma/DNB in one specialty shall not be granted NOC for pursuing PG Degree/DNB/Diploma in any other specialty. However, such candidates may pursue their second PG degree course only after the grant of EOL by the Government as per CCS (Leave) Rules.

10.4 Any GDO who is not fulfilling the condition of minimum required service to be sponsored as Post Graduate Candidate within or out of the state shall have to resign on their selection against direct/open seats before joining such courses. And if he/she joins Post Graduation without getting NOC from the Government or without submitting his/her resignation, in case of contractual GDO his/her services shall be deemed terminated and recovery shall be made as per terms of contract agreement and in case of regular GDO candidate, disciplinary proceedings shall be initiated besides writing to the concerned Head of Institute for cancellation of the admission.

11. **NOC and Sponsorship for pursuing Super Specialty courses:**

11.1 **NOC/Sponsorship for GDOs :**

11.1.1 There shall be no requirement of NOC for appearing in the All India NEET Super Specialty or any other Entrance Examination to the Super Specialty Courses prescribed except for appearing against the Sponsored quota seats of the Autonomous Institutions.

11.1.2 Since the state needs the services of super specialists to improve the health care facilities within the state, the state would offer sponsorship to candidates who wish to pursue super-specialty courses, subject to following conditions:—

(a) GDO seeking sponsorship should be regular and should have completed the mandatory service of the State after Post Graduation as per clause 6.1 if the candidate had pursued post graduation earlier as a sponsored candidate.

(b) Those candidates who had initially joined as Direct Candidates but subsequently turned GDO or those who have joined GDO ship after doing Post Graduation from elsewhere shall be considered for sponsorship to Super specialty Courses subject to the condition that the GDO should be regular and should have served the State for at least three years including one year of mandatory field posting.

(c) In case of GDOs, who fulfil the conditions as laid down at clause (a) and (b) above, and have cleared NEET-SS or any such prescribed examination including unsponsored seats of Autonomous Institutions shall apply to the DHS for Sponsorship and shall be relieved after fulfilment of formalities as prescribed at Clause 11.3.

(d) In case of GDOs, who wish to pursue the Super Specialty Courses on sponsored seats of Autonomous institutions, NOC shall be granted only subject to fulfilment of clause 11.1.2 (a) and (b), notwithstanding the requirement of lesser/greater service in the prospectus of any particular Autonomous Institution.

(e) Such candidates who have been granted NOC as prescribed at Clause (d) above and have been subsequently selected to pursue the Super Specialty Course against sponsored quota of Autonomous Institutions shall apply to the DHS for relieving and shall be relieved after fulfilment of formalities as prescribed at Clause 11.3.

11.1.3 There shall be no annual capping on the number of sponsored seats for Super Specialty Courses.

11.1.4 Any GDO who is not fulfilling the condition of minimum required service to be sponsored as Super Specialty Candidate within or out of the State shall have to resign and complete the obligation of the bond on their selection against direct/open seats before joining such courses. And if he/she joins Super Specialty Course without getting NOC/Sponsorship from the Government or without submitting his/her resignation, in case of contractual GDO his/her services shall be deemed terminated and recovery shall be made as per terms of contract agreement and in case of regular GDO candidate, disciplinary proceedings shall be initiated besides writing to the concerned Head of Institute for cancellation of the admission.

11.2 **NOC/Sponsorship for Medical Faculty :**

11.2.1 The State shall also allow the regular medical faculty to pursue Super Specialty Courses for career progression and providing better services to the patients of the State. However sponsorship shall only be available for the sponsored quota seats of Super Specialty Courses in Autonomous Institutions.

11.2.2 The conditions of sponsorship for medical faculty shall be the following:

(a) The Medical faculty should be regular.

(b) He/she should have served for a minimum period of three years in the Medical College as Assistant Professor or above.

(c) He/she should be occupying a post which is over and above the MCI requirement for running of Under Graduate/Post Graduate courses in the concerned institutions. For instance if as per MCI requirement two posts of Assistant Professors are required in Department of Medicine in a particular institutions and the candidates who is seeking sponsorship is one amongst the only two Assistant Professors available, he/she will not be given the benefit of the Sponsorship in any case. However, if there are three or more Assistant Professors working against the sanctioned strength, which is more than the MCI requirement, sponsorship may be granted on a first come first serve basis.

11.2.3 The DME shall be competent to sign the Sponsorship Certificate on the behalf of the Government subject to fulfillment of conditions as outlined at clause 11.2.2 above and clause 11.3 below.

11.2.4 In the event of selection of the applicant who has been issued sponsorship certificate, the post which the incumbent was occupying before leaving for the course shall remain vacant and the incumbent shall join back on the same post after completion of Super Specialty Course. The medical faculty candidate who has successfully completed the course and joined back the Medical Education Department shall be entitled for seniority of the prescribed duration of the course in the same department. However, any formal designation/promotion shall happen only once the candidate joins back. In case, the incumbent wants to join against available entry level vacancy in the Super Specialty Department, he/she shall be allowed to join. However, in no case shall the incumbent be allowed to occupy the higher post in the Super Specialty Department and his services in that department shall be counted from the date of actual joining for the purpose of seniority/promotion etc.

11.2.5 In case any candidate of the regular medical faculty wants to appear for/pursue Super Specialty through NEET-Super Specialty

Examination or the unsponsored quota seats of Autonomous Institutions, he/she may avail leave of kind due including study leave. However, in case sufficient leave is not admissible, the candidate will have to resign from the post and the post shall be deemed vacant for all purposes. And if he/she joins Super Specialty Course without getting NOC/Sponsorship from the Government or without submitting his/her resignation, disciplinary proceedings shall be initiated besides writing to the concerned Head of Institute for cancellation of the admission.

11.3 Terms and Conditions of Sponsorship for Super Specialty Courses :

11.3.1 As the Government incurs substantive expenditure on each candidate for doing Super Specialty and also pays them full pay during the course, every GDO (regular) who have been sponsored to pursue Post Super Specialty within the State in Government Medical/Dental colleges shall have to furnish a bond to serve the State for at least five years after completion of their respective courses. Similarly, in case of GDOs/medical faculty sponsored for Super Specialty outside the State (including sponsored quota seats of Autonomous Institutions), as the Government pays them full pay alongwith increments during the course, every GDO (regular)/medical faculty who has been sponsored to pursue Super Specialty outside the State shall have to furnish a bond to serve the State for at least seven years after completion of their respective courses. Similarly, as the Government expends huge resources in the education of Direct Candidates including payment of stipend, every direct candidate who pursues Super Specialty within the State in Government Medical/Dental Colleges shall have to furnish a bond to serve the State for at least three years after completion of their respective courses.

11.3.2 The categories of Super specialty Students (GDO/Direct) shall furnish bond as per detail below:

(a) The candidates shall furnish a bond in the form of a legal undertaking to serve the State for prescribed period failing which the candidate shall have to pay the Rs. 60 Lakhs to the State Government. The candidate shall also furnish an undated cheque from a scheduled bank amounting to Rs. 60 Lacs (Sixty lacs) in the name of DHS (in case of GDOs) and or DME (in case of medical faculty/direct candidates). The DHS/DME shall be at liberty to get the cheque encashed in event of violation of the bond conditions.

(b) The candidates shall also furnish undertaking as a part of bond that they shall complete the course prescribed failing which they shall be liable to pay Rs. 15 lakhs to the State government for wastage of seat.

(c) The prescribed format of the bond shall be as per Annexure-B.

11.3.3 The general conditions including violation and procedure to be adopted shall be same as outlined in Clause 6, unless otherwise prescribed in this clause.

11.4 For leaving the course midway :

11.4.1 The GDOs, who leave the DM/MCh Super Specialty Course midway either within the State or outside the State of H.P., shall stand debarred to re-appear as a sponsored candidate for pursuing DM/MCh Super Specialty Course for next five years, for both within the State and outside the State of H.P. The period of five years for the purpose of de-barring shall be reckoned from the date of leaving the course midway.

11.4.2 In case, the GDO who has been sponsored and treated as on duty (with full pay and allowances), leaves the course midway, the period involved shall be converted into/debited from Leave of Kind Due standing in his credit on the date on which he proceeded to join such course. If there is no sufficient leave of kind due in his credit that period may be treated as EOL and the payment made to the person for this period shall be recovered from

the candidates. In addition to this, the GDO shall have to pay Rs. 15 Lakhs in event of leaving the course midway as per terms of the bond.

11.4.3 In case of direct candidates who leave the course midway, they shall have to pay Rs. 15 lakh to the State Government as per the terms of the bond. Information in respect of such cases shall be sent to the DME by the concerned Principal along with bond documents.

12. Miscellaneous:

12.1 For the purpose of incentive, this Policy shall be applicable henceforth; meaning thereby the GDOs who have served in field postings in the past will be awarded incentive as per previous Notification dated 20-03-2017 (and amended from time to time) and any GDO who is serving/will serve in any field posting will be entitled for incentive as prescribed in this Policy from now onwards.

12.2 Keeping in view deficiency of Doctors in the peripherals postings and the problems being faced by the Resident Doctors pursuing Post Graduation in various colleges of the State, this Policy shall be applicable to every candidate pursuing post graduation (irrespective of year of joining) and all such candidates shall have to furnish a Bond as per this Policy and they shall also be entitled to avail concessions in this Policy like in terms of mandatory service and relaxation in FDR vis-à-vis previous policy in this regard. All such candidates shall within one month of the notification of the policy, submit bond as per this policy and the FDR shall be returned to the respective candidates thereafter. If any candidate fails to do so, the FDR already submitted shall be forfeited and appropriate action shall be initiated against the defaulting candidate.

12.3 The State Government reserves the right to alter/amend any provision in the PG Policy at any time/from time to time.

By order,

Sd/-

(R. D. DHIMAN),
Additional Chief Secretary (Health)."

7. As per clause 5.2 of aforesaid policy, NOC shall be issued to GDOs desirous of pursuing Post Graduation from the autonomous institutions for appearing in their entrance examination against the sponsored quota subject to the condition that he/she should be regular and should have three years of uninterrupted continuous services without any break or unauthorized absence Once, GDO after having obtained NOC appears in entrance examination as referred to above and gets selected, he with a view to avail sponsorship, is under obligation to furnish bond in terms of clause 6.1 of the Policy to the effect that he/she shall serve the State for mandatory period of five year after completion of respective course, failing which he/she shall pay sum of Rs.40.00 Lakh to the State government. Candidate concerned would furnish undated cheque from scheduled bank in the name of Director Health Services, which can be encashed by the Department, in case of violation of bond conditions. Besides above, candidate selected against sponsored quota is required to deposit his/her original degree with Director Health Services/DDHS, in case of direct candidates/ GDO's, which shall be released after completion of bond period or deposition of requisite amount. Apart from aforesaid condition, candidate selected against sponsored quota is also required to furnish undertaking as part of bond that he /she shall complete prescribed course, failing which he/she shall have to pay Rs.10.00 Lakh to the State Government for wastage of seat.

8. Clause 11.1.2 of the 2019 Policy specifically deals with the sponsorship of candidates against super-specialty courses. As per aforesaid clause, GDO seeking sponsorship besides being in regular service, should have completed the mandatory service of the State after Post Graduation as per clause 6.1 of

the Policy, if the candidate had pursued post graduation earlier as a sponsored candidate.

9. Once NOC to pursue super specialty course is granted in favour of candidate desirous of pursuing aforesaid course, against sponsored seat in autonomous institutions in terms of clause 11.1.2, he/she is under obligation to furnish bond in terms of terms and conditions of sponsorship for super-specialty course contained in Clause 11.3.1, which provides that candidates sponsored to pursue Super Specialty outside the State shall have to furnish a bond to serve the State for at least seven years after completion of their respective courses and in case he/she fails to serve the State in terms of aforesaid bond, he shall have to furnish an undated cheque from a scheduled bank amounting to Rs. 60 Lakh (Sixty Lakh) in the name of DHS (in case of GDOs) and or DME (in case of medical faculty/direct candidates), who shall be at liberty to get the cheque encashed in event of violation of the bond conditions.

10. In case, GDO sponsored for super-specialty course in autonomous institution fails to complete the course and leaves the course midway, he/she shall have to pay 15 Lakh in the event of leaving course midway.

11. If aforesaid Policies of the years 2017 and 2019 promulgated by the state of Himachal Pradesh for regulating admissions to various post graduation and super-specialty course in medical education within/outside the State are perused juxtaposing each other, it can be safely inferred that by and large, conditions contained in both the notifications are *pari materia* same, save and except the amount of the bond as well as period of mandatory service. The only major difference in aforesaid two policies is that in 2017 Policy, for pursuing super-specialty (DM/MCh) courses within and outside the State, all GDOs, who had done post-graduation during service were eligible for pursuing DM/MCh Courses without condition of serving the State after PG whereas, GDOs who joined State Health Services directly after PG course, were

under obligation to serve for two years for becoming eligible for DM/MCh course as sponsored candidate. Most importantly, in Clause 4.3 of the aforesaid 2017 Policy (Annexure B), it was provided that in case the GDO is selected for doing second PG course, he shall have to again furnish a bond to serve the State as provided in Clause 4.1 and in case the GDO is selected for doing second PG course during the bonded period of service, he/she shall have to serve the balance period of earlier bonded service in addition to the bonded service of second PG course as the duration of second PG course shall be excluded from the bonded period of service, meaning thereby GDO after having done his PG against sponsored quota though was under obligation to serve the State, for three years after completion of post graduation but in case, he was selected for super-specialty i.e. DM/MCh course during the existence of bonded period, he/she though was permitted to join super-specialty course of DM/MCH for next five years, but after having done such Super specialty course, he/she was to serve the balance period of earlier bonded service in terms of bond furnished by him /her at the time of taking admission in PG course in addition to seven years, which he was otherwise under obligation to serve the State in terms of bond furnished by him while taking admission in super-specialty course.

12. However, in the 2019 Policy, (Annexure P-3, aforesaid condition as contained in clause 4.3 of 2017 policy, is not incorporated, as a consequence of which, candidate after having completed post graduation course cannot apply for super-specialty course till the time, he/she serves the Department for at least 4 years including first mandatory field service after completion of his/her post graduate course.

13. Being aggrieved on account of non-incorporation of condition as contained in Clause 4.3 of the 2017 Policy in subsequent 2019 Policy and condition of mandatory service as provided under Clauses 6.1 and 11.1.2 of the 2019 Policy, petitioners have approached this court in the instant

proceedings, praying therein for the following main relief(s), as have been taken in CWP No. 2176 of 2021:

"i) A writ of mandamus may kindly be issued by directing the respondent authorities to issue sponsorship certificate/NOC as sponsor category candidate to apply and appear in the examination of Super Specialty curt (M.Ch) Urology at AIIMS in which last date for application closes on 07.04.2021; and/or

ii) A writ of mandamus may kindly be issued by directing the respondent authorities to issue NOC as sponsor category candidate to apply and appear in the examination of Super Specialty Course (M Ch) Urology at PGI MER, Chandigarh in which last date for application closes on 24.04.2021; and/or

iii) Issue a writ of certiorari quashing Annexure P-3 which is non beneficial and against the interest of the petitioner and candidates like petitioner at large; and /or

iv) Further issue a writ of mandamus directing respondent authorities to consider the Petitioner in 2017 policy in view of the amendment in June 2019 in 2019 Policy; and /or

v) Issue a writ of mandamus directing respondents to relieve the Petitioner from Zonal Hospital Mandi, if the petitioner is selected at AIIMS; and/or

vi) Issue a writ of mandamus directing respondents to relieve the Petitioner from Zonal Hospital Mandi, if the Petitioner is selected at PGI MER Chandigarh; and /or""

14. I have heard the parties and gone through the record.

15. Having heard Learned Senior Counsel/Counsel appearing for the parties and gone through the material available on record, this court finds that there is no dispute inter se parties that all the petitioners herein after

having done their MBBS/graduation in medical sciences, joined medical services in the State of Himachal Pradesh and they all subsequently, with a view to enhance their education and professional skills, did PG in their respective fields in terms of 2017 Policy, Annexure P-2. Petitioners, after having done their PG in respective fields have been serving State of Himachal Pradesh in terms of bonds executed by them at the time of their admission to PG courses against sponsored seats. It is also not in dispute that all the above named petitioners before being selected against sponsored seats of PG courses within or outside the State had been serving the State continuously, without there being any break, that is why, respondent-State in terms of 2017 Policy, granted NOC in their favour enabling them to pursue PG courses against sponsored quota within and outside the State in autonomous institutes.

16. In March, 2021, All India Institute of Medical Sciences (for short, 'AIIMS') New Delhi and Post Graduate Institute of Medical Education and Research (for short, 'PGI') Chandigarh, which are autonomous institutions, as per Clause 3.1.1 of 2019 Policy, issued prospectus for DM/MCh (*Magister Chirurgiae* or Master of Surgery) in various fields (Annexure P-5), inviting therein applications for admission in various super-specialty courses. Petitioners herein being in-service candidates applied for the super-specialty courses in the fields of Urology (Dr. Manoj Sharma), DM Nephrology (Dr. Varun Jaswal), DM Histopathology (Dr. Aarti Dhatwalia), MCh(Dr. Mahender Singh Rana) and Gastroenterology (Dr. Sohil Chuahan), against sponsored seats in terms of clause 11.1.2 of 2019 Policy i.e. Annexure P-3. Besides above, petitioners also applied to the respondents through proper channel seeking therein permission to appear as a sponsored candidate (Annexure P-7 of CWP No. 2176 of 2021), however, the fact remains that the respondents neither granted sponsorship to the petitioners nor rejected their cases, as such, petitioners apprehending that their prayer shall be rejected by respondents on account of conditions contained in Clauses 6.1 and 11.1.2 of

the 2019 Policy, wherein it is specifically provided that the GDO provided sponsorship besides being in regular and should have competed mandatory service of State as per Clause 6.1, approached this Court in the instant petitions seeking therein similar relief(s) as have been reproduced herein above.

17. Vide order dated 1.4.2021, Hon'ble Division Bench of this court, while issuing notice to the respondents, directed them to have instructions and posted the case(s) for 6.4.2021. On 6.4.2021, CMP No. 4281 of 2021 came to be filed on behalf of petitioner Manoj Sharma under Rule 13 Part II of Part C (Civil Writs) of the High Court of Himachal Pradesh (Original Side) Rules, 1997 read with Order VI, rule 17 CPC, seeking permission to amend the petition, since the representation having been made by the aforesaid petitioner to consider his case for sponsorship for pursuing super-specialty course in PGI Chandigarh came to be rejected. This court, while allowing aforesaid application, permitted the aforesaid petitioner to amend the petition and ordered that the amended writ petition be taken on record. Since despite repeated opportunities respondent-State failed to file reply to the main petition as well as stay application, i.e. CMP No. 4068 of 2021, this court vide order dated 6.4.2021, directed respondents to issue provisional NOC in favour of the petitioner Manoj Sharma to enable him to participate in the examination in question. However, the Court, while passing aforesaid order, clarified that issuance of provisional NOC shall abide by the final decision of the writ petition and issuance of NOC shall not create equities in favour of the petitioner in case of his being declared successful in the examination. Records of all the writ petitions captioned herein above, reveal that similar direction to issue provisional NOC in favour of all other petitioners also came to be passed by this Court, whereafter, all the petitioners participated in the examination and have been declared successful. All the petitioners competed with thousands of candidates, who had applied for super-specialty courses and

have been declared successful. Since the petitioners appeared in the examination for admission to super-specialty courses on the strength of provisional NOCs issued by respondents in terms of interim direction issued by this court and they after being declared successful, have not been granted NOC for being considered as sponsored candidates, they are unable to complete the formalities of their admission in super-specialty courses at PGI MER Chandigarh and AIIMS New Delhi. Since the petitioners herein are required to complete formalities and furnish NOC issued in their favour by respondent-State for being considered as sponsored candidates, on or before 20.7.2021, all these petitions came to be listed before me for hearing on urgent basis.

18. Mr. B.C. Negi and Mr. Sanjeev Bhushan, learned Senior Advocates alongwith other learned Advocates, while representing petitioners herein vehemently argued that the 2019 Policy, framed by the respondent State for regulating admissions to various PG/super-specialty courses in medical education, in and outside the State, is non-beneficial and against the interests of petitioners as well as other similarly situate persons, who otherwise have been regularly serving the State of Himachal Pradesh after doing their graduation in medical sciences. Above named learned senior counsel while referring to Clauses 6.1 and 11.1.2 of 2019 Policy, vehemently argued that the very purpose and object of the policy are to ensure that the doctors studying at the expenditure of Government serve the State and its public, after having acquired expertise in their fields so that the money spent by the Government on their studies is not wasted and special skill /knowledge acquired by the doctors at the expense of the Government is put to use for the benefit of the public at large. Learned senior counsel while making this court peruse the record, submitted that from day one all the petitioners have been serving the State without there being any interruption, regularly and they otherwise are under obligation to serve the State in terms of the bonds furnished by them at

the time of their admission in MBBS course, PG course and Super-specialty course. While referring to Clause 4.3 of the 2017 policy, learned counsel representing the petitioners contended that in the year 2017 Policy, respondent-State with a view to equip its doctors with latest education/knowledge in the field of medical sciences had made a specific provision for admission of doctors in super-specialty courses after theirs having completed PG course. Vide aforesaid Clause, doctors after having completed their PG courses, though could apply for super-specialty courses during subsistence of their earlier bond furnished at the time of admission to PG course, but after completion of super-specialty they were to serve the balance period of earlier bonded service in addition to the bonded service of DM/MCh course and in such eventually, no loss, if any, could be said to have been caused to anyone.

19. Learned Senior counsel representing the petitioners, while assailing condition of minimum service as contained in Clause 6.1 of 2019 Policy, contended that the condition of minimum service as contained in Clauses 6.1 and 11.1.2 of the 2019 POlicy. if examined/tested, vis-à-vis the loud object and purpose of permitting in-service candidates to pursue super-specialty courses, it can be safely held that the conditions of minimum service contained in Clauses 6.1 and 11.1.2, is neither in the benefit of doctors aspiring to enhance their skills by doing super-specialty courses nor the public at large, who otherwise in the event of petitioners acquiring special skill after doing super-specialty course, would be benefited immensely.

20. Lastly, learned senior counsel for the petitioners contended that the petitioners who are serving the State uninterruptedly, are ready to give undertaking that they. after completing their super-specialty courses would not only serve the department for seven years in terms of bond to be executed by them at the time of completion of super-specialty course, but would also complete the remaining period of bond earlier executed by them at the time of

admission to post-graduation course. Besides above, learned senior counsel representing petitioners, made available copies of judgments passed by this court in CWP No. 2112 of 2020, titled Dr. Lucky Kumar vs. ACS and others, CWP No. 941 of 2019, State of Himachal Pradesh versus Kunal Kumar and others, decided 20.5.2019 and CWP No. 4591 of 2020, Nipun Kumar vs. State of Himachal Pradesh to demonstrate that pursuant to aforesaid judgment, candidates who were yet to complete their bonded service have been granted NOC's by the respondent-State and as such, being similarly situate, they also deserve similar treatment.

21. Mr.Ajay Vaidya, learned Senior Additional Advocate General, while opposing aforesaid prayer made on behalf of the petitioners, vehemently argued that the condition of minimum service as envisaged in Clauses 6.1 and 11.1.2 of the 2019 Policy, have been specifically provided in the Policy keeping in view the larger public interest and as such, no illegality or infirmity if any, can be found in the same. Mr. Vaidya further argued that otherwise also question with regard to imposing condition of service and bond by respondent-State while granting NOC for admission in medical colleges and sponsoring candidates for super-specialty courses has been upheld by Hon'ble Apex Court in many cases as such, there is no occasion for this court to re-examine this matter, which otherwise stands duly settled. Mr. Vaidya, further contended that since 2017 Policy stands superseded by 2019 Policy, no benefit, if any can be derived by the petitioners in terms of Clause 4.3 of the 2017 Policy, especially when they all at the time of their admission to PG courses have furnished bond undertaking therein that after doing PG courses on public expenses, they shall serve the Department uninterruptedly for four years or in the breach of said condition shall pay Rs.40.00 Lakh to the State government. Mr. Vaidya further contended that all the petitioners after completion of their post-graduation have not completed four years and as such, not entitled to sponsorship to pursue super-specialty courses in terms of Clause 11.1.2,

which otherwise provides that the GDO seeking sponsorship should be regular and should have completed mandatory service of the State after PG, as per Clause 6.1.

22. Lastly, Mr. Vaidya, learned Senior Additional Advocate General contended that since the Hon'ble Division Bench in CWP No. 3184 of 2020 titled Satish Kanwar vs. State of HP decided on 27.8.2020, CWP No. 602 of 2020 titled Mandeep Tomar vs. State of Himachal Pradesh, decided on 14.9.2020 and CWP No. 1968 of 2007, State of Himachal Pradesh vs Dr. Sanjay Vikrant, decided on 20 December, 2007, has already upheld condition of minimum service contained in Clause 6.1, this court is estopped from examining the legality and validity of aforesaid Clause in the instant proceedings.

23. Mr. Vaidya, learned Senior Additional Advocate General fairly admitted that pursuant to the direction issued by this Court, to grant provisional NOC in certain cases, respondent-State in terms of judgment dated 3.7.2020 passed in CWP No. 2112 of 2020 titled Dr. Lucky Kumar vs. Additional Chief Secretary (Health) and others, CWP No. 941 of 2019 State of Himachal Pradesh vs. Kunal Kumar and another, decided on 30.5.2019, CWP No. 4591 of 2020, Nipun Kumar vs. State of Himachal Pradesh have already issued NOC's for being considered as sponsored candidates, despite theirs having not completed the mandatory service in terms of Clause 6.1 of 2019 Policy.

24. Pleadings available on record reveal that the respondent-State has filed short-reply affidavit in CWP 4591 of 2020 titled Nipun Sharma vs. State, CWP No. 2279 of 2021, Mahender Singh Rana vs. State of Himachal Pradesh, wherein while referring to Clauses 6.1 and 11.1.2 of the 2019 Policy they have stated that since the petitioner(s) underwent the Course within the State, they are required to serve State for four years after completion of course including first year of mandatory field posting to become eligible for grant of NOC and pursuing super-specialty course. Besides above, respondents have also stated

in their reply that sponsorship is a special policy of the State Government to provide super-specialty services in the State and intention of policy makers behind providing provisions of mandatory service is to ensure uninterrupted service of super-specialists in the State in the larger interest of State.

25. Before ascertaining correctness of submissions /counter-submissions made on behalf of learned counsel for the parties, this court deems it necessary to deal with judgment dated 27.8.2020 in case titled Satish Kanwar vs. State of HP CWP No. 3184 of 2020, judgment dated 14.9.2020 in CWP No. 602 of 2020 titled Mandeep Tomar vs. State of Himachal Pradesh and judgment dated 20.12.2007 in CWP No. 1968 of 2007, titled State of Himachal Pradesh Vs. Dr. Sanjay Vikrant.

26. Though learned Senior Additional Advocate General, while making this Court peruse the judgments supra, made a serious attempt to persuade this court to agree with his contention that since the legality and validity of Clauses 6.1 and 11.1.2 of the 2019 Policy, have been already examined/dealt with by Division Bench of this Court, this court has no occasion to re-examine the same, but having carefully perused the aforesaid judgments rendered by Division Bench of this Court, this court is not persuaded to agree with Mr. Vaidya, learned Senior Additional Advocate General. Bare perusal of judgments supra reveals that at no point of time, challenge, if any, ever came to be laid to the conditions contained in Clauses 6.1 and 11.1.2 of the Policy, rather, in cases titled Satish Kanwar and Mandeep Tomer (supra), petitioners therein approached the Court on account of refusal by State to grant NOC to pursue senior residency and to apply for the post(s) of Assistant Professor(s) in AIIMS Delhi, however, Division bench having taken note of Clause 6.1 of the Policy, wherein specific condition of mandatory service is provided, refused to interfere, but did not give any specific finding with regard to the legality and correctness, if any, of the condition of mandatory service provided in Clauses 6.1 and 11.1.2. Similarly, in the cases of Dr. Sanjay Vikrant and Mandeep

Tomer (supra), Division Bench upheld the decision of respondents not to grant NOC to the petitioners concerned for the reason that they both intended to leave their service in the State of Himachal Pradesh despite having executed bond to serve for the minimum period, and wanted to apply for the post(s) of Assistant Professor(s) in AIIMS Delhi and AIIMS Bilaspur, respectively. Petitioners in both the above captioned cases, never sought NOC(s) to pursue higher studies/super-specialty courses, rather, they wanted respondents to issue NOC in their favour, enabling them to join as Assistant Professor(s) in other institutions, but since they had executed bond to serve the State for the specified period, they were denied the NOCs by the respondent-State.

27. Case of the petitioners herein, is altogether different to the cases (supra) decided by Division Bench of this Court. Petitioners herein after having done their PG courses as sponsored candidates from the institutions within and outside the State, served the respondent-State for more than two years, in terms of bond executed by them at the time of admission to PG course and now they intend to do specialization in their respective fields as sponsored candidates. But since they have not completed the mandatory period of 4/5 years in terms of the bonds executed by them at the time of taking admission in PG course, they are not being issued the NOC sfor being considered as sponsored candidate for taking admission in super-specialty courses.

28. Though, Hon'ble Division Bench of this court in judgments referred to by learned Senior Additional Advocate General has not gone into legality of Clauses 6.1 and 11.1.2 of the 2019 Policy, as such, this Court is not estopped from examining that issue but since issue with regard to imposition of condition of mandatory service and execution of bond by respondents while granting admissions to various courses in medical education, stands upheld by Hon'ble Apex Court in **Assn. of Medical Superspeciality Aspirants & Residents** v. **Union of India,** 2019 8 SCC 607, there is no necessity at all for this court to apply its mind on this issue. Hon'ble Apex court in the aforesaid

judgment, has categorically held hat once there is no provision in the Medical Council of India Act touching upon the subject matter of compulsory bonds, States are free to legislate on the subject matter of medical bonds. Executive authority of the State Government is co-extensive with that of the legislative power of the State Legislature. Even in the absence of any legislation, the State Government has the competence to issue executive orders under Article 162 of the Constitution on matters over which the State legislature has the power to legislate. The Notifications issued by the State Governments imposing a condition of execution of compulsory bonds at the time of admission to post-graduate courses and super-specialty courses cannot be said to be vitiated due to lack of authority or competence. Besides above, in aforesaid judgment it has been held that condition imposed for admission to medical colleges will not violate the right of an individual to carry on his profession. The right to carry on the profession would start on the completion of the course. At the outset, there is no doubt that no right inheres in an individual to receive higher education. Violation of a right guaranteed under Article 19(1)(g) does not arise in a case pertaining to admission to a college. However, while upholding decision of respondent State to impose condition of execution of bond at the time of admission, Hon'ble Apex Court has categorically held that the period of compulsory service and exit should be reasonable. In the aforesaid judgment Hon'ble Apex Court directed State Governments and the Armed Forces Medical College to consider imposing condition of compulsory service period of two years, in default of which doctors shall compensate the Government by paying Rs.20.00 Lakh. Relevant paragraphs of the judgment (supra) are reproduced here-under:

> "I. Jurisdiction of the State Government:
>
> 17. Schedule VII List 1 Entry 66 of List I of the 7th Schedule to the Constitution refers to coordination and determination of standards in institutions for higher education or research and scientific and

technical institutions. Entry 25 of List III of the 7 th Schedule deals with education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I. Legislations can be made by the State Legislature relating to medical education subject to the legislation made by the Parliament. The Medical Council of India Act governs the field of medical education in this country. Admittedly, there is no provision in the Medical Council of India Act touching upon the subject matter of compulsory bonds. Therefore, the States are free to legislate on the subject matter of medical bonds. Executive authority of the State Government is co-extensive with that of the legislative power of the State Legislature. Even in the absence of any legislation, the State Government has the competence to issue executive orders under Article 162 of the Constitution on matters over which the State legislature has the power to legislate. The Notifications issued by the State Governments imposing a condition of execution of compulsory bonds at the time of admission to post- graduate courses and super Speciality courses cannot be said to be vitiated due to lack of authority or competence. The field of bonds requiring compulsory employment is not covered by any Central Legislation. Therefore, the submissions made on behalf of the Appellants that the States lacked competence to issue the notifications as the field is occupied are rejected.

II. Violation of Fundamental Right

Article 14

A. Arbitrariness

18. The Appellants are aggrieved by the decision of the State Governments imposing conditions for their admission in the post-graduate courses and super Speciality courses. According to them, the State Governments have understood the decision of this Court in Harsh

Pratap Sisodia (supra) to be a restraint on the exercise of their power in matters relating to eligibility criteria for admission to medical course. Suddenly, the introduction of the compulsory bonds after 15 years of the judgment in Harsh Pratap Sisodia (supra) is the result of decision taken by the State Governments which is dubbed by the Appellants as arbitrary. This Court in Harsh Pratap Sisodia (supra) was concerned with the additional eligibility criteria being introduced by the State Governments for the 15% All India Quota students. The decision taken by the State Governments to impose a condition of compulsory bond for admission to post-graduate courses and super Speciality is on the basis of relevant material. Huge infrastructure has to be developed and maintained for running medical colleges with post-graduate and super Speciality courses. The amount of fees charged from the students is meagre in comparison to the private medical colleges. Reasonable stipend has to be paid to the doctors. Above all, the State Governments have taken into account the need to provide health care to the people and the scarcity of super specialists in their States. Consequently, a policy decision taken by the State Governments to utilize the services of doctors who were beneficiaries of Government assistance to complete their education cannot be termed arbitrary.

B. Reasonableness:

19. Reasonableness is a ground that pervades through the submissions made by the counsel on both sides. In the State of West Bengal, the requirement of a compulsory bond was initially a service of one year in the State in default of Rs.10 Lakhs was to be paid. This was enhanced to three years and Rs.30 Lakhs by a Notification dated 09.10.2014. In the State of Tamil Nadu, the bond condition was that a doctor has to serve for ten years in the State and in default of which, the doctor was to pay Rs.2 Crores. This was reduced to two years and

Rs.50 Lakhs. The Armed Forces Medical College imposes a condition of five years compulsory service in the Army for post-graduate and super Speciality doctors who prosecuted their study in the college. They have an option of not serving for five years by recompensing the Government by paying Rs.25 Lakhs. The main contention of the counsel appearing for the Appellants is that the condition of a long period of service that is imposed is unreasonable. The basis for the submission is that they have already served the society by working in Government hospitals while undergoing their course. Further conditions imposed on them would impede the progress of their careers. Restrictions placed on their choice of place of work are also unreasonable according to them. An alternate submission made by the counsel appearing for the Appellants is that the imposition of the condition of compulsory bond should be reasonable and the exit clause should be relaxed. Notifications issued by the State Governments imposing a condition of compulsory service and a default clause are per se not unreasonable. However, we are in agreement with the learned counsel for the doctors that the period of compulsory service and the exit should be reasonable. The State Governments and the Armed Forces Medical College are directed to consider imposing the condition of compulsory service period of two years in default of which the Doctors shall recompense the Government by paying Rs. 20 Lakhs. Article 19:"

29. It is quite apparent from aforesaid law laid down by Hon'ble Apex Court that though the State, while granting admission in various streams of medical sciences, is well within its right to impose condition of compulsory service so that a person who becomes doctor at the expense of State is made to serve the society for specified period but the Hon'ble Apex Court in the aforesaid judgment has categorically held that condition of compulsory service should

be reasonable. Similarly, though the action of State Government compelling candidates seeking admission in medical colleges to execute bond for serving State for a minimum period after completion of course failing which to pay specified amount, has been upheld by Hon'ble Apex Court, but it has been categorically held in the aforesaid judgment that the amount of bond should be reasonable.

30. In the case at hand, pleadings adduced on record by the petitioners, if are read in their entirety vis-à-vis the prayer(s) made in the petitions, nowhere suggest that there is a direct challenge, if any, to the condition of mandatory service provided under Clauses 6.1 and 11.1.2, rather, petitioners are aggrieved by period of mandatory service as provided under Clause 11.1.2, which though enables GDO to seek sponsorship to pursue super-specialty course after completion of PG course, but subject to his/her having completed mandatory service in terms of bond executed by him/her at the time of admission to post graduation course.

31. There cannot be any quarrel with the condition of mandatory service as has been envisaged under Clause 6.1 of the 2019 Policy, which provides that every GDO (regular or contract), who has been sponsored to pursue PG in Government Medical/Dental colleges shall have to furnish a bond to serve the State for at least five years after completion of his course but period of mandatory service cannot be unreasonable.

32. Though Clause 11.1.2 enables candidates having PG degree to seek sponsorship to pursue super-specialty course but not before completion of mandatory service in terms of bond executed by him/her as per Clause 6.1. As has been taken note herein above, there is no direct challenge to Clause 6.1 of the 2019 Policy, by the petitioners in the instant petitions, but once they are aggrieved by conditions contained in Clause 11.1.2, this court necessarily needs to look into the reasonableness of condition of mandatory service as provided under Clause 6.1.

33. In **Assn. of Medical Superspeciality Aspirants & Residents** (supra), in the State of West Bengal, there was a requirement of compulsory bond of initial service of one year and in default to pay Rs.10. Lakh, however, same was subsequently enhanced to 3 years and Rs.30 Lakh by Notification dated 9.10.2014. In the State of Tamilnadu, bond condition was that a doctor has to serve for ten years and in default to pay Rs.2.00 Crore, however, subsequently these were reduced to two years and Rs.50 Lakh, respectively. Similarly Armed Forces Medical College imposed condition of mandatory service of five years for pursuing PG and super-specialty courses, by the doctor who prosecuted studies in college and in the event of default to pay Rs.25.00 Lakh.

34. Hon'ble Apex Court though upheld the imposition of condition of compulsory bond by the State Governments and Armed Forces Medical College, but categorically held that the period of compulsory service and exit should be reasonable.

35. In the case at hand, though the respondent-State is well within its right to impose condition of mandatory service while sponsoring in-service candidates for super-specialty courses against sponsored quota but as has been held by Hon'ble Apex Court in judgment supra, period of compulsory service should be reasonable.

36. In the case at hand, perusal of Clause 6.1 suggests that the GDOs sponsored to pursue PG within State in Government Medical Colleges/Government Dental Colleges are required to furnish bond to serve the State for four years including mandatory first year posting in the field, failing which to pay Rs.40.00 Lakh to the State Government and GDO sponsored for PG outside the State on sponsored quota seats of autonomous institutions is required to furnish bond to serve the State for five years including mandatory first year of field posting after completion of his/her respective course, and in default to pay Rs.40.00 Lakh.

37. Similarly, perusal of Clause 11.1.2 of the 2019 Policy reveals that the candidates seeking sponsorship to pursue super-specialty courses are required to serve the Department for seven years after completion of super-specialty courses in terms of Clause 11.3.1 and in default to pay Rs.60.00 Lakh. On the top of everything condition of mandatory service as provided under Clause 11.1.2, which provides for sponsorship to candidate who wishes to pursue super-specialty course, is highly unreasonable because candidate seeking admission to super-specialty course after having done post graduation course is required to serve the Department mandatory for a period of four years in case he was sponsored to pursue PG within State whereas, candidate who is sponsored for PG outside the State is under obligation to serve state for at least five years and in default to pay Rs.40.00 Lakh.

38. Since the Apex Court vide judgment dated 19.8.2019 (supra), has already directed the State Governments and the Armed Forces Medical College to consider imposing condition of two years, in default of which doctor shall compensate the Government by paying Rs.20.00 Lakh, condition as provided under Clause 6.1 requiring a GDO (regular/contract) to serve at least for four years /five years after having done PG cannot be allowed to sustain, rather by now, the respondents, in terms of directions of Apex Court should have amended Clause 6.1 by reducing period of mandatory service and amount of bond.

39. In the aforesaid judgment, Hon'ble Apex Court having taken note of period of mandatory service fixed by State of West Bengal, State of Tamil Nadu and Armed forces Medical College, wherein periods of three years, ten years and five years were provided, directed the State governments and the Armed Forces Medical College to consider imposing of condition of mandatory service of two years and in default to pay amount of Rs.20.00 Lakh. Hence, condition of mandatory service of four/five years provided in Clause 6.1 deserves to be quashed, as a consequence of which condition of mandatory service as

contained in Clause 11.1.2, which provides for sponsorship to the candidates, who wish to pursue super-specialty courses, cannot be pressed and candidates who have already rendered mandatory service of more than two years after completion of their PG course pursuant to bonds executed by them at the time of their admission cannot be denied sponsorship in case they are otherwise eligible.

40. As has been categorically held by Apex Court and observed by this Court in para supra, respondent-State is well within its right to impose condition of mandatory service and execution of bond, while granting admission in various streams of medical sciences but period of such mandatory service and amount of bond prescribed under the policy have to be reasonable and definitely same cannot be unreasonable/arbitrary.

41. No doubt, decision taken by State government to impose condition of bond for admission to PG and super-specialty courses is on the basis of relevant material, huge infrastructure is to be maintained for running college with PG and super-specialty courses and amount of fee charged from the students is meager, in comparison to private medical colleges. State government having taken into account need to provide medical facilities to its people and super-specialists in the State, have taken a policy decision to sponsor its doctors for higher education so that subsequently the service of the doctors, who are beneficiaries of Government assistance to complete their education, are put to the benefit of the general public, but at the same time, State, while providing opportunity to the doctors to enhance their expertise, knowledge and skills, cannot impose conditions which are highly arbitrary, unreasonable and can cause undue pressure on the doctors pursuing higher studies being sponsored candidates.

42. Otherwise also it is the obligation of the State under the Constitution to ensure the creation of conditions necessary for good health including provisions for basic curative and preventive health services and assurance of

healthy living and working conditions. Under Articles 39(e), 39(f) and 42 of the Constitution, obligations are cast on the State to ensure health and strength of workers, men and women; ensure children are given opportunities & facilities to develop in a healthy manner and to secure just & humane conditions of work and for maternity relief, respectively. Article 47 of the Constitution makes improvement of public health a primary duty of the State hence, it is bounden duty of State to provide best health care system to the public at large. It is otherwise duty of the State to provide special education/latest education and exposure to latest technology to its doctors rendering services in various medical hospitals. No doubt, while providing special education/advance education, State may have to incur some expenses but to recover such amount, doctors who pursued their higher studies being sponsored candidates, cannot be put to undue hardships by imposing unreasonable and unrealistic conditions in the bonds supposed to be executed by them at the time of their admission to the super-specialty courses.

43. No doubt, while providing special education, /advance education, State may have to incur some expenses but that cannot be recovered from the doctors who were sponsored by it to pursue PG and super-specialty courses. Art. 21 of the Constitution of India. imposes an obligation on the State to safeguard right to life of every person. Preservation of human life is of paramount importance. Government hospitals being run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human, life. Failure on the part of Government hospitals to provide timely medical treatment to a person in need of such treatment results in violation of his right guaranteed under Art. 21 of the Constitution of India **(See: Paschim Banga Khet Mazdoorsamity** vs **State Of West Bengal & Anr** (1996) 4 SCC 37 (Paras 9 and 16). In a 'Welfare State', it is the obligation of the State to ensure creation of sustainable conditions congenial to good

health, including provision of super-specialties so that people are not made to run from pillar to post to get medical treatment.

44. True it is that the State with a view to ensure that the doctors sponsored by it for PG /Super specialty courses are made to serve the State, can bind them to serve the State for specified period but such period, as has been held by apex Court, can be reasonable and not unreasonable.

45. Apex Court in **Modern Dental College & Research Centre** v. **State of M.P.** (2016) 7 SCC 353, has held that maintenance and improvement of public health and to provide health care and medical services is the constitutional obligation of the State. To discharge this constitutional obligation, the State must have the doctors with professional excellence and commitment who are ready to give medical advice and services to the public at large. State can satisfactorily discharge its Constitutional obligation only when the aspiring students enter into the profession based on merit. Paragraphs 171 and 172 of the judgment (supra) may be profitably extracted herein below:

> "171. It is the obligation of the State under the Constitution to ensure the creation of conditions necessary for good health including provisions for basic curative and preventive health services and assurance of healthy living and working conditions. Under Articles 39(e), 39(f) and 42 of the Constitution, obligations are cast on the State to ensure health and strength of workers, men and women; ensure children are given opportunities & facilities to develop in a healthy manner and to secure just & humane conditions of work and for maternity relief, respectively. Article 47 of the Constitution makes improvement of public health a primary duty of the State. However, right to health is no longer in the sole domain of Part IV of the Constitution. In Kirloskar Brothers Ltd. v. Employees' State Insurance Corp. (1996) 2 SCC 682, it was held that right to health is a fundamental right of

workers and the maintenance of health is most imperative constitutional goal whose realization requires interaction of many social and economic factors. In Rajasthan Pradesh Vaidya Samiti, Sardarshahar and another v. Union of India and others (2010) 12 SCC 609, this Court held that the citizens of this country have a right under Article 21 of the Constitution of India which includes the protection and safeguarding the health and life of public from mal-medical treatment. More recently in Centre for Public Interest Litigation v. Union of India (2013) 9 SCR 1103, again this Court has recognized that right to life under Article includes right to health.

17.2 Maintenance and improvement of public health and to provide health care and medical services is the constitutional obligation of the State. To discharge this constitutional obligation, the State must have the doctors with professional excellence and commitment who are ready to give medical advice and services to the public at large. State can satisfactorily discharge its constitutional obligation only when the aspiring students enter into the profession based on merit. None of these lofty ideals can be achieved without having good and committed medical professionals."

46. Very purpose and object of formulating policy to sponsor candidates to pursue super-specialty courses are to provide better health services to the public at large and aforesaid object and purpose can only be achieved if doctors serving the State are given opportunity at first instance to hone their professional skills by undergoing super-specialty courses from premier institutes. Though Clause 11.1.2 provides an opportunity to GDOs having PG degree to take admission in super-specialty courses as sponsored candidates

but before doing so, they are compelled to have completed mandatory service of four/five years on account of theirs having furnished bond at the time of taking admission in PG course in terms of aforesaid Policy. Though stand of the respondent State is that once it has spent huge amount to give opportunity to its doctors to do PG, they are under obligation to serve the State for some time so that money spent thereupon is compensated but if the aforesaid condition of mandatory service of four/five years before seeking admission in super-specialty course is invoked/pressed, in case of candidates who want to pursue super-specialty courses, very purpose and object of the policy shall be defeated. As has been observed herein above, very purpose and loud object of policy is to provide super-specialists to the public at large, which otherwise is/are required to be provided at the first opportunity. In case post-graduates are made to wait for five years, to apply for super-specialty course, it is not only State which would be deprived of services of super-specialists for some time. Candidate seeking admission in super-specialty course would also lose opportunity to have admission in super-specialty course at the first opportunity.

47. This court cannot lose sight of the fact that it is always easy to have education in continuation. Once break comes in education, it is always difficult to retrieve such rhythm/zeal and same may be lost forever. Say an in-service candidate gets an opportunity to do PG course at the age of 30, he would require three years to complete post-graduation course, that means, he would be post graduate by 33 and in case, he is made to render mandatory service of five years before seeking admission in super-specialty course, in terms of bond executed ay him /her at the time of admission to post graduation course, he/she would turn 38 by which time, he/she shall neither have the enthusiasm to study nor the capacity to put in hard work and as such, very object and purpose of policy to provide better education to its doctors are defeated.

48. To the contrary, if a person after having completed his post graduation is permitted to pursue super-specialty course he/she would not only become super-specialist after 7-8 years of his having taken admission in PG course, rather, he/she would be more enthusiastic and capable of honing his professional skills. But if a post-graduate is made to wait for 4-5 years, to apply for super-specialty course in terms of policy formulated by the Government, he would not only become overage but it would be difficult for him to concentrate on account of his/her domestic responsibilities.

49. With the formulation of the Policy there is louder purpose to be achieved, inasmuch, in-service candidates, on attaining higher academic achievements, would be available to be posted in rural areas by the State Government. It is not that an in-service candidate would leave the service merely on account of having secured a PG degree or diploma though secured by virtue of being in the service of the State Government. To alley the same, there is a provision of execution of bond, whereby candidate pursuing PG and super-specialty course is under obligation to serve the State Government for some particular period. But as has been held by Apex Court, period of mandatory service and amount of bond conditions are to be reasonable. If period of mandatory service and amount of bond are reasonable, there is perceptible reasonable nexus between the classification and the object sought to be achieved. . In-service candidates, and the candidates not in the service of the State Government, are two classes based on an intelligible differentia. An in-service candidate may be away from theories but still he needs to be assessed as eligible for PG and super-specialty courses so that he updates himself regularly and thereafter serves the public at large with advanced education and latest technology. Reliance is placed upon **State of M.P.** v. **Gopal D. Tirthani** (2003) 7 SCC 83, wherein Hon'ble Apex Court has held as under:

"21. To withstand the test of reasonable classification within the meaning of Article 14 of the Constitution, it is well settled that the classification must satisfy the twin tests: (i) it must be founded on an intelligible differentia which distinguishes persons or things placed in a group from those left out or placed not in the group, and (ii) the differentia must have a rational relation with the object sought to be achieved. It is permissible to use territories or the nature of the objects or occupations or the like as the basis for classification. So long as there is a nexus between the basis of classification and the object sought to be achieved, the classification is valid. We have, in the earlier part of the judgment, noted the relevant statistics as made available to us by the learned Advocate-General under instructions from Dr Ashok Sharma, Director (Medical Services), Madhya Pradesh, present in the Court. The rural health services (if it is an appropriate expression) need to be strengthened. 229 community health centres (CHCs) and 169 first-referral units (FRUs) need to be manned by specialists and block medical officers who must be postgraduates. There is nothing wrong in the State Government setting apart a definite percentage of educational seats at postgraduation level consisting of degree and diploma courses exclusively for the in-service candidates. To the extent of the seats so set apart, there is a separate and exclusive source of entry or channel for admission. It is not reservation. In-service candidates, and the candidates not in the service of the State Government, are two classes based on an intelligible differentia. There is a laudable purpose sought to be achieved. In-service candidates, on attaining higher academic achievements, would be available to be posted in rural areas by the State Government. It is not that an in-service candidate would leave the service merely on account of having secured a postgraduate degree or diploma though secured by virtue of being in the service of the State

Government. If there is any misapprehension, the same is allayed by the State Government obtaining a bond from such candidates as a condition precedent to their taking admission that after completing PG degree/diploma course they would serve the State Government for another five years. Additionally, a bank guarantee of rupees three lakhs is required to be submitted along with the bond. There is, thus, clearly a perceptible reasonable nexus between the classification and the object sought to be achieved.**"**

50. As has been stated herein above, there cannot be any quarrel with the authority of the respondent State to compel/ask candidates seeking admission to various streams of medical sciences to execute bond undertaking therein to serve the State for a specified period and in default to pay some amount, after completion of diploma/degree/super-specialty course, but period of mandatory service and amount of bond cannot be unreasonable.

51. In the case at hand, period of mandatory service provided under Clause 6.1, by no stretch of imagination can be said to be reasonable and as such, same deserves to be reduced to two years, as has been directed by Apex Court in judgment supra. If it is so, petitioners herein who have served the State for more than two years after their having completed PG course, are entitled to be granted NOCs for pursuing super-specialty courses in autonomous institutions like AIIMS and PGI Chandigarh.

52. Though it is the domain of respondent-State to incorporate or delete conditions in Policy regulating admissions to PG and super-specialty courses but having taken note of Clause 4.3 of 2017 Policy, this court wishes to observe that the respondent-State while refixing the mandatory period of service in terms of Clause 6.1 may also consider incorporating condition that in case GDO is selected for doing second PG course and super-specialty course during bonded period of service, he/she shall have to serve earlier

period in addition to the bonded period of PG and super-specialty courses. In the case at hand, petitioners have categorically stated before this court that once they are permitted to pursue super-specialty course, they shall serve the State for seven years in terms of bond to be executed by them, pursuant to their admission in super-specialty course in addition to mandatory service they are /were required to render in terms of bond executed by them, at the time of admission to PG course.

53. It is not the case of respondent State that in case the petitioners and other similarly situate persons are sent to pursue super-specialty courses, there would be none to serve the general public. In the short reply filed to the petition, respondents have simply stated that sponsorship is a special policy of the Government in a bid to improve specialist/super-specialist services in the State and further to provide best possible medical facilities to the people in the largest interests of the patients. It has been further averred in the reply that the intention of the policy makers behind keeping provisions for mandatory service is also to ensure the uninterrupted service of specialists in the State in the larger public interest. It is not mentioned in the short reply that at present no doctors are available in the specialties, where petitioners are rendering their services as post graduates and in case they are sent for pursuing super-specialty courses, public at large would suffer rather, this court is of the view that once the petitioners who are brilliant, are provided an opportunity to pursue super-specialty courses, they would be an asset to the State, and as has been undertaken by them, they would serve the State for the requisite bond period.

54. This court can take judicial note of the fact that there is dearth of doctors in the state of Himachal Pradesh. What to talk of super-specialists, hospitals like IGMC and Dr. RPGMC, Tanda do not have the adequate faculty to serve the public at large. Besides above, respondent-State has opened five new colleges, which are being run by the faculty appointed on contract basis

and as such, it would be expedient and in the interest of public at large, that more and more doctors are sent for super-specialty courses so that people of the State are not compelled to go to Chandigarh or Delhi for their medical treatment.

55. Once the writ petitioners are allowed to improvise and galvanize their skills , the State would be immensely benefited. It is not in dispute that all the petitioners herein have competed on all India basis and have secured higher positions in merit list of their respective fields, that too in premier institutions like AIIMS and PGI and as such, it would be sheer injustice to the petitioners in case, they are not allowed to join pursuant to the conditions contained in the 2019 Policy, which otherwise appear to be totally contrary to the object sought to be achieved by the Policy. Moreover, it has come to the notice of the court that the respondent-State, while considering applications for grant of NOCs, has not been very fair rather, has adopted a pick and choose method. In case of certain candidates, who had approached this court and who were granted permission to participate in the examination, respondent-State has already given permission and those candidates on the basis of such permission(s) are already pursuing super-specialty and PG courses and as such, it would not be fair in case the petitioners, who being extremely brilliant got admission in premier institutions, are denied opportunity to take admission in AIIMS/PGI.

56. Consequently in view of the detailed discussion made herein above, though this court sees no reason to interfere with the 2019 Policy formulated by the State of Himachal Pradesh for regulating admissions to various PG/super-specialty courses within and outside State, as a whole, but for the condition of mandatory service of the State for 4/5 years as provided in Clauses 6.1 and 11.1.2 of the 2019 Policy, qua which this court directs the respondent-State to amend the same by reducing the mandatory period of service from four/five to two years by making appropriate amendment(s) in

Clauses 6.1 and 11.1.2 of the 2019 Policy, strictly in compliance with judgment of Apex Court in **Assn. of Medical Superspeciality Aspirants & Residents** v. **Union of India,** 2019 8 SCC 607. Ordered accordingly.

57. Since in these petitions, all the petitioners have completed two years bonded service under the State, they are held entitled to be issued NOC/sponsorship for undergoing PG/super-specialty courses in the respective institutions, which shall be issued in their favour, positively on or before 20.7.2021.

All the petitions stand disposed of in the afore terms, alongwith all pending applications.

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

Between:-

GABRIEL INDIA LIMITED,
A COMPANY DULY INCORPORATED UNDER COMPANY'S ACT,
HAVING ITS REGISTERED OFFICE AT
29TH MILE STONE, PUNE NASHIK HIGHWAY,
VILLAGE KURULI, TALUKA KHED, PUNE
(MAHARASHTRA)-40151 AND HAVING ITS UNIT/
WORKS AT PARWANOO, DISTRICT SOLAN, (HP)
THROUGH ITS COMPANY SECRETARY AND AUTHORIZED SIGNATORY
SHRI ANSHUL BHARGAVA
SONOF SHRI S.L. BHARGAVA,
RESIDENT OF EMPIRE ESTATE, L 1-302,
OLD PUNE-MUMBAI HIGHWAY, CHINCHWARD,
PUNE (MAHARASHTR)-401510

... PETITIONER

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE WITH
MR. AJEET JASWAL, ADVOCATE)

AND

1. PRESIDING OFFICER,

INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT,
SHIMLA, DISTRICT SHIMLA (HP)-171001

2. SHRI SHAKTI CHAND
SON OF SHRI ROHAL RAM,
RESIDENT OF VILLAGE DUDHAR, P.O. BIJHARI,
TEHSIL BARSAR, DISTRICT HAMIRPUR (HP).

3. SHRI RAGHUBIR DASS
SON OF SHRI JAI CHAND,
RESIDENT OF VILLAGE AND P.O. SAKRI,
TEHSIL DEHRA, DISTRICT KANGRA (HP)

4. SMT. SHAKUNTLA DEVI, WIDOW]

5. SHRI RAJINDER SINGH, SON]

6. SHRI SURJIT SINGH, SON]

7. MS. AJNITA THAKUR, DAUGHTER] OF LATE SHRI PRITHI SINGH,
ALL RESIDENT OF VILLAGE AND P.O. TIERA,
TEHSIL AND DISTRICT KANGRA (HP)

8. SMT. SUKH VARSHA SHARMA, WIDOW]

9. MS. SONIA SHARMA, DAUGHTER]

10. SHRI MUNISH SHARMA, SON]

11. SHRI VINEET SHARMA, SON] OF LATE SHRI OM PRAKASH
ALL RESIDENTS OF VILLAGE KHERA SITARAM
P.O. AND TEHSIL KALKA, DISTRICT PANCHKULA
(HARYANA)

12. SHRI JAG MOHAN
SON OF SHRI BACHAN RAM,

RESIDENT OF VILLAGE TIPRA,P.O. AND TEHSIL KALKA,
DISTRICT PANCHKULA (HARYANA)

13. SHRI BAKSHI RAM
SON OF SHRI HARI SINGH,
RESIDENT OF VILLAGE KHERA SITARAM,
P.O. AND TEHSIL KALKA, DISTRICT PANCHKULA,
(HARYANA)

.. RESPONDENTS

(NEMO FOR R-1
MR. V.D. KHIDTTA, ADVOCATE, FOR R-2 TO R-13)

CIVIL WRIT PETITION
NO. 1794 OF 2017
DECIDED ON: 17.08.2021

Constitution of India, 1950 - Articles 226 and 227 - **Industrial Disputes Act, 1947 -** Award of Industrial Tribunal-cum-Labour Court- Challenged- Held- Writ Court has jurisdiction to examine the correctness and genuineness of the award passed by the Tribunal, especially when there is an error of law apparent on the face of record - Modification if any, in standing order with regard to age of retirement, can always be said to have come in force with effect from 29.08.2005 and as such, all the employees retired prior to that date, cannot be permitted to claim the benefit of the same after their retirement- Award passed by Learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla set aside - Petition allowed.

Cases referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. AIR SCW 3157;

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 /227 of the Constitution of India, challenge has been laid to Award dated 5.5.2017, passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court in Ref. No. 86 of 2005, whereby learned Tribunal below, while allowing the claim petition of the respondent Nos. 2 to 13/workmen (hereinafter, 'workmen'), directed the petitioner-employer (hereinafter, 'employer') to pay full wages, alongwith all consequential benefits to the workmen, with effect from the date they were given retirement by employer on completion of age of 55 years till they attained the age of 60 years, within a period of three months from the date of passing of award till realization failing which, the same shall carry interest at the rate of 9% per annum, from the date of petition till realization.

2. For having bird's eye view of the matter, certain undisputed facts as emerge from the pleadings as well as documents available on record, are that workmen No. 2, 3, 12 and 13 and predecessor-in-interest of respondents Nos. 4 to 7 and 8 to 11 (hereinafter, 'workmen') were employed with the petitioner company and they joined services of petitioner during 1978-79. On attaining age of 55 years, the workmen were retired from the service of the petitioner during the year 1998 to 2002, as detailed in para-4 of the writ petition. First Standing Order of the petitioner company came into force with effect from 5.4.1982 which was certified by the Certifying Officer under the provisions of S.5 of Industrial Employment (Standing Orders) Act, 1946. Under Clause 25 of the Standing Order, date of retirement/superannuation of workman was fixed at 55 years as is evident from Clause 25 of the work Certified Standing Order (Annexure P-3). Clause 25 of annexure P-3 provides as under:

"25. Superannuation/retirement:-

The employee shall automatically retire from the service of the company on attaining age of 55 years in accordance with the date of birth given by him at the time of appointment and as appearing in the Company's record(s).

The management may at the discretion extend the service of an employee for a period not exceeding one year at a time subject to maxim of 3 years."

3. On 18.7.1998, workmen working with the petitioner-company, including present workmen,, applied to the Certifying Officer for changing age of retirement of workmen by modifying the Standing Order from 55 to 60 years. Certifying Officer, approved the modification sought by worker's union on 17.11.1998 and communicated the same to petitioner company vide letter dated 19.11.1998 (Annexure P-4).

4. Being aggrieved with the aforesaid order dated 17.11.2018 passed by the Certifying Officer modifying the age of retirement from 55 to 60 years, in the Standing Orders, petitioner preferred an appeal before the appellate authority on 13.12.1998 however, such appeal was dismissed on 10.1.2003, as is evident from Annexure P-5. Petitioner Company preferred CWP No. 263 of 2003 before this court assailing therein order dated 10.1.2003 passed by appellate authority. Division Bench of this Court vide judgment dated 23.5.2005, disposed of the petition permitting the petitioner to withdraw the writ petition with liberty to approach the Certifying Officer for certification of draft Standing Order including items relating to age of retirement of employees/workmen. While granting aforesaid liberty to the petitioner company, Division Bench of this court set aside order dated 19.11.1998 passed by Certifying Officer as well as order dated10.1.2003 passed by the appellate authority with respect to modification effected in Standing Order of the company. Copy of the said order stands annexed as Annexure P-6. Petitioner company in light of aforesaid liberty granted to it by Division Bench of this Court, submitted a draft proposal on 18.6.2005 for modification of Standing Order, to the Certifying Officer and proposed following modification with respect to age of retirement/superannuation

"superannuation/retirement: - the age of retirement or superannuation of a workman shall be as may be agreed between the management and workmen through a contact or as specified in the settlement award of both workman and management. The employee shall automatically retire from service of the company on attaining the age as provided herein before to be calculated in accordance with date of birth given by him at the time of appointment and appearing in company's record. Management may at its discretion extend service of the employee for a period not exceeding one year at a time subject to maximum of 3 years."

5. Before the Certifying Officer could take decision if any on the draft proposal of modification of Standing Order submitted by petitioner company in terms of order dated 23.5.2005 passed by Division Bench of this court, workmen including respondents Nos. 2 to 13 who stood retired, raised an industrial dispute alleging therein that they have been wrongly retired from service of petitioner at the age of 55 years, in violation of Certified Standing Orders and claimed reinstatement with full back wages. Since conciliation inter se parties failed, appropriate Government under S.10 of Industrial Disputes Act, formulated following point of reference for adjudication by Labour Court-cum-Industrial Tribunal:

> "Whether the retirement of S/Shri Shakti Chand S/o Shri Rohal Ram, Raghubir Dass S/o Shri Jai Chand, Prithi Singh S/o Shri Jhandha Singh, Om Prakash S/o Shri Sant Ram, Jag Mohan S/o Shri Bachan Ram and Bakshi Ram S/o Shir Hari Singh by the management of M/s Gabriel India Ltd., Parwanoo, District Solan, HP in violation of Certified Standing Orders and Sub Rule 3 of Rule 10-A of the Model Rules, the Industrial Employment (Standing Orders) Rules, 1973, Amendment 1991 framed under Industrial Employment (Standing Orders) Act, 1946 on the plea

of stipulation of retirement age 55 years in the appointment letters of the aforesaid workmen is legal and justified? If not, for what service benefits including reinstatement in service the above workmen are entitled to?"

6. Aforesaid reference came to be registered as Ref. No. 86 of 2005 on 7.7.2005 (Annexure P-7). During the pendency of the aforesaid reference before Labour Court-cum-Industrial Tribunal, Certifying Officer, in terms of order dated 23.5.2005 passed by Division Bench of this Court, considered the draft Standing Order submitted by petitioner company afresh and agreed to the demand of the union and certified as under:

> "In view of the facts and legal provisions and the Rulings of the Hon'ble Courts, I agreed to the Demand of the Union and accordingly, certified that the age of retirement of workers/employees, on attaining the age of superannuation, shall be on completion of 6 years by the workmen/employees in conformity with the provision of age of retirement as prescribed in Sub-Item (3) of Item 10=A of Schedule 1-A of Model Standing Orders under Rule 3 of the above said Rules framed under Industrial Employment (Standing Orders), Act, 1946"

7. Being aggrieved and dissatisfied with the aforesaid order passed by Certifying Officer, petitioner filed an appeal under S.6 of Industrial Employment (Standing Orders) Act, 1946 which came to be allowed vide order dated 5.4.2006 (Annexure P-9). Aforesaid order passed by appellate authority further came to be laid challenge in CWP No. 389 of 2006 having been filed by the Employees Union. Learned Single Judge of this court vide judgment dated 22.6.2007, quashed and set aside the findings returned by the appellate authority and upheld the order passed by Certifying Officer enhancing the age of retirement from 55 to 60 years. (Annexure P-10). Being dissatisfied with the

judgment passed by learned Single Judge, petitioner company preferred LPA. No. 73 of 2007 before the Division Bench of this Court, which however, came to be dismissed on 28.11.2007 (Annexure P-11). Thereafter, an SLP No9163 of 2008 was filed by the petitioner before Hon'ble Apex Court, but the same was also dismissed on 5.1.2016 (Annexure P-12), as a consequence of which, order dated 29.8.2005 passed by Joint Labour Commissioner-cum-Certifying Officer Himachal Pradesh Annexure P-8 accepting the demand of Employees Union for enhancement of age of retirement of the employees of petitioner company from 55 to 60 years, came to be upheld.

8. After disposal of SLP having been filed by the petitioner company, Labour Court-cum-Industrial Tribunal, Shimla decided the reference petition No. 86 of 2005, and allowed the claim petition filed by the petitioners therein (respondents Nos. 2 to 13 herein). In the aforesaid background, petitioner-company has approached this court in the instant proceedings praying therein to set aside the impugned award, inasmuch as petitioner-company has been directed to pay full wages to the workmen by considering age of retirement to be 60 years.

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

10. Since the draft Standing Order, with respect to item relating to the age of retirement of the workers, submitted by petitioner-company, to the Certifying Officer, pursuant to order dated 23.5.2005, stands rejected by Certifying Officer vide order dated 29.8.2005 and such order of the Certifying Officer has been upheld in appeal till the Hon'ble Apex Court, there cannot be any dispute that as of today all the employees of the petitioner-company are entitled to be superannuated at the age of 60 years and not at the age of 55 years. However, in the case at hand precise dispute inter se parties is with regard to date of application of order dated 29.8.2005, whereby age of retirement came to be fixed by Certifying Officer as 60 years.

11. Shri Bhupender Gupta, learned senior counsel representing the petitioner, while fairly admitting that the award dated 29.8.2005 passed by Certifying Officer has attained finality, contended that since the workmen herein stood retired much prior to passing of order dated 29.8.2005, petitioner-company cannot be directed to pay full back wages alongwith consequential benefits from the date when they were given retirement by the petitioner-company till the age of 60 years. Mr. Gupta, learned senior counsel argued that though finality came to be attached to the order dated 29.8.2005 passed by the Certifying Officer on 5.1.2016, when SLP having been filed by the petitioner-company came to be dismissed, but even otherwise, if it is presumed that order dated 29.8.2005 had come into force on 29.8.2005, even then, workmen/respondents Nos. 2, 3, 12 and 13 and predecessor-in-interest of respondents Nos. 4 to 7 and 8 to 11, would not be entitled to any benefit because by that time, they all stood retired from the petitioner-company. Lastly Mr. Gupta, learned senior counsel argued that all the respondents Nos. 2 to 13/workmen stood retired from the employment of the petitioner-company prior to the year 2001, after having attained age of 55 years and no protest, if any was lodged by them at the time of their retirement and as such, industrial dispute raised by them after an inordinate delay, otherwise could not have been entertained by the Industrial Tribunal-cum-Labour Court therefore, the award impugned in the present proceedings deserves to be quashed.

12. Mr. V.D. Khiddta, Advocate, while refuting aforesaid submissions made by learned senior counsel representing he petitioner-company, vehemently argued that there is no illegality and infirmity in the award passed by learned Tribunal below and same deserves to be upheld. Mr. V.D. Khidtta, Advocate, argued that though the workmen stood retired prior to passing of impugned award as well as order dated 29.8.2005 passed by Certifying Officer but since employees union of the petitioner-company had applied for

modification of Standing Orders, with respect to increase in age of retirement, much prior to their retirement, they rightly came to be given benefit of the same by the learned Tribunal below, while passing the impugned award. Mr. V.D. Khiddta, Advocate further argued that on 18.7.1998, when all the workmen were in service, Employees Union had applied for modification of Standing Order, which prayers of theirs came to be ultimately accepted vide order dated 19.11.1998, passed by Certifying Officer-cum-Joint Labour Commissioner (Annexure P-4) and as such, otherwise also all the workmen including respondents Nos. 2 to 13 are entitled to be superannuated at the age of f60 years after passing of order dated 19.11.1998, Lastly, Mr. V.D. Khiddta, Advocate argued that since the very arrangement of petitioner-company made in Standing Order to retire its employees at the age of 55 years, was in violation of Industrial Employment (Standing Orders) Act, 1946, wherein specific provision has been made to retire employees/workmen on attaining the age of 60 years, action of petitioner-company in superannuating the workmen on their having attained the age of 55 years, cannot be allowed to sustain being in violation of statutes and as such, no interference is called for.

13. Having heard learned counsel for the parties and perused the material available on record, vis-à-vis reasoning assigned in the impugned Award while allowing the claim petition having been filed by the workmen, this court finds that there is no dispute inter se parties, with regard to employment of workmen/respondents Nos. 2 to 13 with the petitioner-company. It is also not in dispute that respondents Nos. 2 to 13, stood retired from their service during 1998 to 2002. Further it is not in dispute that the first Standing Order of petitioner-company came into force with effect from 5.4.1982, which was certified by Certifying Officer under S.5 of Industrial Employment (Standing Orders) Act, 1946, Under Clause 25 of said Standing Order, and in that the age of retirement of the workman was fixed at 55 years. It is also not in

dispute that all the respondents /workmen came to be appointed with the petitioner-company in terms of aforesaid first Standing Order dated 5.4.1982, wherein admittedly the age of retirement was fixed at 55 years.

14. Though In terms of Clause 25, management may at its discretion could extend the service of an employee for a period not exceeding one year at a time subject to maxim of 3 years, but in the case of all the respondents, petitioner-company did not exercise aforesaid discretion and as such, all the respondents stood retired at the age of 55 years. This court also finds from record that union of the petitioner-company prior to retirement of all the respondents/workmen vide representation dated 18.7.1998, applied for modification of Standing Order with respect to increase in age of retirement. Since aforesaid prayer of the workmen was not acceded to by the petitioner-company, dispute inter se petitioner-company and employees union landed before Certifying Officer-cum-Joint Labour Commissioner, who vide order dated 19.11.1998 (Annexure P-4), accepted the proposal submitted by employees union for modification in age of retirement from 55 to 60 years . However, before aforesaid order came to be passed by Joint Labour Commissioner-cum-Certifying Officer, respondent No. 1 Shakti Chand had retired, whereas all the other respondents came to be retired thereafter.

15. Shri V.D. Khiddta, Advocate appearing for the respondents Nos. 2 to 13 argued that since order dated 19.11.1998 modifying the age of retirement from 55 to 60 years was passed during the subsistence of service of respondents Nos. 3 to 13 except respondent No.2, Industrial Tribunal-cum-Labour Court rightly held them entitled for wages for the period from the date when they were superannuated on attaining age of 55 years and till the time they attained the age of 60, years alongwith consequential benefits.

16. However, this court finds no force in the aforesaid submission of Mr. V.D. Khiddta, Advocate, for the reason that aforesaid order dated 19.11.1998 was laid challenge in appeal by petitioner-company, which was dismissed on

10.1.2003. However, fact remains that order dated 10.1.2003 passed by appellate authority in appeal having been filed by petitioner-company, alongwith order dated 19.11.1998 passed by Certifying Officer/Joint Labour Commissioner, Himachal Pradesh, whereby he accepted the proposal to modify the age of retirement from 55 to 60 years, came to be stayed vide order dated 23.5.2005 passed by Division Bench of this Court in CWP No. 263 of 2003 filed by the petitioner-company.

17. Though vide aforesaid judgment, petitioner-company was permitted to withdraw the petition filed by it with liberty to approach Certifying Officer for certification of draft Standing Order, containing therein item relating to age of retirement of the workmen working with the petitioner but Division Bench of this court, also set aside orders dated 10.1.2003 passed by appellate authority and dated 9.1.1998 passed by Certifying Officer subject to the condition that the petitioner shall approach the Certifying Officer for certification of draft Standing Order within four weeks from the date of passing of order dated 23.5.2005. Vide order dated 23.5.2005, Division Bench of this court clarified that in case, draft Standing Order is submitted by petitioner-company to the Certifying Officer within four weeks from the date of passing of order dated 23.5.2005, impugned orders dated 10.1.2003 and 9.11.1998 passed by appellate authority and Certifying Officer shall be treated to have been set aside.

18. Since pursuant to aforesaid liberty reserved by Division Bench on 23.5.2005 in CWP No. 263 of 2003, petitioner-company submitted draft Standing Order for certification with the Certifying Officer, within the time stipulated by the court, order dated 9.11.1998 of Certifying Officer and 10.1.2003 passed by appellate authority came to be set aside.

19. Though Shri V.D. Khiddta, Advocate argued strenuously that since the petitioner-company failed to submit draft proposal within the time stipulated by Division Bench vide order dated 23.5.2005, passed in CWP No.

263 of 2003, specifically containing therein reference with regard to age of retirement, orders dated 19.11.1998 passed by appellate authority and order dated 10.1.2003 passed by Certifying Officer, cannot be deemed to have been set aside, as such, they remained in full force during the pendency of the case before Certifying Officer as well as before appellate authority thereafter. However, having carefully perused order dated 29.8.2005 (Annexure P-8) having been passed by Certifying Officer, rejecting therein draft Standing Order submitted by petitioner-company in terms of order dated 23.5.2005, this court has no option but to reject aforesaid submission of Mr. V.D. Khiddta, Advocate being contrary to record. Order dated 29.8.2005 itself suggests that draft Standing Order dated 17.6.2005 submitted by petitioner-company was received on 18.6.2005 i.e. prior to expiry of four weeks from the date of passing of order dated 23.5.2005. Similarly, aforesaid order further reveals that in draft Standing Order dated 17.6.2005, petitioner-company specifically submitted a proposal regarding age of retirement of the workers/employees contending that in the M/s Hero Honda Motors Ltd. Dhurera, District Mahendergarh Haryana and M/s Eicher Tractors, age of retirement of workers is 55 years. Since both the conditions of order dated 23.5.2005 were duly adhered to by the petitioner-company, it can be safely inferred that order dated 10.1.2003 and order 19.11.1998 passed by Certifying Officer and appellate authority respectively stood set aside, meaning thereby order dated 19.11.1998, whereby proposal submitted by Employees' Union for enhancing age of retirement from 55 to 60 years was accepted by Certifying Officer, had lost its efficacy and no benefit, if any, could be claimed by the workmen on the basis of aforesaid order regarding enhancement of age of retirement from 55 to 60 years.

20. Mr. V.D. Khiddta, Advocate argued that order dated 19.11.1998 remained in force till passing of order dated 23.5.2005 in CWP No. 263 of 2003 because aforesaid orders came to be set aside on 23.5.2005 and as such,

person retired during this period is entitled to be given benefit of order dated 19.11.1998 passed by Certifying Officer enhancing age of retirement from 55 to 60 years, but his plea cannot be accepted for two reason, firstly aforesaid order dated 19.11.1998, came to bet set aside vide order dated 23.5.2005 and secondly, Division Bench of this court vide aforesaid order dated 23.5.2005, permitted petitioner-company to submit fresh draft Standing Order to Certifying Officer for consideration afresh and pursuant to direction contained in order dated 23.5.2005, Certifying Officer passed fresh order dated 29.8.2005, rejecting therein draft Standing Order submitted by petitioner-company containing therein proposed age of retirement as 55 years, instead of 60 years. Since vide order dated 23.5.2005, Certifying Officer passed fresh orders pursuant to order dated 23.5.2005 on the draft Standing Order submitted by petitioner-company, its earlier order dated 19.11.1998 stood merged with order dated 29.8.2005 and lost its efficacy. Since order dated 29.8.2005 passed by Certifying Officer enhancing age of retirement from 55 to 60 years, stands accepted till Hon'ble Apex Court, there is no occasion for this court to look into the correctness of the same, however, in view of the detailed discussion made herein, this court is of definite view that modification, if any, in Standing Order with regard to age of retirement, can always be said to have come in force with effect from 29.8.2005 (Annexure P-8) and as such, all the employees retired prior to that date, cannot be permitted to claim the benefit of the same after their retirement. If argument having been advanced by respondents is accepted, it would amount to opening Pandora box. All the employees petitioner-company, who stood retired prior to 29.8.2005 would claim that they be also given benefit of modification in the age of retirement made in Standing Order regulating the services of the workers/employees of the petitioner-company.

21. Since all the respondents stood retired prior to passing of order dated 29.8.2005, they cannot and could not be held entitled to full wages

alongwith all consequential from the date, when they were retired by petitioner-company till they attained the age of 60 years and as such, impugned Award passed by learned Tribunal below does not call for any interference by this court.

22. Having carefully perused material available on record, vis-à-vis reasoning assigned by learned Tribunal below while passing impugned Award this court has no hesitation to conclude that the learned Tribunal below has gone totally astray while appreciating the evidence and has miserably failed to appreciate the evidence in its right perspective as such, erroneous findings have come on record.

23.At this stage, V.D. Khiddta, Advocate argued that while exercising power under Art. 226 this court has limited power to re-appreciate the evidence. There cannot be any quarrel with the aforesaid submission made by Mr. Khiddta, learned counsel for the workmen, but, by now it is well settled that the error of law apparent on the face of record, can be corrected by writ court, if finding of fact is based on no evidence, that would be considered an error of law. Reliance is placed on judgment passed by the Hon'ble Apex Court in case **Bhuvnesh Kumar Dwivedi** vs. **M/s Hindalco Industries Ltd.** ***AIR SCW 3157***. Bare reading of aforesaid judgment reveals that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment, clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in

regard to findings of fact recorded by Tribunal, writ of certiorari can be issued, if it is shown that while recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said

> finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

24. Perusal of aforesaid findings returned by the Hon'ble Apex Court, nowhere completely bars jurisdiction of writ Court to examine the correctness and genuineness of the Award having been passed by the Tribunal, especially when there is an error of law apparent on the face of record.

25. There is another aspect of the matter. As per Section 7 of the Industrial Employment (Standing Orders) Act, 1946, standing orders shall, unless an appeal is preferred under section 6, come into operation on the expiry of thirty days from the date on which authenticated copies thereof are sent under sub-section (3) of section 5, or where an appeal, as aforesaid is preferred, on the expiry of seven days from the date on which copies of the order of the appellate authority are sent under sub-section (2) of section 6.

Since in the case at hand, after passing of order dated 19.11.1998, petitioner company preferred an appeal on 13.12.1998, which was dismissed on 10.1.2003 by the appellate authority, against which the petitioner company filed CWP No. 263 of 2003, in which orders dated 19.11.1998 and 10.1.2003 passed by the Certifying Officer and the appellate authority came to be quashed and set aside, it can be safely said that modification in the Standing Orders, certified on 19.11.1998, never came into force, till 29.8.2005, by which time, admittedly all the workmen herein, stood superannuated.

26. In view of the detailed discussion made herein above, present petition is allowed. Award dated 5.5.2017, passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla, (H.P.) in Ref. No. 86 of 2005 is set aside.

All pending applications stand disposed of. Interim directions, if any, also stand vacated.

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

Hari Chand and others .....Petitioners

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 1747 of 2020
Decided on: July 14, 2021

Constitution of India, 1950 - Extraordinary jurisdiction- Petitioners who were appointed as Chowkidars on part time basis in their respective Gram Panchayats have approached the Court for issuance of directions to the respondents to grant them daily wage status from due dates, with all consequential benefits as has been granted to other part time employees of Gram Panchayats – Held - Policy decision, to convert part time workers into daily wagers and regularization thereafter, on completion of requisite period, is to be applied uniformaly qua all such appointees of various Gram Panchayats, Panchayat Samitis and Zila Parishads in the State - No discrimination can be

made while converting their services from part time basis to daily wage on the ground of availability of funds with the concerned Gram Panchayats, Panchayat Samitis and Zila Parishads- Writ petition allowed.

For the Petitioner : Mr. A.K. Gupta, Mr. Abhyendra Gupta and Ms. Babita, Advocates.

For the Respondents : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur and Ms. Svaneel Jaswal, Deputy Advocates General.

THROUGH VIDEO-CONFERENCING

Sandeep Sharma, Judge (oral):

Petitioners herein, who were appointed as Chowkidars, on part time basis in their respective Gram Panchayats, have approached this Court in the instant proceedings, for issuance of directions to the respondents to grant them daily wage status from due dates, with all consequential benefits as has been granted to other part time employees of Gram Panchayats.

2. Vide communication dated 13.10.2009 (Annexure P-1/B), Government of Himachal Pradesh, Department of Personnel, circulated a policy to regulate services of the part time workers. Vide aforesaid policy, Government of Himachal Pradesh decided to convert services of all part time Class IV employees, who have competed 10 years continuous service as on 31.3.2009 in all departments, except in Education and Ayurveda, to daily wagers subject to certain terms and conditions. The extract of above communication is as under:

"No. PER(AP.B)F(1)-1/2009
Government of Himachal Pradesh
Department of Personnel (Apptt.II)
Dated; Shimla 171002 13th October, 2009

From

The Chief Secretary to the
Government of Himachal Pradesh

To

1. All The Administrative Secretaries to the Government of Himachal Pradesh
2. All the Heads of Departments in Himachal Pradesh
3. All the Deputy Commissioners in HP

Subject: Policy to regulate the services of Part Time Workers.

Sir,

In continuation of this Department Letter No. Per(AP.B)(I)-1/2006-Vol.11 dated 5th July, 2007, I am directed to say that the matter regarding movement of Part-Time Workers to Daily Wage basis has been engaging the attention of the Government for some time past. It has now been decided by the Government that part time Class-IV employees having completed ten years continuous service as on 31st march, 2009, in all departments except Education and Ayurveda Department will be made daily wager subject to the observance of the following terms and conditions:

1. Part Time Class IV employees who have completed ten years of continuous service as on 31st March, 2009, will be made daily wager. Posts vacated by such part time employees shall stand abolished.
2. The orders to this effect will be issued at the level of Heads of Departments after verifying the facts.
3. For the determination of the date of birth of the candidate concerned, criterion as laid down in Rule 7.1 of HPFR Vol.1 shall be observed.
4. The conversion to daily wager status shall only be from prospective effect i.e. after the date of the orders are issued after completion of the codal formalities.

5. Such Part Time Worker who have been engaged without being sponsored by the employment exchange, may be given the relaxation while conversion.
6. after converting the Part Time employees as daily wager the information should come to the Finance Department for effective monitoring.
7. these instructions may kindly be brought to the notice of all concerned for strict compliance and the receipt of the same may also be acknowledge.

This issues with the prior approval of the Finance Department obtained vide their No. 511172-Fin.(C)B(15)-3/2006 dated 20.08.2009."

3. In terms of aforesaid policy decision taken by the State of Himachal Pradesh, services of all part time worker appointed by Gram Panchayat, Panchayat Samitis and Zila Parishad with prior approval of the Government save and except Part Time Chowkidars came to be converted into daily wagers but services of Part Time Chowkidars appointed by Gram Panchayats were not converted into daily wagers on the ground that they were not appointed by the Panchayati Raj Department and as such, they are not covered under the policy formulated by Government of Himachal Pradesh to regulate services of part time workers. In the aforesaid background, petitioners who were appointed as Part Time Chowkidars in different Gram Panchayats have approached this court in the instant proceedings, praying therein for the following reliefs:

"That the respondents may be ordered to grant daily wage status to the petitioners from the due dates with all the benefits incidental thereof."

4. I have heard the parties and gone through record.

5. It is not in dispute that vide communication dated 13.10.2009, P1/B, Government of Himachal Pradesh, promulgated policy to convert services of part time workers to daily wagers subject to their having completed 10 years continuous service as on 31.3.2009. Para 2 of the petition wherein complete details with regard to initial appointment of the petitioners is given, clearly reveals that majority of petitioners have completed 10 years, save and except petitioners namely Hem Chand and Mohan Lal, as Part Time Chowkidars in their respective Gram Panchayats and as such, they claim themselves to be covered under the policy dated 13.10.2019, annexure P-1/B, pursuant to which admittedly services of the persons appointed on part time basis by Gram Panchayats, Panchayat Samitis and Zila Parishads qua the posts of Jal Rakshaks, Panchayat Sahayaks and Technical Assistants stand converted to that of daily wagers.

6. Respondents Nos. 1 to 3 in their reply to the petition have nowhere disputed that the services of the number of persons, given appointment on part time basis by the Panchayat Samitis and Zila Parishads stand converted as daily wagers. Subsequent to aforesaid Policy to convert part timers into daily wagers dated 13.10.2009, Panchayati Raj Department, Himachal Pradesh issued another Notification dated 11.9.2018, Annexure P-1, whereby Government of Himachal Pradesh decided to regularise the services of the daily wagers serving in Panchayat Bhawans and Samitis under Zila Parishads. Vide aforesaid communication, Government of Himachal Pradesh also decided that part time workers serving in these institutions as on 31.3.2018 would be brought on daily wage establishment under the said Zila Parishads in their respective districts.

7. Interestingly, in the case at hand, Panchayat Chowkidars and Peons working in Panchayat Samitis and Zila Parishads on part time basis have been given benefit of policy decision dated 13.10.2009 and 11.9.2018 (Annexure P-1), whereas, claim of the petitioners, who were admittedly appointed as Part

Time Chowkidars in their respective Gram Panchayats have been denied such benefit on the ground that the petitioners were not appointed by the Government and as such, they cannot seek benefit of conversion of their part time service into daily wage service in terms of policy of regularisation and policy to convert part time employees to daily wagers. Respondents in their reply have stated that Part Time Chowkidar is engaged by Gram Panchayat and as such, is an employee of Gram Panchayat concerned. It has been further stated in the reply that Gram Panchayats through their resolutions in terms of Section 135 of Panchayati Raj Act, read with Rule 137 have engaged Part Time Chowkidar on monthly remuneration and as such by no stretch of imagination they can claim to be employees of State of Himachal Pradesh. However, respondents in their reply have categorically admitted that Part Time Chowkidar are being paid monthly remuneration of Rs.4,000/- per month out of Grant-in-Aid paid by the State Government to the Gram Panchayat under 5th State Finance Commission. Respondents have further stated in their reply that matter with regard to conversion of Panchayat Chowkidars from part time to daily wager was taken with competent Authority for providing honorarium to Panchayat Chowkidar equal to that of daily wage Chowkidars in Government departments alongwith financial implication but competent Authority i.e. Finance Department has expressed its inability to concur with the proposal. It has been further stated in the reply that those part time employees who have completed 8 years of continuous service on 31.3.2018 were to be converted into daily wagers and also daily waged workers, who have completed 5 years of service on 31.3.2018 shall be regularized and their monthly salary shall be totally borne by concerned Panchayat Samitis and Zila Parishad and Panchayat Bhawans under Zila Parishads.

8. Precisely the case of the respondents is that category of petitioners i.e. Part Time Chowkidar does not fall within purview of Notification, Annexures P-1 and P-1/B since Part Time Chowkidars being employees of

concerned Gram Panchayat are being paid honorarium out of Grant-in-Aid given to Gram Panchayat by the respondent State.

9. Shri A.K. Gupta, Advocate learned counsel appearing for the petitioners while drawing attention of this Court to various documents adduced on record alongwith the petition and rejoinder to the reply filed by respondents, vehemently argued that since all the part time workers of Gram Panchayat, Panchayat Samitis and Zila Parishads have been granted benefit in terms of Notifications /policy of converting services of part time workers to daily wagers as well as regularisation, category of petitioners being similarly situate, who were also appointed by Gram Panchayats, cannot be denied benefit of policy of converting services of part time workers to daily wagers as well as regularisation. Mr. Gupta, further argued that under S.135 of Panchayati Raj Act, Gram Panchayats not only appointed Part Time Chowkidars but they also appointed Jal Rakshaks, Technical Assistants and Panchayat Sahayaks with prior approval of competent authority i.e. Panchayat Officer. Lastly, Mr. Gupta argued that since major share of salary /wages of employees whose services stand converted on daily wage basis are paid by respondent-State, it cannot be claimed by respondents that the persons employed by Gram Panchayats are the employees of the Gram Panchayat concerned only and not of respondent-State.

10. Mr. Arvind Sharma, learned Additional Advocate General, while referring to the reply filed by the respondent-State, submitted that the part time workers engaged in Panchayat Samitis, Zila Parishads and Panchayat Bhawan under Zila Parishads subject to their having completed 10 years service on 31.3.2018 have been brought on daily wage establishment with the understanding that monthly salary of such employees shall be totally borne by Panchayat Samitis, Zila Parishads and Panchayat Bhawans under Zila Parishad. However, Mr. Sharma, learned Additional Advocate General was unable to dispute that initially all the employees of other categories i.e. Peons,

Part Time Chowkidars, Jal Rakshaks, Panchayat Sahayaks and Technical Assistants are/were appointed by Gram Panchayats concerned, as per their requirement. Mr. Sharma, learned Additional Advocate General was further unable to dispute that the Technical Assistants employed by Gram Panchayats to implement various projects under MGNREGA have been already granted benefit in terms of policy to convert part time services to daily wage subject to satisfaction of requisite conditions.

11. Lastly, Mr. Sharma, learned Additional Advocate General contended that only those Panchayat Samitis/Zila Parishads have been permitted to convert services of part time workers to daily wagers, who are self sufficient in funds and income, so that salary/honorarium to the employees brought on daily wage establishment is paid by them and not by the respondent-State.

12. Having heard learned counsel appearing for the parties and perused material on record, there appears to be no dispute inter se parties that under S.135 of the Panchayati Raj Act, 1994, every Panchayat with the previous approval of the prescribed authority can appoint such officers and officials as it considers necessary for efficient discharge of its duties. Aforesaid exercise of power under S.135 of the Act ibid, is to be made in terms of Rule 137 of the Panchayati Raj (General) Rules, 1997. S. 135 of Panchayati Raj Act and Rule 137 of the Rules supra are reproduced hereinbelow:

> "135. Other Officers and servants of Panchayats.-
>
> (1) Subject to the provisions of section 134 every Panchayat may, with the previous approval of prescribed authority, appoint such other officers and servants as it considers necessary for the efficient discharge of its duties.
>
> (2) The qualifications, method of recruitment, salaries, leave, allowances and other conditions of service including disciplinary

matters of such officers and servants shall be such as may be prescribed."

"137. Other officers and servants of Panchayats (section 135 of the Act)-
.

(1) The Panchayats subject to the availability of funds in the budget, may by a resolution propose, to the Director or any other officer authorised, the number of employees required by it and salary and allowances to be paid to them and duties to be assigned to each of them. The Director or any other officer authorised by him may allow the appointment of such servant as he considers necessary for the efficient discharge of the duties with following conditions:- 1 [(i) that no office bearer shall be included in the selection committee, if he is a near relative (father, grandfather, fatherin-law, maternal or paternal uncle, son, grandson, son-in-law, brother, nephew, brother-in-law, wife, sister, sister's husband, mother, daughter, niece, mother-in-law, daughter-in-law and husband) of any of the candidate who has applied for any post in the Panchayat; (ii) that no person shall be employed by a Panchayat if he has been convicted of any criminal offence involving moral turpitude; and (iii) that no employee of the Panchayat shall be retained in service after he has attained the age of superannuation as is applicable in the case of Government servants for their retirement.]

(2) A Panchayat for good and sufficient reasons may impose the following penalties on its employees 2 [where such provision has not been prescribed in the specific appointment and conditions of services rules]: (i) Censure. (ii) Recovery of whole or part of any pecuniary loss caused to the Panchayat by negligence or breach

of orders of the Panchayat. (iii) Removal or dismissal of employees:

Provided that before imposing any penalty the employee shall be informed of the specific charges against him and shall be given a reasonable opportunity to explain his position or produce any evidence.

(3) An employee who has been punished under sub-rule (2) may prefer an appeal within thirty days of communication of the order of punishment to the employee to the District Panchayat Officer in case penalty is imposed by the Gram Panchayat or Panchayat Samiti and to the Director in case the penalty is imposed by Zila Parishad..

(4) In case of non-availability of sufficient work, the services of any employee of a Gram Panchayat can be dispensed with by giving him one month's notice or in lieu thereof one month's pay .

(5) CCS(Conduct) Rules, 1965, as amended from time to time, shall apply to the servants of a Panchayat in so far as they are not inconsistent with the provisions of the Act and these rules: Provided that for the word "Government" and the words "Government Servants" where-ever they occur in the aforesaid Rules, the words "Gram Panchayat" and the words "employees of Gram Panchayat" shall be deemed to have been substituted, respectively.

13. Careful perusal of aforesaid provision of law contained under Panchayati Raj Act and rules framed thereunder, reveal that though the Gram Panchayat enjoys power to appoint employees as it may consider necessary for the efficient discharge of its duties but such appointment cannot be made

without the prior approval of competent authority i.e. District Panchayat Officer and subject to availability of funds in budget. Rule 137 of Panchayati Raj (General) Rules, 1997 clearly provides that Gram Panchayat, subject to availability of funds and budget may by resolution proposed to Director or any other officer authorized appoint the number of employee required by it and salary if required to be paid to them and duties to be assigned to them, Director or any other officer authorized by him can allow appointment of such servant as he considers necessary for the efficient discharge of duties, meaning thereby appointment if any proposed to be given by Gram Panchayat shall be approved by authorized officer i.e. Director or any other officer authorized by him. As such, it is difficult to conclude that the employees given appointment on part time basis by Gram Panchayats are the employees of Gram Panchayat for all intents and purposes. Reply filed by respondents clearly reveals that all the employees including part timers (employees) employed by Gram Panchayat, Panchayat Samitis and Zila Parishads are paid out of Grant-in-Aid provided by the respondent-State. At this stage, it would be apt to take note of para-7 of the reply filed by the respondents, which reads as under:

> "That in reply to the contents of these sub-paras, it is submitted that there are 12 Zila Parishads and 78 Panchyayat Samitis in the State and vide office order dated 11.9.2018, Annexure P-1, permission was to convert those part time employees into daily wagers who have completed 8 years of continuous service on 31.3.2018 and also to regularize the service of those daily waged workers, who have completed 5 years of service on 31.3.2018. The said permission was granted only for those Zila Parishads and Panchayat Samitis, who are having sufficient income from their own sources of income to meet out the salary/wages of employees engaged by them with the prior approval of the competent Authority with the condition that their monthly salary

shall be borne by the concerned Zila Parishad, Panchayat Samitis and Panchayat Bhawans under Zila Parishads as per past practice.

As the Gram Panchayats are not having sufficient income from their own sources of income to meet out the salary of the Chowkidars as such, they are being paid out of Grant-in-Aid. Provided by the State Government and as such, does not fall within the purview of ibid Notification...

The brief of monthly remuneration paid to Gram Panchayat Chowkidars since 1997 to till date is as under:-

	Grant-in-Aid + G.P. Share		Total
1.4.1997	--	=	Rs.500/-
1.4.2007	Rs.650+150	=	Rs.800/-
1.4.2012	Rs.1050+150	=	Rs1200/-
1.4.2014	Rs.1850+150	=	Rs2000/-
1.4.2016	Rs.2050+150	=	Rs.2200/-
1.4.2017	Rs.2350+150	=	Rs.2500/-
1.9.2017	Rs.2900+150	=	Rs.3050/-
1.10.2017	Rs.4000+150	=	Rs.4150/-
1.42019	Rs.4500+300	=	Rs.4800/-
1.4.2020	Rs.5000+300	=	Rs.5300/-

As such, the category of petitioners i.e. Panchayat Chowkidar of Gram Panchayat does not fall within the purview of said Notification as they are being out of Grant-in-Aid out of total honorarium."

14. Perusal of aforesaid para 7 of the reply, clearly reveals that major share of remuneration being paid to Chowkidar is paid by respondent-State. As of today, Gram Panchayat Chowkidar gets remuneration of Rs.5300/- per

month and out of 5300/- 5,000/- is paid by the respondent-State whereas, concerned Gram Panchayat only pays Rs.300/- out of its resources. Para-7 of the reply, reproduced supra, reveals that there are 12 Zila Parishads and 78 Panchayats within State and vide communication dated 11.9.2018, permission was given to convert those part time worker into daily wager who have completed 8 years of continuous service as on 31.3.2018 and to regularize the services of those persons, who have completed 5 years of service on 31.3.2018.

15. Interestingly, aforesaid permission has been granted only to those Zila Parishads and Panchayat Samitis who are having sufficient income from their own resources to meet the expenditure of salary and wages of employees engaged by them with the prior approval of the competent authority. Having perused contents of office order dated 11.9.2018, this Court is of the view that respondents by issuing aforesaid communication have attempted to create class within class, which is not permissible. Once all the part time workers/employees are appointed by Gram Panchayat, Panchayat Samitis and Zila Parishads concerned with the prior approval of competent authority, and they are being paid monthly remuneration out of Grant-in-Aid provided by the respondent-State, no distinction can be made inter se employees of Gram Panchayats, which have no sufficient resources and Gram Panchayats who have sufficient means/funds.

16. Once all the part time workers/employees engaged in Gram Panchayats, Panchayat Samitis and Zila Parishads have been appointed or given appointment by respective Gram Panchayat, Panchayat Samitis and Zila Parishads, with prior approval of respondent-State, policy decision, if any to convert part time workers into daily wagers and regularisation thereafter, on completion of requisite period, is to be applied uniformly qua all such appointees of various Gram Panchayats, Panchayat Samitis and Zila Parishads in the State. Benefit of policy to convert part time services into daily

wage services and thereafter, of regularisation after having completed requisite period cannot be denied to part time workers/employees or other employees appointed by Gram Panchayats on the ground that their Gram Panchayats, Panchayat Samitis or Zila Parishads have no sufficient funds and they are not the employees of respondent-State.

17. Perusal of annexure P-1/B clearly reveals that the respondent-State decided to regularize services of part time workers working in all departments save and except Education and Ayurveda Departments, subject to their having completed 10 years continuous service as on 31.3.2009. Though in the case at hand, Mr. Arvind Sharma, learned Additional Advocate General while referring to reply filed by the respondent, made an attempt to carve out a case that part time employees of Gram Panchayats cannot be cannot be termed to be the employees of respondent-State but such plea is not tenable for two reasons, firstly, Gram Panchayat can only appoint part time worker/employee or any other employees under S.135 of the Act with prior approval of competent authority. If competent authority does not concur with proposal of Gram Panchayat, Gram Panchayat of its own has no authority to appoint any person. Secondly, 90% of the monthly remuneration to part time workers or other employees appointed by Gram Panchayat while exercising power under S.135 of the Act, is paid by respondent-State. Though Mr. Arvind Sharma, learned Additional Advocate General further argued that as per communication dated 11.9.2018 (Annexure P-1), employees serving in Panchayat Samitis and Panchayat Bhawans under Zila Parishads have been held entitled to benefit of policy of conversion from part time worker to daily wager and thereafter of regularisation and as such, part time workers of Gram Panchayat cannot claim benefit of policy of conversion from part time worker to daily wager and then to regularisation, however, this court is not impressed with aforesaid submission of learned Additional Advocate General.

18. S.2 (26) of Panchayati Raj Act, 1994, prescribes definition of 'Panchayat', which reads as under:

> ""panchayat" means a Gram Panchayat, a Panchayat Samiti or a Zila Parishad, as the case may be;"

19. "Panchayat" means a Gram Panchayat, a Panchayat Samiti or a Zila Parishad as the case may be, meaning thereby Panchayat Samitis and Zila Parishads are also to be considered as Gram Panchayats and as such, it cannot be said that in terms of policy dated 11.9.2018 and 13.10.2009, only persons serving in Panchayat Samitis and Panchayat Bhawans under Zila Parishads are entitled for regularisation as well as conversion from part time worker to daily wagers.

20. Learned Additional Advocate General, while inviting attention of this court to judgment dated 25.11.2009 in CWP(T) Nos. 9608 and 9609 of 2008, passed by this Court, vehemently argued that since similar pleas raised by Part Time Chowkidars working in various Gram Panchayats stand rejected vide aforesaid judgment of Hon'ble Division Bench, present writ petition deserves outright dismissal. However, having carefully perused judgment supra, this court finds that Chowkidars in various Gram Panchayats had filed writ petition for regularisation and for the payment of minimum wages, however, such plea of theirs was rejected by Division Bench of this Court in terms of judgment of Hon'ble Apex Court in **Secretary, State of Karnataka and others** Vs. **Uma Devi and others** (2006) 4 SCC 1.

21. In the case at hand, petitioners are not seeking regularisation, rather, their simple prayer is to convert their services from part time to daily wages as has been done in case of other similarly situate persons. Though learned Additional Advocate General argued that other categories i.e. Panchayat Sahayaks, Jal Rakshaks, Technical Assistants and peons cannot be termed to be similarly situate to that of the petitioners but such plea of his

is not at all tenable since it stands established, rather admitted that all the aforesaid categories were given initial appointment on part time basis by respective Gram Panchayats, and in terms of policy decision dated 13.10.2009 and 11.9.2018, their services stand converted from part time to daily wage and they further stand regularized after having completed requisite period.

22. Though, Part Time Chowkidars in terms of their appointment, are only required to work for four hours, but if their duty charter, Annexure P-1/A is perused, it is difficult to conclude that the persons appointed as Chowkidar on part time basis can complete his given work in four hours, rather, duty chart clearly suggest that the work of Chowkidar is not only arduous but he/she is required to be present 24 x7 for duties and as such, no discrimination can be done to them on the ground that they are not employees of Panchayat Samitis and Zila Parishads.

23. Otherwise also, as per definition of Panchayat, provided under S.2(26), Panchayat Samitis and Zila Parishads fall within the meaning of 'Panchayat'.

24. Vide Notification dated 21.10.2000, Annexure P-1/C Government of Himachal Pradesh formulated scheme for engaging technical staff in Gram Panchayats. Very purpose and aim of aforesaid scheme is /was to provide technical help to Gram Panchayat for execution of developmental works. Vide aforesaid Scheme, persons having qualifications in various technical trades of JE, surveyor and draughtsman etc. are /were to be appointed by Gram Panchayats. Clause 4 of above Notification reveals that the Gram Panchayat would be the appointing authority of Technical Assistant /Takniki Sahayaks. The Notification dated 21.10.2000, is reproduced herein below:

"Government of Himachal Pradesh

Department of Panchayati Raj

PCH-HC()-5/2000

Shimla 171009 dated the 21st October, 2000

Notification

The Governor, Himachal Pradesh is pleased to order a Scheme for engaging Technical staff in Gram Panchayat. The aim of the scheme is to provide technical help to the Panchayats for execution of Development works.

This scheme will be applicable all over the State and it will provide employment opportunity to those persons, who are qualified in various technical trades like JEs/Surveyors/ Draftsman etc. The Scheme will be beneficial in order to improve the quality of works being carried out by the Panchayats and there will be somebody who can be given responsibilities by the Panchayats for execution in various Development works.

The following guidelines will be followed for engaging Technical staffing the Gram Panchayats.

DESIGNATION: The technical person to be recruited would be designated as Takniki Sahayak.

2.HONORARIUM: Tekniki Sahayak would be paid honorarium of Rs.1200/- per month. He will also be paid TA and DA at such rates that he Govt. may fix from time to time for tours connected with Panchayat works.

3.WORKING HOURS: Takniki Sahayak would work for 4 hours a day. He/she would be entitled for all gazetted holidays and 12 days casual leave in a year.

4.APPOINTING AUTHORITY: Gram Panchayats would be the appointing authority of Takniki Sahayak. One Takniki Sahayak would be appointed for every 2-3 Panchayats. The grouping of Panchayats based on their income would be done by the BDO concerned. The hqrs of

Takniki Sahayak would be in the same place as of the Hqrs of GPVA and would be fixed by the BDO.

5. SELECTION PROCEDURE The selection of Takniki Sahayak would be done in the following manner: -

1) Applications of the persons possessing the below mentioned qualification would be invited by the Panchayat where the Hqrs of Takniki Sahayak is proposed.

2) The persons having following qualifications would be eligible to apply:-

(a) Diploma in any branch of engineering from recognized institution.

b) Diploma in Draftsman/surveyor from recognized institute

The applications would then be processed by GPVA and (b) . candidates would be called for interviews. Interviews would be conducted by a committee consisting of Pradhans of the concerned Panchaayts one JE to be nominated by the BDO and AE(Dev.) who would be the Chairman of the Committee:

The

Selection would be made on the following criteria:-

(i) Educational qualification as follows: 20 marks

Full 10 marks to be given for degree in Engineering.

(a)	10 marks for qualification	5 marks for diploma in engineering 3 marks for diploma in draughtsman
(b)	10 marks for performance in	Percentage of marks in degree/diploma to be

	Degree/diploma	divided by 10

(ii) Experience: 10 marks (1 mark for each year of relevant experience)

(iii) If no member of family is in Government service 5 marks to be given.

(iv) If belong to same 2-3 Panchayats, 5 marks to be given.

(v) Interview to test personality aptitude and knowledge: 10 marks.

The appointment letters would be issued to the selected candidates by the Panchayats where the Hqrs is fixed and the Takniki Sahayak would be the employee of that Panchayat under Section 136 of HP Panchayati Raj Act, 1994.

25. As per aforesaid Scheme Gram Panchayat concerned would be the appointing authority of Technical Assistants. It is not in dispute that part time services of Technical Assistants appointed by Gram Panchayat concerned stand converted into daily wage basis in terms of communication dated 13.10.2009 and many of them, who have completed 5 years service as daily wagers stand regularized. The Notification dated 30th November, 2016 is reproduced herein below:

"Government of Himachal Pradesh

Department of Panchayati Raj

No. PCB-HB(1)1/2011-T.S.Vol-II dated Shimla-9, 30th November, 2016.

Notification

The Governor of Himachal Pradesh in continuation to this department Notification No. PCH-HA(1)11/2010-1-3905-4144 dated 12.7.2016, is pleased to designate Technical Assistants as daily wager who have completed 5 years

of service as on 30.9.2016, out of such Technical Assistants, those who were getting monthly remuneration @ Rs.240/- per day w.e.f. 26.9.2012 shall be deemed to be daily wager from he said date i.e. 26.9.2012.

The Governor of Himachal Pradesh is further pleased to order that Technical Assistants will be considered for regular pay scale after completion of 7 years of service as per policy which has already been approved for this category on 22.6.2016 and notified on 12.7.2016 vide Notification referred above."

26. Similarly, communication dated 30.7.2019 issued by Irrigation and Public Health, Himachal Pradesh Annexure A-2 annexed with CMP No. 10427 of 2020 having been filed by petitioner, seeking permission to place on record additional documents, reveals that Irrigation and Public Health Department decided to convert services of Jal Rakshaks/Water Guards initially appointed by Gram Panchayats to Pump Attendants. Jal Rakshaks, who have completed 12 years as on 31.12.2018 with 240 days in calendar year having minimum qualification of 8th pass have been held entitled to be appointed as pump attendants on contract basis. Condition of minimum qualification imposed by Irrigation and Public Health Department for converting services of Jal Rakshaks to pump attendants stands already quashed vide judgment dated 23.6.2021 passed by a Coordinate Bench in CWP No. 3047 of 2020 titled Jagdish Kumar vs. State of Himachal Pradesh.

27. Having carefully sifted entire material available on record, this court is convinced and satisfied that initially all the categories of employees i.e. Panchayat Chowkidars, Jal Rakshaks/Water Guards, Panchayat Sahayaks, Technical Assistants and Peons are/were given appointment by the Gram Panchayat under S.135 of the Act read with Rule 137 of the Rules, on part time basis, after having obtained necessary approval of the Government and their remunerations are/were being paid out of Grant-in-Aid provided by the

respondent-State to the various Gram Panchayats, Panchayat Samitis and Zila Parishads and as such, no discrimination inter se aforesaid categories can be made while converting their services from part time basis to daily wage on the ground of availability of funds with the concerned Gram Panchayats, Panchayat Samitis and Zila Parishads.

28. Further, having taken note of the fact that 90% of the remuneration is paid out of the Grant-in-Aid released by the respondent-State and all the appointments of part time workers are made with prior concurrence and approval of competent authority, it cannot be concluded that persons working against aforesaid posts are the employees of Gram Panchayats.

29. Though under S.135 of Act, read with Rule 137 of Rules, Gram Panchayat is competent to appoint persons as per its necessity but such appointments cannot be made without prior concurrence of Director, Panchayati Raj or any other competent authority, meaning thereby appointment, if any, by Gram Panchayat can only be made qua the different categories of employees subject to satisfaction of the competent authority i.e. Director, Panchayati Raj or any other officer, authorized in this behalf. Last word in appointment of persons appointed against aforesaid categories in Gram Panchayat, Panchayat Samitis and Zila Parishad is of respondent Department and not of concerned Gram Panchayat, Panchayat Samitis or Zila Parishad.

30. Leaving everything aside, once it stands established that all the categories mentioned supra, stand granted benefit of policy of conversion from part time basis to daily wage basis, no discrimination can be meted to the category of petitioners i.e. Part Time Chowkidars that too on the ground that they are not employees of respondent-State.

31. A Division Bench of this court in CWP No. 528/2015, **Rajesh Kumar and others** versus **State of H.P. and others**, decided on 20.3.2015,

while dealing with similar issue pertaining to regularization of Technical Assistants, has held as under:

"3. Petitioners approached this Court by way of CWP No.9804 of 2013 seeking regularization. CWP No. 9804 of 2013 was disposed of on 6.5.2014 with a direction to consider the cases of the petitioners for regularization. Cases of the petitioners have been rejected on 13.11.2014 vide Annexure P-8. The grounds mentioned for the rejection of the petitioners cases for regularization is that they were merely working on part time basis with effect from their initial date of appointment that too under the Panchayat. Fact of the matter is that the notifications under which the petitioners have been appointed and their remunerations have been fixed, have been issued by the State Government. Petitioners have been working for four hours a day and thereafter for full day @ Rs. 240/- per day as per notification dated 18.2.2005 and their status has been converted from contract to daily wage, after the completion of ten years as per notification dated September, 2012.

4. This Court in CWP No. 6916/2011, titled as Pankaj Kumar vs. State of H.P. and others and analogous matters decided on 9.12.2014 has directed the respondent State to regularize the teachers, who were not appointed by the State Government, but were appointed by the Gram Panchayats, after completion of requisite length of service. The Co-ordinate Bench has held as under:

"50. It pains us to record here that the State Government has utilized the services of the said teachers right from the year 2003, they have lost their youth and are performing their duties with legitimate expectations and the Government, after taking note of their work and conduct, as discussed hereinabove and at the cost of repetition, came forward and regularized their services and by now,

they must have crossed the age of consideration and the impugned judgment has taken away their bread, not only the bread, but has affected their matrimonial home and their family and career of their children for no fault of theirs."

5. Accordingly, the present writ petition is allowed. Respondent-State is directed to consider the cases of the petitioners for regularization in view of the principles laid down in the judgment dated 9.12.2013, quoted hereinabove. Pending application(s), if any, also stands disposed of. No costs"

32. Division Bench, while referring to Pankaj Kumar (supra), has reiterated that State Government has utilized the services of the said teachers right from the year 2003, they have lost their youth and are performing their duties with legitimate expectations and the Government, after taking note of their work and conduct, as discussed hereinabove and at the cost of repetition, came forward and regularized their services. In the case at hand also, petitioners have been serving the respondents for a long time now, and at this stage, they are neither in a position seek employment somewhere else nor to leave the jobs, as they have to maintain their families and respondents are expected, being welfare State, to reciprocate them by extending benefits of policies of conversion into daily wagers and/or regularisation.

33. Consequently, in view of detailed discussion made supra, writ petition is allowed. Respondents are directed to convert services of petitioners and other similarly situate persons from part time to daily wagers, in terms of policy dated 13.10.2009/11.9.2018, forthwith, preferably within a period of eight weeks. Needless to say, petitioners on account of conversion of their services from part time to daily wage from due date, shall not be entitled to any financial benefits but their seniority from due date shall be protected for

the purpose of regularisation which they may claim subsequently pursuant to regularisation policy, if any, framed thereafter.

Petition stands disposed of, alongwith all pending applications.

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

Between:

SANJEEV KUMAR SON OF SH. GANGA RAM, R/O VILLAGE PLARAN, P.O. KOTLA, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

....PETITIONER

(BY SH. N.K.THAKUR, SENIOR ADVOCATE WITH MR. DIVYA RAJ SINGH, ADVOCATE)

AND

STATE OF HIMAHCAL PRADESH

....RESPONDENT

(BY SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SH. R.P.SINGH AND SH. NARENDER THAKUR, DEPUTY ADVOCATE GENERALS)

CRIMINAL MISC.PETITION(MAIN)
No.1087 of 2021
DECIDED ON:18.08.2021

Code of Criminal Procedure, 1973 - Section 439- Regular bail- Petitioner seeking his release under Section 21-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 – Held - Object of the bail is to secure the attendance of the accused in the trial and proper test to be applied in the solution of the question qua grant or refusal of bail is whether it is probable that accused will appear to take his trial- Normal rule is of bail and not jail- Bail granted with conditions - Petition allowed. (Para 8)

Cases referred:
Prasanta Kumar Sarkar vs.Ashis Chatterjee and another (2010) 14 SCC 496;

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

O R D E R

Bail petitioner, namely Sanjeev Kumar, who is behind the bars since 2.6.2021, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure, praying therein for grant of regular bail in case FIR No.77 of 2021, dated 2.06.2021, registered at police Station, Sadar, District Solan, H.P. under Sections 21 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (***for short 'Act').***

2. Status report filed by the respondent-State on the basis of the investigation carried out by the Investigating agency, reveals that on 2.6.2021, police after having received secret information, intercepted vehicle bearing registration No.HP-92-0951 at Chambaghat being driven by present bail petitioner, Sanjeev Kumar and allegedly recovered 12.70 grams heroin from the dash board of the vehicle in question. At the time of aforesaid recovery, one person apart from present bail petitioner namely, Aman Prashar was also sitting in the jeep. Since both the occupants of the vehicle failed to render proper explanation qua the possession of aforesaid quantity of contraband, police after completion of the necessary codal formalities lodged the FIR, as detailed hereinabove, against them and since then they are behind the bars. Since challan stands filed in the competent court of law and nothing remains

to be recovered from the bail petitioner, he has approached this Court in the instant proceedings for grant of bail.

3. Mr. Desh Raj Thakur, learned Additional Advocate General, while fairly admitting the factum with regard to filing of the challan in the competent court of law, contends that though nothing remains to be recovered from bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency. While referring to the status report, learned Additional Advocate General submits that since petitioner alongwith other co-accused Raman Prashar purchased intermediate quantity of contraband from some unknown person at Kalka, it cannot be said that he is not indulging in the illegal trade of narcotics. Lastly, learned Additional Advocate General submits that since bail petitioner is drug addict, there is every likelihood of his being indulged in the activities again in case he is ordered to be enlarged on bail and as such, his prayer for grant of bail may be rejected outrightly.

4. Having heard learned counsel for the parties and perused material available on record, this court finds that on 2.6.2021, 12.70 grams of Heroin came to be recovered from the dash board of the vehicle being driven by the present bail petitioner and as such, it cannot be said that he has been falsely implicated. However, having taken note of the fact that aforesaid quantity of contraband never came to be recovered in the presence of independent witnesses coupled with

the fact that no case in past stands registered against the present bail petitioner, prayer made on behalf of the petitioner otherwise deserves to be considered. Though, this Court has no reason to differ with the submissions made on behalf of learned Additional Advocate General that petitioner has committed offence having adverse impact on the society, but same time Court cannot lose sight of the fact that the petitioner, if not rehabilitated at first opportunity would get involved more deeper in this activity. Since bail petitioner is drug addict and in past no case stands registered against him, it would be appropriate in case he is taken to some rehabilitation centre for treatment, so that as soon as possible, he is brought back to the main stream. Otherwise also, no fruitful purpose would be served by keeping the bail petitioner behind the bars because that would definitely not help him in getting rid of bad habit, rather it would be in his best interest that he is provided treatment immediately. Otherwise also, quantity of contraband allegedly recovered from the vehicle being driven by the bail petitioner is intermediate and as such, rigours of section 37 are not attracted.

5. Apart from above, this Court finds from the record that at the time of recovery, two persons were sitting in the vehicle, from where intermediate quantity of contraband came to be recovered. One case already stands already registered against co-accused Raman Prashar and as such, it would be too premature to conclude complicity, if any, of

the petitioner in the case at hand and as such, this Court sees no reason to let him incarcerate in jail for an indefinite period during trial. Otherwise, guilt, if any, of bail petitioner is yet to be determined in accordance with law and as such, this Court sees no reason to curtail his freedom for indefinite period during the trial. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioner being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions, as has been fairly stated by learned Senior Advocate representing the petitioner.

6. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may

wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

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

> inserting Section 436A in the Code of Criminal Procedure, 1973.
>
> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

7. In **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49, Hon'ble Apex Court 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.

8. Needless to say, 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.

9. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496, has laid down the various principles to be kept in mind, while deciding petition for bail i.e. prima facie case against the accused, nature and gravity of offence, severity of punishment, likelihood of repeating of the offence by accused etc.

10. In view of above, bail petitioner has carved out a case for himself. Consequently, present petition is allowed. Bail petitioner is ordered to be enlarged on bail, subject to furnishing bail bonds in the sum of Rs.1,00,000/- with one local surety in the like amount, to the satisfaction of the learned Chief Judicial Magistrate/ learned Judicial Magistrate 1st Class, besides the following conditions:

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

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

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

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

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

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

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

Rhythm Chauhan .....Petitioner No.1

Versus

Smt. Neelam Nengnong ...Petitioner No.2

CMPMO No. 158 of 2021
Decided on: August 4, 2021

Constitution of India, 1950 - Article 227 - Section 13 (B) of Hindu Marriage Act- Waiving off statutory period of six months- Very object of the provision is to enable the parties to dissolve a marriage by consent, specially if marriage has broken irreparable and there is no possibility of rapproachment- No fruitful purpose would be served by keeping the matter pending for six months- Order of Family Court quashed and set aside- Petition allowed.

Cases referred:

Priyanka Khanna v. Amit Khanna, (2011) 15 SCC 612;
Veena vs. State (Government of NCT of Delhi) and another, (2011)14 SCC 614;

For the petitioners: Mr. Rajesh Kumar Parmar, Advocate.

THROUGH VIDEO-CONFERENCING
The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 5.7.2021, passed by learned Principal Judge, Family Court, Kullu in HMP No. 6 of 2021 (Regd. No. HMA No. 78/2021) dismissing the joint application filed by the parties, for waiving off statutory period of six months, while accepting their prayer to grant divorce by way of mutual consent under S.13B of Hindu Marriage Act, petitioners have approached this Court in the instant proceedings filed under Art. 227 of the Constitution of India, praying therein to set aside order dated 5.7.2021.

2. Since petitioner Nos.1 and 2 are husband and wife and have decided to get their marriage dissolved by way of mutual consent under S.13B of Hindu Marriage Act and they both jointly have approached this court in the instant proceedings, laying therein challenge to order dated 5.7.2021 passed by learned Family Court below, whereby their joint request to waive off statutory period of six months before second motion has been rejected, there is no necessity to issue notice to either of parties and petition at hand can be disposed of today itself on the basis of material available on record.

3. Precisely, the facts as emerge from the record are that the marriage inter se petitioner Nos. 1 and 2 was solemnized on 30.9.2017 and they lived in the capacity of husband and wife till June, 2019, whereafter, due to certain differences, both started living separately. Now since both the petitioners by way of amicable settlement arrived inter se them have resolved to get their marriage dissolved by way of mutual consent, they preferred a petition under S.13B of Hindu Marriage Act (Annexure P-2) before Family Court, Kullu,

Himachal Pradesh on 2.7.2021. On 5.7.2021, Family Court below having taken note of the joint petition filed by the petitioners under S.13B of the Act, though recorded statements of both the parties, but rejected the application having been filed by petitioners praying therein for exemption of cooling period of six months for grant of divorce.

4. Since both the parties have now decided to start new lives, by remarrying and petitioner No.1 who is a pilot in Indian Coast Guard, has to go abroad on official duties, petitioners have approached this court in the instant proceedings, praying therein to set aside order dated 5.7.2021.

5. Perusal of order dated 5.7.2021 passed by learned court below, though reveals that the facts as have been narrated herein above are not in dispute but learned court below having taken note of the fact that prior to filing petition under S.13B of the Act ibid, no mediation/conciliation proceedings took place, and there is no clarity with regard to the alimony paid by petitioner No.1 to petitioner No.2, rejected the application to waive off cooling period of six months. Besides above, learned court below, while placing reliance upon judgment of Hon'ble Apex Court in **Amardeep Singh** vs. **Harveen Kaur** in Civil Appeal No. 11158 of 2017 decided on 12.9.2017, recorded in the order impugned in the instant proceedings, that the petitioners have lived together only for two years and as such, their prayer for waiving off cooling period cannot be acceded to.

6. Having heard learned counsel for the parties and perused the judgment rendered by Hon'ble Apex Court in **Amardeep** (supra), this court finds that the court while considering prayer to waive off cooling period must be satisfied that the parties were living separately for more than mandatory period and all efforts of mediation and reconciliation have failed and there is no chance of reconciliation and further the cooling period will only prolong their agony. While considering application as referred to above, learned Court below,

besides considering the period of marriage inter se applicants is also required to see that for how long period, applicants are living separately.

7. True it is that in the case at hand, marriage inter se parties was solemnized in the year 2017, but it is also not in dispute that both the parties are living separately since June, 2019 i.e. approximately for two years. Though there is no mention with regard to statements made by petitioners in first motion but careful perusal of impugned order nowhere suggests that the parties are not interested in getting their marriage dissolved by way of mutual consent. Very purpose of mediation and conciliation proceedings is to give chance to the applicants desirous of having their marriage dissolve, to rethink or to explore possibility of reconciliation.

8. True it is that in the case at hand, no mediation/conciliation proceedings, if any, took place inter se parties before their having approached court under S.13B for dissolution of marriage by way of mutual consent, but once they themselves have approached learned Family Court below for getting their marriage dissolved that too after living separately for two years, learned court below normally should not have rejected their prayer especially keeping in view the status of petitioners, who are well educated and petitioner No.1 is serving with Indian Coast Guards.

9. Learned counsel for the petitioners informed this Court that no formal order if any, on account of alimony ever came to be passed but while settling dispute amicably inter se them, one cottage leased by family of petitioner No.1 has been given to petitioner No.2 already so that she earns her livelihood. He further undertakes before this Court that proper proof with regard to aforesaid arrangement arrived inter parties shall be placed before learned Family Court at the time of recording of statements of second motion.

10. Since, the marriage inter se petitioners has broken irreparably and there is no possibility of rapprochement, no fruitful purpose would be served by keeping matter pending for another six months, rather, pendency of

application filed by petitioners for dissolution of marriage would aggravate their mental agony.

11. Since the petitioners are living separately for the last two years, cooling period can be waived off especially when there is no possibly of rapprochement and marriage *inter se* them has broken beyond repair. At this stage, it would be apt to take note of judgment rendered by this court in **Bharti Kapoor** v. **Des Raj**, CMPMO No. 271 of 2017, decided on 31.10.2018, relevant paras, whereof read as under:

> **8.** Accordingly, for the reasons and circumstances narrated herein above, present petition is ordered to be converted into a petition under Section 13B of Hindu Marriage Act. Since both the parties are living separately for the last many years and they have been litigating with each other, statutory period of six months as envisaged under Section 13B of the Act for grant of divorce by way of mutual consent, can be waived, especially when there is no possibility of rapprochement of the parties and marriage has broken beyond repair. In this regard, it would be apt to take note of the judgment rendered by the Hon'ble Apex Court in **Veena** vs. **State** (**Government of NCT of Delhi**) **and another**, (2011)14 SCC 614, wherein the Hon'ble Apex Court has held as under:
>
> > 12." We have heard the learned counsel for the parties and talked to the parties. The appellant has filed a divorce petition under Section 13(1)(a) of the Hindu Marriage Act, 1955, being HMA No.397/2008 which is pending before the Court of Sanjeev Mattu, Additional District Judge, Karkardooma Courts, Delhi. In the peculiar facts and circumstances of this case, we deem it appropriate to transfer the said divorce petition to this Court and take the same on Board. The said petition is converted into one under Section 13B of the Hindu Marriage Act and we grant divorce to the parties by mutual consent."

9. Reliance is also placed on a judgment rendered by Hon'ble Apex Court in **Priyanka Khanna** v. **Amit Khanna**, (2011) 15 SCC 612, wherein Hon'ble Apex Court has held as under:-

> "7. We also see form the trend of the litigations pending between the parties that the relationship between the couple has broken down in a very nasty manner and there is absolutely no possibility of a rapprochement between them even if the matter was to be adjourned for a period of six months as stipulated under Section 13-B of the Hindu Marriage Act. 8. We also see from the record that the first litigation had been filed by the respondent husband on 2.6.2006 and a petition for divorce had also been filed by him in the year, 2007. We therefore, feel that it would be in the interest of justice that the period of six months should be waived in view of the above facts."

10. In the instant case also, statutory period of six months deserves to be waived keeping in view the fact that the marriage between the parties has broken beyond repair and there seems to be no possibility of parties living together. The Hon'ble Apex Court in Civil Appeal No.11158 of 2017 [arising out of Special Leave Petition (Civil) No.20184 of 2017] titled as **Amardeep Singh** vs. **Harveen Kaur**, decided on 12.09.2017, has held as under:-

> "13. Learned amicus submitted that waiting period enshrined under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini 10, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy11, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra12 and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta13. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan 10 AIR 1986 AP 167 (DB) 11 AIR 1994 Kar 12 (DB) 12 AIR 1990 Del 146 13 AIR 2005 MP 106 (DB) Moorkkanatt14. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable

only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

i) How long parties have been married?
ii) How long litigation is pending?
iii) How long they have been staying apart?
iv) Are there any other proceedings between the parties?
v) Have the parties attended mediation/ conciliation?
vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

14 AIR 2010 Ker 157

14. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

15. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so

that the court grants divorce by mutual consent only if there is no chance for reconciliation.

16. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

17. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.15as follows:

> 15 (2005) 4 SCC 480 "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For

ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." 18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

> 20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.
>
> 21. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

12. It is quite apparent from bare perusal of judgment passed by this court (supra) and Hon'ble Apex Court that the very object of aforesaid provision is to enable the parties to dissolve a marriage by consent, especially if marriage has broken irreparably and there is no possibility of rapprochement.

13. In the case at hand, both the parties after having explored possibility of rapprochement and finding no success there, have approached the court for dissolution of marriage by way of mutual consent and as such no fruitful purpose would be served by keeping the matter pending for six months.

14. Accordingly, in view of detailed discussion made herein above, petition at hand is allowed. Order dated 5.7.2021, passed by learned Principal Judge, Family Court, Kullu in HMP No. 6 of 2021 (Regd. No. HMA No. 78/2021), is quashed and set aside and learned court below is directed to record statements of second motion on **5.8.2021**, on which date, parties undertake to appear before learned court below. Needless to say petitioners would make available copy of settlement arrived inter se them, especially with regard to the cottage given to petitioner No.2 enabling her to earn her livelihood.

15. Registry is directed to send a copy of this judgment to learned family court below via fax, forthwith, enabling it to do the needful well within stipulated time.

Authenticated copy to learned counsel for the petitioners.

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

Between:-

INDER MOHAN SHARMA, GOVERNMENT COLLEGE KOTSHERA, CHAURA MAIDAN, SHIMLA-171004.

...PETITIONER

(BY MRS. RANJANA PARMAR, SENIOR ADVOCATE, WITH MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION), GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, SHIMLA-171002.

2. DIRECTOR OF EDUCATION, HIMACHAL PRADESH, SHIMLA-171001.

...RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATES GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

No.4670 of 2019
RESERVED ON: 16.08.2021
DECIDED ON: 01.09.2021

Constitution of India 1950 - Article 226 – **The H.P. Education Service (Class I Gazetted College Cadre Recruitment and Promotion) Rules, 1977** - Denying promotion to the petitioner is not sustainable in law- State cannot be permitted to use different yardsticks for similarly situated persons where it has conferred promotion against the post of Principal upon incumbents similarly situated as the petitioner then the same treatment ought to have been given to the petitioner also and denial of the same to petitioner indeed amounts to discrimination- Petition allowed.

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

J U D G M E N T

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

The petitioner before this Court is a senior citizen. He initially joined the Rana Padam Chander Sanatan Dharam Bhargav College, Shimla as a Lecturer in the subject of English on 18th October, 1965. Said College at the relevant time was affiliated to Punjab University and was recognized by the Punjab Government. After coming into force of the Reorganization Act and on the establishment of the Himachal Pradesh University, this College was affiliated to the Himachal Pradesh University. On the request of the Managing Committee of the College, the State of Himachal Pradesh agreed to take over the same. The College was thus taken over by the Government vide Notification dated 24th September, 1977 vide Annexure A-1 w.e.f. 15th September, 1977. The College was taken over by the State with all its assets

and liabilities as on the date when the College was taken over. After taking over of the College by the State, the services of the employees of the College were now to be governed under the Statutes and Ordinances of Himachal Pradesh University. Appointment of a Lecturer in College at the relevant time was governed by The Himachal Pradesh Education Service (Class-I Gazetted College Cadre Recruitment and Promotion) Rules, 1977, in terms whereof, the essential conditions for being appointed to the post of Lecturer, *inter alia*, was First Class or High Second Class Degree at the level of Master's Degree in the relevant subject. At the time when the College in issue was taken over by the State, the petitioner was not possessing the Degree of MA in English in First Class or High Second Class, though he was possessing the Master's Degree in the concerned subject. In this background, the case for taking over the services of Lecturers, like the petitioner was considered by the Government in consultation with the Himachal Pradesh Public Service Commission and the Commission vide Communication dated 10th January, 1980 (Annexure A-3), conveyed its approval for taking over the services of the petitioner and other persons including Shri Satish Chander, Shri I. M. Sharma, Shri J.M.L. Bhatnagar and Smt. Usha Baljit Singh as Lecturers, in relaxation of the normal provisions of Rules regarding essential qualifications prescribed for the post of Lecturer. This was followed by issuance of Communication dated 26/28 February, 1980 (Annexure A-4/A), vide which their services were taken over as Lecturers by the respondent-State.

2. The grievance which has been raised by the petitioner by way of this petition is with regard to his non-promotion to the post of Principal, College Cadre. The contention of the petitioner is that persons similarly situated as the petitioner, namely, Shri Satish Chander Vinayak, Shri M. L. Sharma and late Shri J.M. Mahajan were promoted to the post of Principal vide Notifications, dated 23.02.1993 and 31.01.1994, whereas, he has not been promoted to the said post.

3. Record demonstrates that the petitioner had filed Original Application, i.e., OA No. 592 of 1995 before the erstwhile learned Himachal Pradesh State Administrative Tribunal with the prayer that respondent-State be directed to promote him to the post of Principal and said Original Application was disposed of by ordering it to be treated as a representation. The representation was decided against the petitioner vide order dated 10th July, 1995 (Annexure A-13/A). The reason given as to why the case of the petitioner stood rejected for promotion to the post of Principal was that his services were taken over as a Lecturer by relaxing the minimum qualification eligibility criteria and, therefore, the petitioner was not entitled for being considered for promotion.

4. Learned Senior Counsel for the petitioner has argued that incumbents like Shri Satish Chander Vinayak, Shri M. L. Sharma and late Shri J.M. Mahajan were similarly situated as the petitioner and in these circumstances, denial of promotion to the petitioner against the post of Principal on the ground that his services were taken over as a Lecturer in relaxation of the eligibility criteria, is arbitrary. Accordingly, a prayer has been made for issuance of a direction to the State to promote him to the post of Principal from the due date with all consequential benefits.

5. The stand of the State is that the petitioner was rightly denied promotion, as he was not possessing the minimum qualification even to be recruited as a Lecturer and his services were taken over as a Lecturer by relaxing the Rules. It is further the stand of the State that Shri Satish Chander Vinayak was promoted to the post of Principal as per the directions of the learned Tribunal dated 18.11.1993 and, therefore, the petitioner cannot equate his case with that of Shri Satish Chander Vinayak. It is further the stand of the State that the representation of the petitioner stood disposed of by a speaking order in compliance to the directions of the learned Tribunal and, therefore, the petitioner is not entitled for any relief.

6. Learned Additional Advocate General, on the strength of the reply, has submitted that Shri Satish Chander Vinayak was promoted on the basis of an order passed by the learned Tribunal and, therefore, the petitioner *per se* cannot claim discrimination and as the petitioner was not eligible for promotion to the post of Principal, therefore, there is no illegality in denying the promotion to him against the post in issue.

7. In rebuttal, learned Senior Counsel for the petitioner, by drawing the attention of the Court to the order which was passed by the learned Tribunal in the case of the petitioner as well as in the case of Shri Satish Chander Vinayak, which are on record, submitted that though the Original Applications filed by the petitioner as well as by Shri Satish Chander Vinayak were disposed of by similar orders by the learned Tribunal by issuing a direction to the State to consider the representation of the parties concerned, yet the State promoted Shri Satish Chander Vinayak to the post of Principal and dismissed the representation of the petitioner. She has submitted that it is not as if learned Tribunal had directed Shri Satish Chander Vinayak to be promoted and it was in compliance to the said mandate that Shri Satish Chander Vinayak was promoted. On these basis, she submitted that the petitioner cannot be discriminated against by the State and he has a right to be promoted as Principal.

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

9. It is not in dispute that the services of the petitioner were indeed taken over as a Lecturer when the College in which he was serving, was also taken over by the State Government, by relaxing the relevant Recruitment and Promotion Rules, as the petitioner was not possessing 50% marks in MA in the subject of English. It is also a matter of record that it was not only the petitioner, whose services were so taken over by granting relaxation and there were other similar incumbents including Shri Satish Chander Vinayak, Shri

M. L. Sharma and late Shri J.M. Mahajan, who were given the same benefit of relaxation. Yet, whereas the other incumbents were promoted to the post of Principal, the petitioner was denied the same. The reason which the State has given for denying promotion to the petitioner, is not sustainable in law. State cannot be permitted to use different yardsticks for similarly situated persons. When it has conferred promotion against the post of Principal upon incumbents similarly situated as the petitioner, then the same treatment ought to have been given to the petitioner also and denial of the same to the petitioner indeed amounts to discrimination. The plea of the State that Shri Satish Chander Vinayak was offered promotion on account of the directions passed by the learned Tribunal, is not correct, because the order passed by the learned Tribunal was not a mandate to promote Shri Satish Chander Vinayak against the post of Principal, but the direction passed by the Tribunal was to consider his representation. Similar order was passed by the learned Tribunal in the case of the petitioner also. Yet, whereas Shri Satish Chander Vinayak was promoted to the post of Principal, the petitioner was denied the same by rejecting his representation. This arbitrary act of the State of treating the petitioner differently as from similarly situated persons, is indeed violative of Article 14 of the Constitution of India and not sustainable in the eyes of law.

10. Accordingly, this petition is allowed by directing the State Government to consider the case of the petitioner for promotion to the post of Principal in terms of his seniority in the Cadre of Lecturers. In other words, if any incumbent junior to the petitioner was promoted to the post of Principal as up to the date when the petitioner superannuated, then the petitioner be promoted to the post of Principal as from the date when such junior incumbent was promoted. This promotion, if conferred, however, shall be on notional basis as from the date of promotion up to the date of superannuation and as from the date of superannuation, actual monetary benefits shall accrue to the petitioner, for grant of pensionary benefits only. The arrears of monetary

benefits which so accrue, shall be given to the petitioner within a period of three months from today, failing which, the same shall earn simple interest @6% per annum, as from the date of filing of the petition. Miscellaneous applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, A.C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

MANOJ KUMAR BANSAL,
SON OF LATE SH. BRIJ BHUSHAN BANSAL, EX.JUDICIAL OFFICER,
HIMACHAL PRADESH,JUDICIAL SERVICE,
RESIDENT OF R/O (BLOCK-A, SET NO.2) NEW BROCKHURST,
SHIMLA-2 PRESENTLY AT P.G. COLLEGE RESIDENCEVILLA
ROUND NAHAN, DISTT. SIRMAUR, H.P.

.....PETITIONERS

(BY SH. AMAR VIRK AGGARWAL AND SH. RAJESH K. PARMAR, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH THE CHIEF SECRETARY FINANCIAL COMMISSIONER-CUM-HOME SECRETARY TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. HIGH COURT OF HIMACHAL PRADESH,THROUGH ITS REGISTRAR GENERAL, SHIMLA, HIMACHAL PRADESH.

3. SH. T.N. VAIDYA, DISTT & SESSIONSJUDGE (RETIRED) H.P. PRESENTLY PRESIDENT,

DISTRICT CONSUMER REDRESSAL FORUM,MUKTSAR, PUNJAB.

.....RESPONDENTS

(SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RANJAN SHARMA, SMT. RITTA GOSWAMI, SH. VIKAS RATHORE, ADDITIONAL ADVOCATES GENERAL
AND SMT. SEEMA SHARMA, DEPUTYADVOCATE GENERAL FOR R-1,
SMT. SHALINI THAKUR, ADVOCATE, FOR R-2,
NONE FOR R-3*)*

CIVIL WRIT PETITION
No. 4594 of 2010
RESERVED ON: 19.08.2021
DELIVERED ON: 09.09.2021

Compulsory retirement- Disciplinary proceedings- Challenge thereof- Held, Court not to act as Appellate Authority in disciplinary proceedings and reappreciate the evidence- The Inquiry held by the Competent Authority according to the procedure prescribed in Law- There was no violation of principles of natural justice- Findings of disciplinary authority are based on evidence- Impugned proceedings not illegal- Writ petition dismissed.

This petition coming on for pronouncement this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

Petitioner was a judicial officer. After culmination of disciplinary proceedings, penalty of compulsory retirement was imposed upon him in the year 2000. Pursuant to interim order passed in the petitions filed by him, petitioner continued to serve. Litigations reached the Hon'ble Apex Court. Subsequently another disciplinary proceeding was initiated against the petitioner in the year 2005, whereunder he was compulsorily retired on 10.06.2010. In the instant petition, petitioner has called in question the second disciplinary proceedings & the orders passed thereunder.

2 Facts:

2(i) Petitioner joined Himachal Pradesh Judicial Service on 23.02.1987. He faced departmental proceedings culminating in imposition of penalty of compulsory retirement upon him on 22.09.2000. Respondent No.3 the then District and Sessions Judge, Shimla was the inquiry officer in theinquiry proceeding. In his inquiry report, he held that all the charges levelled against the petitioner were established. CWP No.943/2000 filed by the petitioner in respect of this disciplinary proceeding was allowed by the learned Single Judge. Petitioner was exonerated from all the charges. In LPA No.50/2004 filed by respondent No.2 (High Court), the operation of judgment passed by learned Single Judge was stayed by an interim order dated 13.12.2004. The interim orderwas stayed by the Hon'ble Apex Court on 04.03.2005 in Special Leave Petition No.3982/2005 filed by the petitioner. Asa result whereof the petitioner continued to serve. This SLP was disposed of on 10.01.2008 with a direction that interim order dated 04.03.2005 shall remain in force till the disposal of LPA No.50/2004 by the High Court. LPA No.50/2004 was eventually partly decided in favour of the petitioner on 09.01.2009. The judgment passed by learned Single Judge was modified regarding two charges which were held to be partly proved by enquiry officer. Respondent No.2 filed Civil Appeal No.1185/2012 against this judgment. The civil Appeal was disposed of by the Hon'ble Apex Court on 18.02.2020, *inter alia* keeping in view the compulsorily retirement of the petitioner in the interregnum in another disciplinary proceedings (impugned herein).

2(ii) While the petitioner was posted at Chopal, District Shimla, respondent No.2 received a complaint against him from one Sh. Vipin Lal Clerk of Sh. Balbir Singh, Advocate, Chopal. This complaint was dated 08.10.2005. The complainant levelled charges of exploitation and abuse of

power by the petitioner. The details of this complaint are not being referred to at this stage for sake of brevity. Upon receipt of complaint, a discreet inquiry was ordered by respondent No.2 on 26.11.2005. Respondent No.3 the then District and Sessions Judge Shimla was directed to hold the discreet inquiry. Simultaneously, petitioner's comments to the complaint were also called for. Respondent No.3 conducted the discreet inquiry. He recorded statement of the complainant on 29.12.2005. Certain documents submitted by the complainant were also taken into possession by the Discreet Inquiry Officer. Discreet inquiry report was submitted by respondent No.3 to respondent No.2 on 03.01.2006. Respondent No.3 in his discreet inquiry report found substance in the allegations levelled against the petitioner.

2(iii) Upon consideration of all aspects, the Full Court on 14.07.2006 resolved to charge-sheet the petitioner for major penalty. Memo of charge-sheet was issued to the petitioner on 26/27.09.2006 under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 [in short CCS (CCA) Rules]. Petitioner submitted his written statement of defence on 07.10.2006 and supplementary written statement on 18.10.2006. Petitioner denied all the charges. Matter was considered by the Full Court on 21.03.2007. It was decided to hold regular inquiry against the petitioner. Sh. R.L. Raghu, the then District & Sessions Judge Shimla was appointed as Inquiry Officer on 13.4.2007. On petitioner's representation, the Inquiry Officer was changed and Sh. A.C. Dogra, the then District & Sessions Judge Mandi was appointed as Inquiry Officer on 31.5.2007. Inquiry proceedings were held. The inquiry officer *inter alia* recorded statements of complainant Vipin Lal (PW-1), his brother Ramesh Chand (PW-2) and of the discreet inquiry officer Sh. T.N. Vaidya (PW-7). The inquiry report was submitted to respondent No.2 on 28.05.2009. Inquiry officer held that charges levelled against the petitioner were not established.

2(iv) The Full Court considered the inquiry report on 13.7.2009. A committee of two Hon'ble Judges was constituted to go through the report and suggest appropriate action. The committee submitted its report that inquiry officer neither correctly appreciated the material on record nor the ratio of law laid down in the decisions relied upon by him in the inquiry report. The committee concluded that there was enough material to differ with the findings and conclusions drawn by the inquiry officer. The Full Court on 27.8.2009 approved committee's views based on tentative reasoning. Alongwith a copy of the inquiry report, the disciplinary authority sent a notice to the petitioner under Rule 15(2) of CCS (CCA) Rules on 17.9.2009. Notice carried tentative reasons of disagreement of the disciplinary authority with the inquiry report. Petitioner was directed to submit his response thereto. Petitioner responded to the notice on 01.10.2009.

2(v) Petitioner's response was considered by the Full Court on 3.11.2009. A Committee of one Hon'ble Judge was constituted to examine his reply & to submit its report. The Committee in its report dated 17.02.2010 concluded that inquiry officer erred in exonerating the petitioner. The Full Court on 16.3.2010 considered the entire matter. The report of the committee was accepted. Report of inquiry officer was reversed. Petitioner was held guilty of all the charges levelled against him. Respondent No.2 proposed to impose upon the petitioner penalty of dismissal from the service. Show cause notice in this regard was issued to the petitioner on 31.3.2010 alongwith extract of findings of respondent No.2, reversing the report of inquiry officer. Petitioner submitted his response to the show cause notice on 07.4.2010. His representation was considered by the Full Court on 23.4.2010. It was resolved to take lenient view. Instead of penalty of dismissal, penalty of compulsory retirement was recommended.

2(vi) On 10.05.2010, respondent No.2 informed respondent No.1 that though delinquent official deserved penalty of dismissal from

service, however, taking lenient view on consideration of submissions made by the officer in his representation, a penalty of compulsory retirement was recommended to be imposed upon him. In view of the recommendation of respondent No.2, respondent No.1 issued notification on 31.05.2010/10.06.2010, compulsorily retiring thepetitioner.

3. Having encapsulated the background of holding the disciplinary proceedings against the petitioner, certain relevant factual aspects may be narrated hereinafter around which submissions of learned counsel for the parties revolve:-

3(i) Complaint against the petitioner:

Shri Vipin Lal Clerk in the office of Advocate Shri Balbir Singh Chopal, District Shimla, had sent the complaint dated 08.10.2005 to respondent No.2. In the complaint, he stated that he was known to the judicial officer since the year 2000. In April 2005, when the judicial officer came to Chopal, he called the complainant on telephone to PWD rest houseand talked about working for him. That the complainant had spoken to the judicial officer about his and his brother's case pending in the Chopal Court. That the judicial officer told him that he would decide the cases in his favour and that of his brother but the complainant shall have to work for him till he remained posted at Chopal. That the complainant worked without wages for the officer from 10.04.2005 to 19.07.2005. He did all the chores including cooking meals, cleaning utensils, washing clothes, ironing clothes, brooming, mopping and bringing vegetables & goods from the market etc. That the complainant fell sick on 19.07.2005 and could not go to work for the judicial officer. That on the request of the officer, he sent his brother Ramesh Chand to work for two days. That his brother Ramesh Chand had to leave for home due to domestic compulsion. Upon this, the judicial officer got

infuriated. He started threatening the complainant on telephone for not coming to work. That the officer also threatened to convict his brother in the pending case, not to decide the cases in their favour and that he would get cases framed against him from the police.

The complaint was duly signed by the complainant.

3(ii). Discreet Inquiry:

During discreet inquiry conducted by respondent No.3, statement of complainant on oath was recorded on 29.12.2005. The complainant stood by the assertions made by him in the complaint dated 8.10.2005. The gist of his statement recorded by the discreet inquiry officer was that he knew Sh. Mukesh Bansal from the year 2000 when the officer was posted as Sub Judge at Chopal. The complainant was sent to the residence of the judicial officer at Rampur, where he stayed for about four months. The complainant during this period worked at the officer's residence. In March 2001, mother of Sh. Mukesh Bansal left for Nahan. The complainant was also sent alongwith the mother of the judicial officer. At that time, Sh. Manoj Bansal was residing at Nahan with his family. The complainant helped him in vacating the Government accommodation. Sh. Manoj Bansal hired private accommodation, where the complainant worked for about four months. Judicial Officer trained the complainant in driving and got him a driving licence issued from Mandi, where Sh. Mukesh Bansal was posted. Complainant though was promised Rs.1,000/- per month as remuneration. However, after putting eight months of service, he was paid only Rs.4,000/-. The remaining amount was deducted by the officer on account of teaching him driving and for getting a driving licence issued in his favour.

Subsequently, complainant came back to Chopal. After sometime, he starting working as Clerk in the office of Shri Balbir Singh Advocate. On 10.04.2005, Sh. Manoj Bansal, who was posted at Chopal called him at the resthouse, where he was staying. On his request, the complainant worked at his residence till 19.07.2005 without any remuneration. The officer had promised a job. The judicial officer had promised to acquit the complainant's brother in a case pending before his Court. The complainant due to ailment could not go to the officer's residence. Thereafter the officer starting making telephone calls to the complainant. Telephone conversation made by the officer on 21st and 24th July, 2005 were taped by the complainant. The complainant further stated that after his lodging the complaint against the judicial officer on 8.10.2005 with respondent No.2, Sh. Manoj Bansal called him in his chamber on 30.11.2005 and threatened to crush him emphasizing his position of a judicial officer.

The complainant during discreet inquiry also handed over to the Inquiry Officer a copy of another complaint dated 12.12.2005, copy of complaint titled Vipin Lal Vs. Khazan Sing [Case No.29-1 of 2005], copy of proceedings in case title State Vs. Ramesh Chand [Case No.33-1 of 2005], (both these matters were pending in petitioner's Court), copy of his own driving licence and O.P.D. ticket of Jalta Clinic Chopal. The case *State Vs. Ramesh* was heard by the petitioner. After reserving the matter for pronouncement of judgment, at petitioner's request it was transferred by learned Additional Chief Judicial Magistrate on 03.10.2005 to some other Court. The case *Vipin Lal vs. Khazan Singh* was dismissed on 30.11.2005 for non-prosecution.

3(iii) After conducting the discreet inquiry, respondent No.3 in his discreet inquiry report dated 03.01.2006 concluded as under:-

> *"7. The net result after making discreet enquiry as ordered is that complainant was engaged as domestic helper by Shri Manoj*

Kumar Bansal, though he had also filed a complaint against Khazan Singh in that Court. His brother Ramesh Chand at that time was also an accused in his court."

3(iv) Charge-sheet:

Respondent No.2 issued a charge-sheet to the petitioner on 26.9.2006 under Rule 14 of CCS (CCA) Rules, with following Articles of charges:

ARTICLE-1

"Shri Manoj Kumar Bansal, Civil Judge (Sr. Division) on 10.04.2005, i.e. a day prior to his joining as Civil Judge (Sr. Division)-cum-Judicial Magistrate 1st Class, Chopal, contacted one Shri Vipil Lal son of Shri Ram, Clerk of Sh. Balbir Singh, Advocate, Chopal (who was known to Shri Bansal since 2000), telephonically and called him to PWD Rest house, Chopal where he persuaded him to work gratis as his domestic help by giving him assurance that he will be provided Govt. employment as he (Sh. Bansal) is likely to be appointed as Chief Judicial Magistrate. Further, said Shri Vipin Lal was also assured by Sh. Bansal that his brother Shri. Ramesh Chand who was an accused in a pending criminal case under Sections 451/351/427/506 IPC in the court of JMIC, Chopal would be acquitted by him, where after said Sh. Vipin Lal started working gratis as domestic aid at the residence of Sh. Manoj Kumar Bansal w.e.f. 10.4.05 and continuedworking till 19.7.2005.

Thus, said Sh. Manoj Kumar Bansal abused his official position, which amounts to a gravemisconduct as defined in Rule 3(i) (iii) of the CCS(Conduct) Rules, 1964."

ARTICLE-II

"That said Sh. Manoj Kumar Bansal, while functioning as Civil Judge-cum- JMIC Chopal directed Sh. Vipin Lal who had been working with him as domestic aid but was unable to work due to his sudden illness, to ask his, brother Sh. Ramesh Chand, who was an accused in a criminal case under Sections 451/345/427/506 IPC in his Court, to work in his place as domestic aid w.e.f. 19.7.2005. This act of delinquent Sh. Manoj Kumar Bansal is also a grave misconduct unbecoming of a Judicial officer, as defined in Rule 3(i)(ii) of the CCS (Conduct) Rules, 1964.

ARTICLE-III

"That said Sh. Manoj Kumar Bansal, while functioning as Civil Judge-cum-JMIC, Chopal threatened Sh. Vipin Lal on telephone when the latter due to his illness had stopped working as domestic aid that if he did not resume the workas his domestic aid, then his brother Sh. Ramesh Chand, who was facing a criminal trial in thecourt of Mr. Bansal, would be convicted and that Sh. Vipin Lal would also be involved in a criminal case with the help of the police."

3(v) Regular Inquiry Proceedings

The regular inquiry was held against the petitioner, wherein statements of the complainant (PW-1) complainant's brother Shri Ramesh Chand, the discreet inquiry officer/respondent No.3 (PW-7) and that of petitioner were also recorded. The complaint made by the complainant on 08.10.2005 and his statement recorded on 29.12.2005 by the discreet inquiry

officer were produced in evidence. The complaint was exhibited as Ext. PA and the statement of complainant recorded during the discreet inquiry as Ext.PB.

The complainant as PW-1 denied the allegations levelled in the complaint Ext.PA, but admitted his signature over it. He stated that he was instigated by someone to sign the complaint. He did not disclose the name of alleged instigator. At one place he stated that Ext.PA was sent to the High Court by the alleged unnamed instigator whereas at the other place he admitted stating before the discreet inquiry officer of sending the complaint (Ext.PA) himself. While appearing as PW-1, the complainant denied any acquaintance with Sh. Mukesh Bansal. He tried to resile from his statement recorded in discreet inquiry. He stated that his statement was not recorded in the manner stated by him. However, he also stated that he was not under any threat or fear when his statement was recorded by the discreet inquiry officer on 29.12.2005. The complainant stated that he does not sign any paper without reading or understanding the same, but he had signed his statement dated 29.12.2005 without going through its contents. The complainant stated that he had passed BA examination in the year 2000. He denied having any telephonic conversation with the petitioner. He denied having sent tape (Mark A-1) to the High Court or to the inquiry officer. He denied having fallen sick during July 2005. He denied receiving any medical treatment from Jalta's clinic at Chopal. He stated that he had a driving licence, which he had lost two months back. The said driving licence was stated to have beenprepared at Nurpur District Kangra. He also denied that he had requested his brother Ramesh Chand, who was accused in a criminal case, to work as a domestic servant at petitioner's residence w.e.f. 19.07.2005.

Statement of Ramesh Chand, brother of the complainant was also recorded by the inquiry officer. Shri Ramesh Chand appeared as PW-2 and stated that he knewthe judicial officer posted at Chopal during the year 2005. A criminal case registered against him was pending in the Court of the

judicial officer. The witness denied his brother's ever approaching the judicial officer to help him (PW-2) in the criminal case or that any kind of assurance was given by the judicial officer to the complainant. PW-2 stated that his brother never informed him that the judicial officer would help him in the case. He also denied having been asked by his brother to work as domestic servant in the house of judicial officer w.e.f. 19.07.2005. He denied his brother worked as domestic servantgratis in the judicial officer's house.

The discreet inquiry officer appeared as PW-7 and stated that the complainant (PW-1) had made a statement on oath (Ext.PB) before him on 29.12.2005. Such statement was recorded by him (inquiry officer) in the manner it was stated. After recording the statement (Ext.PB) he read it out to the complainant, who after admitting it to be correct, appended his signatures on it at 'point A'. Complainant also submitted another complaint dated 12.12.2005 alongwith certain documents including a copy of his driving licence. An audio cassette alongwith tape recorded was also brought by the complainant. It was played but was very lengthy & required transcription. The cassette was taken into custody & sent to the High Court with transcription. During cross-examination, PW-7 stated that cassette was not handed-over by the complainant on 29.12.2005. It was produced later & taken into possession.

4. The **arguments** advanced by learned counsel forthe parties can be discussed under following heads:-

Compliance of provisions of CCS (CCA) Rules 1965 while holding disciplinary proceedings against the petitioner.

4(i) An argument has been raised by learned counsel for the petitioner that discreet inquiry should not have been conducted by respondent No.3. It has been submitted that respondent No.3 had earlier also conducted a regular inquiry against the petitioner under another charge-sheet issued to thepetitioner. After conclusion of the inquiry proceeding, under that

charge-sheet, the disciplinary authority had imposed a penalty of compulsory retirement upon the petitioner, on 22.09.2000. In CWP No.943/2000 preferred by the petitioner, learned Single Judge had set aside the punishment order *inter-alia* holding that the inquiry officer had not given any reason in the inquiry report as to why he did not accept the statement of three DWs'. On that basis, learned counsel for the petitioner submitted that respondent No.3 should have recused himself from holding discreet inquiry against the petitioner in the instant case.

The above is a very feeble argument raised by the petitioner. Respondent No.3 was a judicial officer posted at that time as District & Sessions Judge Shimla. He was duty bound to follow and obey the order issued to him by respondent No.2 (High Court of Himachal Pradesh). It was respondent No.2, who had directed respondent No.3 to hold discreet inquiry against the petitioner. Respondent No.3, therefore, was bound to comply the direction. Just because respondent No.3 was the inquiry officer against the petitioner in an earlier charge-sheet or because his findings in the inquiry report in respect to first charge-sheet were not approved by thelearned Single Judge while deciding a writ petition, would not lead to a conclusion that respondent No.3 was biased against the petitioner. There was no reason for respondent No.3 to recuse from holding the discreet inquiry when he was directedto do so by respondent No.2. In the discreet inquiry,respondent No.3 recorded the statement of the complainant and took possession of some documents and articles from him. Conclusion drawn by respondent No.3 during the discreet inquiry was on the basis of the statement of the complainant and the articles/documents handed over to him. Further action upon discreet inquiry was taken by respondent No.2. Discreet inquiry was not straightaway acted upon by respondent No.2. A full fledged regular inquiry was conducted by respondent No.2 in accordance with law. Therefore, the

submission that respondent No.3 should have recused himself from conductingthe discreet inquiry is without any force.

4(ii) Learned counsel for the petitioner also emphasized that the petitioner was not associated during discreet inquiry. Statement of complainant was recorded during discreet inquiry behind back of the petitioner. Statement of complainant's brother was not recorded during discreet inquiry.Version of petitioner was not taken into consideration during discreet inquiry.

The object of discreet inquiry is to conduct an inquiry to get some information without attracting attention. Theinquiry is held to find out the veracity of allegations in the complaint. The statement and information obtained during the course of discreet inquiry is meant to find out whether to proceed ahead with disciplinary proceedings or not. The information gathered during discreet inquiry sets in motion further course of action. Delinquent official need not be associated during discreet inquiry or else the very purpose of 'discreet' inquiry may get defeated. In the instant case, discreet inquiry was conducted. Statement of complainant was recorded. At that stage, it was not necessary to record statements of all those alleged to be associated. Entire matter thereafter was considered by the Full Court. It was found that there was sufficient information & substance to initiate disciplinary proceedings against the petitioner. Therefore, charge-sheet was issued & regular inquiry ensued.

4(iii)(a) Learned counsel for the petitioner submitted that the inquiry officer had submitted the inquiry report in favour of the petitioner. The disciplinary authority did not agree with the findings of the inquiry officer. In terms of Rule 15(2) of CCS (CCA) Rules, the disciplinary authority upon disagreement with report of inquiry officer, is required to forward a copy of the inquiry report together with its own tentative reasons for disagreement with the findings of theinquiry officer on any article of charge to

the delinquent officer. The delinquent officer then shall be required to submit, if he so desires, his written representation to the disciplinary authority. Learned counsel submitted that this provision has not been complied with in the instant case. Reasons for disagreement given by the disciplinary authority in the notice dated 17.09.2009 were very sketchy. They can hardly be called the reasons for disagreement. The petitioner was denied the opportunity to effectively respond to the so called reasons for disagreement given by the disciplinary authority. Prejudice, therefore, has been caused to him.

4(iii)(b) Rule 15 Sub Rule 2 of CCS (CCA) Rules readsas under:-

> *"The Disciplinary Authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the Disciplinary Authority or where the Disciplinary Authority is not the Inquiring Authority, a copy of the report of the Inquiring Authority together with its own tentative reasons for disagreement, if any, with the findings of Inquiring Authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant."*

After considering the inquiry report, the disciplinary authority did not agree with the findings of the inquiry officer. It sent notice to the petitioner under Rule 15(2) of CCS (CCA) Rules, 1965 on 17.9.2009 in following words:-

> *"Subject: Notice under Rule 15(2) of CCS (CCA) Rules, 1965.*
>
> *With reference to the Inquiry held against you under Rule 14 of the CCS (CCA) Rules, 1965, I am directed to send herewith a photocopy of the Inquiry Report submitted by the Inquiry Officer, Shri A.C. Dogra, L.R.-cum-Secretary (Law) to the Govt. of Himachal Pradesh, under Rule 15(2) of the Rules ibid and to say that the Inquiry Officer has neither correctly appreciated the evidence and the material on record nor is the ratio of law laid down in the decisions relied upon by him in the inquiry report applicable to the facts. For instance, the statement of PW-7 Mr.*

T.N. Vaidya,statement of complainant PW-1 Mr. Vipin Pal andExt. PA as well as Ext. PB have not been considered in its right perspective.

You are, therefore, required to submit your written representation/submission in this regard to this Registry within 15 days from the date of receipt ofthis communication."

We may observe here that no such ground as is being canvassed in the present petition with regard to tentative reasons of disagreement of disciplinary authority being sketchy was taken by the petitioner while submitting his representation to the above notice dated 17.9.2009. In his representation, the petitioner effectively responded to the notice. He did not agitate there that he was not aware about reasons of disagreement or that reasons of disagreement were not clear. The petitioner a judicial officer was expected to know the legal provisions. After responding to the notice dated 17.9.2009 without raising any objection of it being vague, petitioner cannot make a grievance in the present petition of the same being sketchy, vague & not disclosing adequate reasons for disagreement. We have however carefully perusedthe notice sent to the petitioner under Section 15(2) of CCS (CCA) Rules and do not find the recorded tentative reasons of disagreement to be vague. While disagreeing with the inquiry report, the disciplinary authority is only to record its tentative reasons for disagreement and not the final conclusion. In the notice dated 17.09.2009, the disciplinary authority has clearly stated that the inquiry officer did not correctly appreciate the evidence and material on record as well as the legal position. In particular, reference to the statement of PW-7 Sh. T.S.Vaidya, statement of PW-1 complainant Sh. Vipin Lal, the complaint Ext.PA and statement of complainant recorded during discreet inquiry Ext-PB has been given in the notice. The case of the prosecution was mainly centered around the

statements of these witnesses and the documents Ext.PA and Ext.PB. The disciplinary authority by way of tentative reasons of disagreement informed the petitioner that in its opinion the statements of these witnesses and the two documents were not considered in correct perspective by the inquiry officer in his report. The disciplinary authority also conveyed that in its opinion, the ratio of law in the decisions relied upon by the inquiry officer was not applicable to the facts.

Therefore, it cannot be said that the tentative reasons of disagreement conveyed by the disciplinary authority with the findings of the inquiry officer to the petitioner in the notice dated 17.07.2009 were vague and further because of such alleged vagueness, the petitioner was prevented from effectively responding to the notice. The notice issued to the petitioner on 17.7.2009 under Rule 15(2) of CCS (CCA) Rules 1965 was in consonance with law.

4(iv)(a) Another procedural error in conduct of disciplinary proceedings, pointed out by the learned counsel for the petitioner relates to the notice dated 31.03.2010 (Annexure P-14) sent by respondent No.2 to the petitioner. It has been submitted that only extract of final conclusion drawn by disciplinary authority was appended with the notice & not the complete report. This has denied an opportunity to the petitioner to state his full case in defence.

Law does not envisage sending notice to the delinquent officer after consideration of his representation under Rule 15(2) of the CCS (CCA) Rules. This notice was sent by respondent No.2 after considering petitioner's representation in response to the notice sent to him on 17.7.2009 under Rule 15(2) of the CCS (CCA) Rules (containing the tentative reasons of disagreement of the disciplinary authority with the inquiry report). The petitioner had sent his detailed representation to this notice. His representation was considered. Respondent No.2 thereafter recorded its final

findings and conclusion disagreeing with the inquiry report. Respondent No.2 proposed to impose upon the petitioner a penalty of dismissal from service under Rule 11(ix) of the CCS (CCA) Rules. The second notice sent to the petitioner vide Annexure P-14 dated 31.03.2010 was to give an opportunity to him to show cause as to why the penalty of dismissal from service be not imposed upon him. Rule 15 does not envisage sending notice before imposing punishment. Still this notice was sent to the petitioner alongwith extract of final conclusion drawn by disciplinary authority. No prejudice was caused to the petitioner on receipt of the second notice. If nothing else, he got an opportunity to plead against imposition of penalty of dismissal upon him under the second notice. He represented once again in response to the second notice. Upon consideration of his representation, taking a lenient view, the proposed penalty of dismissal from service was substituted with penalty of compulsory retirement. By sending notice to the petitioner of proposed punishment alongwith extract of conclusion drawn by disciplinary authority no procedure can be said to have been infringed. There was also no pre-judging of the matter as alleged by the petitioner.

4(iv)(b) Learned counsel for the petitioner also contended that the findings and conclusion drawn by the disciplinary authority in reversing the inquiry report, enclosed alongwith second show cause notice dated 31.03.2010 was infact required to be sent to the petitioner alongwith first notice dated 17.9.2009 issued to him under Rule 15(2) of the CCS (CCA) Rules. This was necessary to enable the delinquent official to effectively respond to the notice dated 17.9.2009.

Rule 15(2) of the CCS (CCA) Rules only mandates supplying of tentative reasons of disagreement of disciplinary authority with the inquiry report. The final conclusion are not arrived at that stage by the disciplinary authority. It is only after following the procedure prescribed under Rule 15(2) of the CCS (CCA) Rules, after considering the representation of delinquent

official that the final conclusion can be drawn by the disciplinary authority. Therefore, to say that the final conclusion arrived at by the disciplinary authority (enclosed with Annexure P-14) dated 31.3.2010 was to enclosed alongwith notice dated 17.09.2009 (Annexure P-12) is not correct statement in law.

4(v) Learned counsel for the petitioner also raised an issue about the alleged incorrect legal provisions mentioned in the notification under which the State imposed penalty of compulsorily retirement upon the petitioner. The notification compulsorily retiring the petitioner was issued by the State under Rule 11 of CCS (CCA) Rules, 1965 read with Rule 15 of H.P. Judicial Service Rules 2004. Learned counsel submitted that Rule 15 of 2004 Rules operates in different field. This rule could not be invoked to impose penalty of compulsorily retirement upon the petitioner.

Disciplinary proceedings were conducted against the petitioner under CCS (CCA) Rules, 1965. Respondent No.2 had followed the provisions of CCS (CCA) Rules, while holding these proceedings. Penalty of compulsorily retirement was recommended to be imposed upon the petitioner by respondent No.2 to respondent No.1 under CCS (CCA) Rules. Notification compulsorily retiring the petitioner was issued by respondent No.1 under Rule 11(vii) of CCS (CCA) Rules read with Rule 15 of H.P. Judicial Service Rules 2004. Mention of Rule 15 of 2004 Rules in the notification dated 31.05/10.06.2010 does not affect the validity of the notification or the punishment imposed upon the petitioner. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law. It would be apt to referto *(2009) 9 SCC 173* titled *P.K. Palanisamy Vs. N. Arumughamand another,* where relying upon (2007) 13 SCC

255 titled *Ram Sunder Ram Vs. Union of India,* it was held that quoting of wrong provision in order of discharge by the competent authority does not take away the jurisdiction of the authority to pass the order and the order of discharge from the army service cannot be vitiated on this sole ground. Relevant extracts from the judgment are as under:-

> *"19....It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of dischargehas to be read having been passed under Section 20 of the Army Act.*
>
> > *'9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of poweris not specifically referred to or a reference is made to a wrong provision off law, that by itself does not vitiate the exercise ofpower so long as the power does exist and can be traced to a source available in law [see N. Mani v. Sangeetha Theatre (2004) 12 SCC 278].*
>
> *Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the Learned Counsel for the appellant."*

4(vi) It has also been argued for the petitioner that opportunity of hearing was not granted to him. This amounts to violation of principles of natural justice.

Disciplinary proceedings were conducted under the CCS(CCA) Rules. Petitioner has been duly associated with inquiry proceeding.

Procedure as contemplated in law was complied with in conduct of disciplinary proceeding. There is no provision under these rules, mandatory requiring affording an opportunity of hearing to the petitioner.

4(vii)(a) Findings of disciplinary authority on merit:

It is settled legal position that while exercising the power of judicial review, the Court will not act as an appellate authority for re-appreciating the evidence led in the departmental inquiry. The findings of fact recorded in the departmental inquiry are not to be interfered with except when the same were based on no evidence or are absolutely perverse.

Considering plethora of previous judgments on the issue, Hon'ble Apex Court in *(2020) 3 Supreme Court Cases 423, titled State of Karnataka and another versus N. Gangaraj* after noticing the facts of the case wherein Disciplinary Authority agreed with inquiry officer's findings about delinquent police official being guilty of misconduct and imposed penalty of dismissal, which was affirmed in appeal, observed that the Tribunal and the High Court could not have interfered with findings of facts recorded by re-appreciating the evidence as if they were the Appellate Authority. It was also observed that power of judicial review is confined to the decision making process and is not akin to the power of Appellate Authority. Power of Judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in eyes of law. The Court in its power of Judicial review does not act as an appellate authority to re- appreciate evidence and to arrive at its own independent findings. It is only where the conclusion reached by disciplinary authority is perverse or suffers from patent error on face of record or based on no evidence at all that interference will be called for. Question of adequacy of evidence is not required to be gone into. Interference with decision of Departmental Authority is permitted if such Authority had held the

proceedings in violation of prescribed procedure or in violation of the principles of natural justice. The Hon'ble apex Court further held as under :-

> *"14. On the other hand learned counsel for the respondent relies upon the judgment reported as Allahabad Bank v. Krishna Narayan Tewari (2017) 2 SCC 308, wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.*
>
> *15. The disciplinary authority agreed with the findings of the enquiry officer and had passed an order of punishment. An appeal before the State Government was also dismissed. Once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by reappreciating evidence as if the Courts are the Appellate Authority. We may notice that the said judgment has not noticed larger bench judgments in State of A.P. Vs. S. Sree Rama Rao, AIR 1963 SC 1723 and B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749 as mentioned above. Therefore, the orders passed by*

the Tribunal and the High Court suffer from patent illegality and thus cannot be sustained in law.

16. Accordingly, appeal is allowed and orders passed by the Tribunal and the High Court are set aside and the order of punishment imposed is restored"

4(vii)(b) In the instant case, learned counsel for the petitioner submitted that:- Discreet inquiry was held behind the back of the petitioner. The petitioner was not associated in the discreet inquiry. Petitioner had not been given the chance to cross examine the complainant during discreet inquiry. Statement of complainant recorded during discreet inquiry could not be held against the petitioner. In the regular inquiry, the complainant had resiled from his statement made in the discreet inquiry (Ext.PB). The complainant in the regular inquiry had stated that his statement in the discreet inquiry was not recorded in the manner in which he had made the statement. Complainant also stated that the complaint (Ext.PA) was made by him at someone's instigation. Once the main evidence against the petitioner had gone i.e. when the complainant had discarded his own complaint as well as the statement made by him in the discreet inquiry then the petitioner could not have been held guilty of the charges by the disciplinary authority. Once the regular inquiry was conducted & the complainant was subjected to cross-examination, then his statement made in the discreet inquiry would be of no consequence. It is only the evidence given by the complainant during regular inquiry that can be considered and not his statement made in the discreet inquiry. It is for this reason that the inquiry officer had exonerated him of all the charges. There was no occasion for the disciplinary authority to take a different view to the one taken by the inquiry officer. The inquiry officer had exonerated the petitioner of all the charges levelled against him. Reversal of findings of inquiry officer by the disciplinary authority was uncalled for.

Learned counsel for respondent No.2 argued that the disciplinary authority had gone through the findings of the inquiry officer. It did not agree with the findings and conclusion drawn by the inquiry officer. The disciplinary authority gave its own findings and arrived at the conclusion that the delinquent official was guilty of the charges levelled against him. During the conduct of inquiry and disciplinary proceeding, there had been no infraction of prescribed mandatory procedure.

4(vii)(c) Question of use of evidence collected during discreet inquiry came up for consideration before the Apex Court in *K.L. Shinde Vs. State of Mysore (1976) 3 SCC 76*. It was held that reliance placed by Superintendent of Police on the earlier statements made by the three constables including Akki from which they resiled, did not vitiate the inquiry or the impugned dismissal order as the departmental proceedings are not governed by strict rules of evidence as contained in the Indian Evidence Act. When a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word and sentenceby sentence, is to insist on bare technicalities and rules of natural justice are matters not of form but of substance. They are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged and he is given an opportunity to cross examine them. Relevant paras of the judgment read as under:-

> *"9.....It may also be observed that departmental proceedings do not stand on the same footing as criminal prosecutions in which high degree of proof is required. It is true that in the instant case, reliance was placed by the Superintendent of Police on the earlier statements made by the three police constables*

including Akki from which they resiled but that did not vitiate the enquiry or the impugned order of dismissal, as departmental proceedings are not governed by strict rules of evidence as contained in the Evidence Act. That apart, as already stated, copies of the statements made by these constables were furnished to the appellant and he cross- examined all of them with the help of the police friend provided to him. It is also significant that Akki admitted in the course of his statement that he did make the former statement before the P.S.I. Khade-bazar police station, Belgaum, on November 21, 1961 (which revealed appellant's complicity in the smuggling activity) but when asked to explain as to why he made that statement, he expressed his inability to do so. The present case is, in our opinion, covered by a decision of this Court in State of Mysore v. Shivabsappa(1) where it was held as follows:-

> *"Domestic tribunals exercising quasi- judicial functions are not courts and therefore, they are not bound to follow the procedure prescribed for trial of actions in courts nor are they bound by strict rules of evidence. They can, unlike courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedures which govern proceedings in court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case, but where such an opportunity has been*

given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with theprocedure followed in courts.

2. In respect of taking the evidence in an enquiry before such tribunal, the person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the explanation of the witness will in its entirety, take place before the party charged who will havefull opportunity of cross-examining him.The position is the same when a witness is called, the statement given previously by him behind the back of the party isput to him, and admitted in evidence, a copy thereof is given to the party and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word and sentence by sentence, is to insist on bare technicalities and rules of natural justice are matters not of form but of substance. They are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged and he is given an opportunity to cross examine them."

10. Following the above decision, this Court held in State of U.P. Vs Om Prakash(1970) 3 SCC 878that the enquiry is not vitiated if the statements taken at the preliminary stage of enquiry are made available to the delinquent officer and he is given an

opportunity to cross-examine the witnesses in respect of those statements."

In *(2009) 1 SCC 438 titled Roop Singh Negi Vs. Punjab National Bank & Ors,* it was held that an inquiry officer in a departmental proceedings performs quasi judicial functions. Purported evidence collected during investigationagainst the accused by the investigating officer by itself would not be treated to be the evidence in disciplinary proceedings. No witness was examined to prove the documents collected in investigation. The management witnesses merely tendered the documents but did not prove the contents thereof. Relevantpart of the judgment in this regard is as under:-

"Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must befound to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnessesmerely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station.

Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left".

In *State of Mysore Vs Shivabasappa (1964) ILLJ 693 Kant*, it has been held that for taking evidence in an inquiry, the person against whom a charge is made should know the evidence which is given against him so that he is in a position to give his explanation. When the evidence is oral, normally the explanation of the witness well in its entirety take place before the party charged, who will have full opportunity of cross examining him. The position is same when a witness is called, statement given previously by him behind the back ofthe party is put to him and admitted in evidence.

4(vii)(d) With assistance of learned counsel for the parties we have gone through the record. We find that it was not a case where the complaint (Ext.PA) and the statement made by the complainant during the discreet inquiry (Ext.PB) were taken into evidence in regular inquiry without giving opportunity to the petitioner to confront the witnesses about them. Vipin Lal was the complainant. He stepped into the witness box as PW-1. The complaint (Ext.PA) made by him to respondent No.2 and his statement (Ext.PB) recorded during the discreet inquiry held by respondent No.3 have been proved duringregular inquiry. Petitioner has raised question about evidentiary value of Ext.PA & Ext.PB in the regular inquiry. The argument raised is that

petitioner was not associated in discreet inquiry, therefore, there cannot be held against him. Petitioner was given an opportunity to cross-examine the witness. Petitioner availed this opportunity. Therefore, it cannot be said that any prejudice was caused to the petitioner. The complaint (Ext-PA) and the statement (Ext.PB) of the complainant recorded during discreet inquiry were produced and proved in evidence during the regular inquiry. The delinquent official also got all the chances to confront the complainant and other witnesses with both these documents.

4(vii)(e) While appearing as PW-1 in the regular inquiry, the complainant did not completely support his statement Ext.PB recorded during the discreet inquiry. He stated that it was not recorded in the manner, he had stated. The inquiry officer gave considerable weight to the complainant's resiling his statement Ext.PB and complaint Ext.PA. The disciplinary authority however considered this aspect differently. The disciplinary authority observed that: **(a)** the complainant (PW- 1) had admitted in the regular inquiry that when his statement in the discreet inquiry was being recorded, he was not under any pressure, intimidation and threat etc. The statement recorded by him during discreet inquiry was of his own free will. **(b)** Complainant (PW-1) had admitted that he had appended his signature on the statement recorded during discreet inquiry. **(c)** Complainant (PW-1) was not a layman. He was graduate, working as a clerk in the office of an Advocate.

(d) The discreet inquiry officer/respondent No.3 while appearing as PW-7 in the regular inquiry stated that he had recorded the statement of the complainant in the manner in which the complainant had stated and that he did not twist the words stated by the complainant. After recording the statement, he had read it out to the complainant, who after accepting it to be correct signed the same. The statement of the complainant was attested by the discreet inquiry officer. During cross examination of PW-7, it was not put to him by the

petitioner that he did not record the statement Ext.PB or that he did not record the statement correctly and in the manner stated by the complainant. **(e)** In the discreet inquiry, the complainant had stated that he was acquainted with the delinquent official since the year 2000. He worked for the delinquent official at Nahan for many months. He was not given promised wages. The official had got prepared complainant's driving licence from Mandi, where Sh. Mukesh Bansal was posted. In lieu of the driving licence, half of the promised wages had been reduced. The complainant had further stated that in the year 2005, the delinquent official had called him at the PWD rest house Chopal, where he was staying and had directed him to work at his residence. Certain cases of the complainant and that of his brother were pending at that time in the Court of the delinquent official. In lieu of the complainant's working as domestic helper at the residence of delinquent official, the officer had promised to acquit him and his brother in the cases against them pending in his Court. With this understanding, the complainant's had worked at the residence of delinquent official w.e.f. 10.04.2005 to 19.7.2005. The complainant further stated that he fell sick on 19.07.2005. He requested, his brother Ramesh Chand (PW-2) to work as a domestic helper at the residence of the delinquent official. Due to domestic compulsion, petitioner's brother Ramesh Chand could not continue working as domestic helper at the residence of delinquent official. The delinquent official got infuriated and started threatening the complainant.

Above is the gist of statement made by the complainant during discreet inquiry, which was considered by the disciplinary authority. The disciplinary authority held that Ext.PA & PB prove that delinquent took work from the complainant & his brother as domestic aid gratis against illegal assurance & threats. Change of stand by the complainant during regular

inquiry was for reasons best known to him. Change of stand was nothing but an after thought to help the delinquent. Neither PW-1 nor PW2 explained as to why PW-1 did not disown his complaint (Ext.PA) dated 8.10.2005 at the time of giving statement Ext.PB on 29.12.2005. Cases of complainant & his brother PW-2 were pending in petitioner's Court. Delinquent official in his statement did not state that Ext.PB was not recorded in the manner stated by the complainant.

In the regular inquiry, the complainant had resiled from his statement recorded in the discreet inquiry. However, the fact remains that the complainant had admitted having signed the statement recorded during discreet inquiry (Ext.PB). The complainant had also admitted sending the complaint (Ext.PA). In regular inquiry he stated that the complaint was sent by him at the instigation of someone else. But that someone else was not named by him. As observed earlier, the complainant was a graduate and working as a Clerk in the office of an Advocate. The complaint was dated 08.10.2005. The statement of the complainant was recorded in the discreet inquiry by respondent No.3 more than two months later i.e. on 29.12.2005. Even in this statement, the complainant had not only stood by his complaint but had given a more clear picture. The signatures on the complaint (Ext.PA) as well as on the statement (Ext.PB) have been admitted by the complainant in the regular inquiry.

Taking stock of entire evidence available on

record, the disciplinary authority disagreed with the findings

and conclusion drawn by the inquiry officer. The inquiry officer had concluded that complainant's resiling of statement & complaint virtually means that there was no evidence to proceed against the delinquent official. Whereas the disciplinary authority had looked into the evidence in proper prospective, considered Ext-PA, Ext-PB, statements of PW-1 PW-2, PW-7 & of delinquent official and held that inquiry officererred in exonerating the delinquent official. Disciplinary authority held that the charges against him were established. Following was held in (*2015) 2 SCC 610 titled Union of India vs. P.Gunasekaran* in respect of power of judicial review of the High Court in the disciplinary proceedings:-

> *"12. Despite the well-settled position, it ispainfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by thedisciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannotact as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:*
>
> *(a). the enquiry is held by a competentauthority;*
>
> *(b). the enquiry is held according to the procedure prescribed in that behalf;*
>
> *(c). there is violation of the principles ofnatural justice in conducting the proceedings; (d). the authorities have disabled*

themselves from reaching a fair conclusion bysome considerations extraneous to the evidenceand merits of the case;

(e). the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f). the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(I) the finding of fact is based on no evidence.

13. Under Article 226/227 of the Constitutionof India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence onwhich findings can be based.

(vi). correct the error of fact however grave itmay appear to be;

(vii). go into the proportionality of punishmentunless it shocks its conscience."

It will also be appropriate to refer *(2021) 2 SCC 612 titled Deputy General Manager (Appellate Authority) and others Vs Ajai Kumar Srivastava,* wherein it was observed that judicial review of departmental inquiry by the Court is limited to determining whether (i) enquiry was held by competent authority; (ii) whether there was compliance with principles of natural justice; and (iii) whether findings were based on some evidence and whether authority had jurisdiction to arrive at conclusion. It was further held that in exercise of jurisdiction of judicial review, courts would not interfere with findings of facts arrived at in disciplinary proceedings except in case of mala fides or perversity i.e. where there is no evidence to support finding or finding is such that no reasonable man could arrive at. Where there is some evidence to support finding arrived at in departmental proceedings, same must be sustained. Relevant paragraphs from the judgment are extracted hereinafter:-

> *"22. The power of judicial review in the matters of disciplinary inquiries, exercised by the departmental/ appellate authorities discharged by constitutional Courts under Article 226 or Article 32 or Article 136 of the Constitution of India is circumscribed by limits of correcting errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice and it is not akin to adjudication of the case on merits as an appellate authority which has been earlier examined by this Court in State of Tamil Nadu Vs. T.V. Venugopalan and later in Government of T.N. and Another Vs. A. Rajapandian and further examined by the three Judge Bench of this Court in B.C. Chaturvedi Vs. Union of India and Others5 wherein it has been held as under:*
>
> > *"13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate*

> *authority has coextensive power to reappreciate the evidence or the nature of punishment. In a disciplinary enquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C.Goel [(1964) 4 SCR 718] this Court held at*
>
> *p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.*

24. It is thus settled that the power of judicial review, of the Constitutional Courts, is an evaluation of the decision making 3 1994(6) SCC 302 4 1995(1) SCC 216 5 1995(6) SCC 749 6 2017(1) SCC 768 7 2020(9) SCC 471 process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The Court/Tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority if based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority is perverse or suffers from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review

cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.

28. The Constitutional Court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of malafides or perversity, i.e., where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained."

It is not for this Court to act as an appellate authority in the disciplinary proceedings and re-appreciate the evidence. The inquiry was held by the competent authority. It was held according to the procedure prescribed in law. There was no violation of principles of natural justice. Findings of disciplinary authority are based on evidence. The disciplinary authority did not consider any inadmissible evidence in reaching its conclusion. The authority in reaching the conclusion was not guarded by any irrelevant or extraneous consideration.

Thus, looking from any angle, we do not find the impugned proceedings/orders to be suffering from any illegality. This writ petition is, therefore, dismissed. Pending miscellaneous applications, if any, shall also stand disposed of.

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

Between:-

SH. PREM CHAND, S/O SH. DURGA DUTT, R/O V&PO KHADDAR, TEHSIL CHOPAL, DISTRICT SHIMLA-171211.

...PETITIONER

(BY SHRI ARVIND NEGI, ADVOCATE, VICE MR. BALRAM SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY EDUCATION, HIMACHAL PRADESH SECRETARIAT, SHIMLA.

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

3. THE PRINCIPAL, GOVERNMENT SENIOR SECONDARY SCHOOL KHADDAR, TEHSIL CHOPAL, DISTRICT SHIMLA, HIMACHAL PRADESH.

4. SH. JOGINDER DUTT, S/O SH. LACHMI RAM, R/O VILLAGE KHADDAR, P.O. NAKOWRAPUL, TEHSIL CHOPAL, DISTRICT SHIMLA, H.P.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS & MR. J. S. GULERIA, DEPUTY ADVOCATE GENERAL, FOR R-1 TO R-3
SHRI VIVEK SHARMA, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.957 of 2019
DECIDED ON: 22.09.2021

Constitution of India 1950 - Article 226 – Petitioner challenged the appointment of private respondent against the post of Physical Education Teacher- Petition suffers the defect of delay and laches - No explanation with regard to delay in filing the petition- Petition dismissed.

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

J U D G M E N T

Response by respondent No. 4 has not been filed. Learned counsel appearing for respondent No. 4 submits that he adopts the response filed by the respondent-State. He is permitted to do so.

2. By way of this petition filed in the year, 2014, the petitioner challenges the appointment of private respondent against the post of Physical Education Teacher (PET) on the grounds taken in the petition.

3. During the course of hearing, when confronted with the point as to why the petition be entertained, as it was hit by delay and laches, learned counsel for the petitioner submitted that as it is an admitted petition, therefore, the question of delay cannot be asked by the Court. In the considered view of the Court, admission of the writ petition does not cures the defect of delay and laches and as no sufficient explanation with regard to the delay in filing the petition could be put forth by learned counsel, as from date when the appointment was offered to the private respondent by the State till the date of filing of the petition, this petition is dismissed on the ground of delay and laches, so also pending miscellaneous applications, if any.

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

Between:-

SANDEEP KUMAR, S/O SH. MOHINDER KUMAR
, RESIDENT OF MOHINDER COTTAGE, P.O. KASUMPTI,DISTRICT SHIMLA, H.P.

...PETITIONER

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

AND

1. STATE OF H.P. THROUGH SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. DIRECTOR GENERAL OF POLICE, SHIMLA, H.P.

3. INSPECTOR GENERAL OF POLICE, SOUTHERN RANGE, SHIMLA, H.P.

4. SUPERINTENDENT OF POLICE, SHIMLA, HIMACHAL PRADESH.

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, ADARSH SHARMA & ...RESPONDENTS

SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS & MR. KAMAL KANT, DEPUTY ADVOCATEGENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 664 of 2020
DECIDED ON: 28.09.2021

Constitution of India 1950 - Article 226 – Appointment to the post of Constable in Police Department- Petitioner did not disclose pendency of criminal cases against him at the time of participating in the process of selection- Appointment not considered – Representation rejected- Held - The approach has to be to condone minor indiscretions rather than to brand them as criminals for rest of their lives- Petition allowed with the direction to respondent Department to offer appointment to the petitioner against the post of constable.

Cases referred:
Basanti Prasad Vs. Chairman, Bihar School Examination Board and others (2009) 6 SCC 791;
Commissioner of Police and others Vs. Sandeep Kumar (2011) 4 SCC 644;

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

J U D G M E N T

By way of this petition, the petitioner has, *inter alia*, prayed for the following reliefs:-

> *"(i) That this Original Application may kindly be allowed and the impugned orders/communications dated 07.1.2011*

(Annexure A-4), 07.06.2012 (Annexure A-7), 05.05.2014 (Annexure A-9) and 17.06.2016 (Annexure A-10) may very kindly be quashed and set aside.

(ii) That the respondents may very kindly be directed to offer the appointment to the post of Constable to the applicant by further directing the respondents to send the applicant for training for the post of Constable in the Police Department (6th I.R.B.N., Sirmour, District Shimla) by further directing the respondents to grant all consequential benefits to the applicant from the date his counterparts were given appointment, which included pay, arrears, seniority etc. in the interest of law and justice.

(iii) That the respondents may very kindly be directed to grant pay and seniority to the applicant from the date when the persons from the same recruitment process were given the same."

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

Respondents advertised the posts of Constable in 6th Indian Reserve Battalion (IRBn.) Sirmaur, District Shimla. Petitioner being eligible, participated in the process of selection. His identification number was SHI2196. He was called for the physical efficiency test vide letter dated 04.04.2010 (Annexure A-1). He qualified the physical efficiency test and thereafter appeared in the written examination under Roll No. 191095. He successfully cleared the same. Thereafter, he was called for personality test, which took place at Police Line Bharari, Shimla on 30.09.2010. Petitioner was declared over all successful in the selection process so undertaken and was reflected amongst the selected candidates for the post in issue. As other successful candidates, who had participated in the

selection process alongwith the petitioner were called for training and he did not receive any such communication, he made a representation to the Inspector General of Police, Recruitment Board, Southern Range, Shimla on 02.01.2011 (Annexure A-3). In response thereto, he was informed vide Annexure A-4, dated 07.01.2011 that though he was provisionally selected for the post of Constable 6th IRBn. and other Battalions, however, when his character and antecedents were got verified from the local police, it was found that FIR No. 3/2006, dated 04.01.2006, under Section 160 of the Indian Penal Code and FIR No. 101/2006, dated 09.05.2006, under Sections 325 & 34 of the Indian Penal Code were registered against him at Police Station East and though inFIR No. 101/2006, he was acquitted by learned Court, but in FIR No. 3/2006, dated 04.01.2006, he was fined Rs.100/- and was sentenced till the rising of the Court and in this view of the matter, as the sentence stoodimposed upon the petitioner, he could not be offered appointment.

3. Against the judgment of conviction, the petitioner had preferred an appeal, which was decided by the Court of learned Additional Sessions Judge, Fast Track Court, Shimla, H.P. vide judgment dated 30.12.2011, passed in Criminal Appeal No. 31-S/10 of 2011, titled as *Sandeep Kumar Vs. State of H.P.*, copy of which judgment is appended with the petition as Annexure A-5. In terms thereof, the appeal so filed by the petitioner against the judgment of conviction, was allowed by the learned Appellate Court by holding that the prosecution had not been able to prove that the petitioner was guilty of the offence alleged against him. He was thus acquitted of the offence punishable under Section 160 of the Indian Penal Code.

4. Thereafter, vide Annexure A-6, the petitioner made a representation to the Inspector General of Police, Recruitment Board,

Southern Range, Shimla, H.P. for offering him appointment in view of the fact that the judgment of conviction against him had been set aside by the learned Appellate Court. However, the claim of the petitioner was rejected by the respondent-Department vide Communication dated 07.06.2012 (Annexure A-7) on the ground that as at the time of participating in the process of selection, the petitioner did not disclose that there were criminal cases pending against him or that he stood involved in criminal cases, hence as per the directions of the Police Headquarter, he could not be considered for the post in question.

5. For completion of pleadings, it is relevant to mention that the petitioner after issuance of Communication, dated 07.06.2012 (Annexure A-7) filed a writ petition before this Court, i.e., CWP No. 309 of 2011-A, which was disposed of by this Court in the following terms:-

> *"After the matter was heard for some time, learned counsel, under instructions, seeks permission to withdraw the present petition with liberty to approach the respondent-authorities for redressal of his grievances as also approach this Court on the same cause of action, if need so arises. Request not opposed by leaned Dy. Advocate General. As such, prayer allowed.*
>
> *2. In view of the aforesaid observations, petition is disposed of with a direction that as and when any request is received by the competent authority, same shall be considered and decided on its merits, in accordance with law, within a period of two months from the date of receipt thereof after affording adequate opportunity of hearing to all concerned. Liberty granted to the petitioner to approach the Court if need so arises subsequently."*

6. Thereafter, the petitioner made a detailed representation to the Inspector General of Police, Sounthern Range, H.P., Shimla, however,

the same was rejected vide Communication dated 05.05.2014 (Annexure A-9). Petitioner filed an appeal against the same before the Principal Secretary (Home), Government of Himachal Pradesh, which was also rejected vide Communication dated 17.06.2016 (Annexure A-10).

7. Feeling aggrieved, the petitioner filed this petition (originally filed as OA No. 6163/2016 before the erstwhile learned Himachal Pradesh State Administrative Tribunal).

8. Learned Senior Counsel for the petitioner has argued that rejection of the candidature of the petitioner is not sustainable in the eyes of law, for the reason that when earlier the appointment was refused to the petitioner on the ground that he stood convicted by imposition of fine to the tune of Rs.100/- and by award of sentence till the rising of the Court, subsequently his candidature could not be rejected in view of the fact that he stood acquitted, that too, honourably by the learned Appellate Court on a new ground. On this count, he prays that the impugned orders be set aside and the respondents be directed to offer the petitioner appointment against the post of Constable in 6th IRBn. and/or other Battalions. On instructions from the Instructing Counsel, learned Senior Counsel has stated that in case this Court is pleased to grant the said relief in favour of the petitioner, then the petitioner shall forgo the relief of seniority etc. and he shall accept the appointment as from the date when the offer shall be made to him, but in case he has become over age, then this aspect may be looked into by the Court sympathetically.

9. Opposing the petition, learned Additional Advocate General has submitted that there is no infirmity in the orders passed by the Department vide which the case of the petitioner was rejected. He has specifically drawn the attention of the Court to the averments made in para-6(ii) of the reply, which has been filed to the petition (originally filed

as OA). He submitted that there was concealment of fact by the petitionerat the time when he applied for the post in question, because he did not disclose about the pendency of criminal cases against him and about his conviction. He also submitted that in terms of the Form which has to be filled in by the candidate at the time of applying for the post in question, these holding outs are to be mandatorily made out by a candidate and as the petitioner herein has mislead the employer, therefore, he deserves no sympathy from the Court. He has further submitted that as on the date, when initially the candidature of the petitioner was rejected by the Department, admittedly, there was a judgment of conviction against him and, therefore, the rejection of the candidature of the petitioner as on the said date cannot be held to be bad, even if subsequently in appeal, the judgment of conviction was set aside. Accordingly, he has prayed for dismissal of the petition.

10. I have heard learned counsel for the parties and also gone through the pleadings as well as the record of the case.

11. The factum of the petitioner being provisionally selected for the post of Constable is not in dispute. The factum of rejection of the candidature of the petitioner initially by the Department on the ground that he stood convicted in FIR No. 3/2006, dated 04.01.2006 is also not in dispute. Subsequently, after the petitioner was acquitted by the learned Appellate Court and he approached the Department seeking appointment against the post of Constable, the same stood refused to him by the Department, on the ground that he had concealed the factum of his being involved in criminal cases at the time of applying for the post in issue. This is also a fact which is not much in dispute. However, this Court cannot lose sight of the fact that the offence for which the petitioner was convicted at the relevant time and which he concealed, was under Section

160 of the Indian Penal Code and at that time, age of the petitioner was hardly between 18-19 years. Not only this, even the punishment which stood imposed upon him, which subsequently stood set aside by the learned Appellate Court, was to pay fine of Rs.100/- and sentence up to the rising of the Court.

12. In similar circumstances, Hon'ble Supreme Court in ***Commissioner of Police and others Vs. Sandeep Kumar (2011) 4 Supreme Court cases 644*** has been pleased to hold as under:-

> "*8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often been condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives.*
>
> *9. In this connection, we may refer to the character 'Jean Valjean' in Victor Hugo's novel 'Les Miserables', in which for committing a minor offence of stealing a loaf of bread for his hungry family Jean Valjean was branded as a thief for his whole life. The modern approach should be to reform a person instead of branding him as a*

criminal all his life.

10. We may also here refer to the case of Welsh students mentioned by Lord Denning in his book 'Due Process of Law'. It appears that some students of Wales were very enthusiastic about the Welsh language and they were upset because the radio programmes were being broadcast in the English language and not in Welsh. Then came up to London and invaded the High Court. They were found guilty of contempt of court and sentenced to prison for three months by the High Court Judge. They filed an appeal before the Court of Appeals. Allowing the appeal, Lord Denning observed :-

"I come now to Mr. Watkin Powell's third point. He says that the sentences were excessive. I do not think they were excessive, at the time they were given and in the circumstances then existing. Here was a deliberate interference with the course of justice in a case which was no concern of theirs. It was necessary for the judge to show - and to show to all students everywhere - that this kind of thing cannot be tolerated. Let students demonstrate, if they please, for the causes in which they believe. Let them make their protests as they will. But they must do it by lawful means and not by unlawful. If they strike at the course of justice in this land - and I speak both for England and Wales - they strike at the roots of society itself, and they bring down that which protects them. It is only by the maintenance of law and order that they are

privileged to be students and to study and live in peace. So let them support the law and not strike it down.

But now what is to be done? The law has been vindicated by the sentences which the judge passed on Wednesday of last week. He has shown that law and order must be maintained, and will be maintained. But on this appeal, things are changed. These students here no longer defy the law. They have appealed to this court and shown respect for it. They have already served a week in prison. I do not think it necessary to keep them inside it any longer. These young people are no ordinary criminals. There is no violence, dishonesty or vice in them. On the contrary, there was much that we should applaud. They wish to do all they can to preserve the Welsh language. Well may they be proud of it. It is the language of the bards - of the poets and the singers - more melodious by far than our rough English tongue. On high authority, it should be equal in Wales with English. They have done wrong- very wrong - in going to the extreme they did. But, that having been shown, I think we can, and should, show mercy on them. We should permit them to go back to their studies, to their parents and continue the good course which they have so wrongly disturbed."[Vide : Morris Vs. Crown Office, (1970) 2 Q.B. at p.125C-H.)

In our opinion, we should display the same wisdom as displayed by Lord Denning.

11. As already observed above, youth often commits indiscretions, which are often condoned.

> *12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he wouldautomatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter."*

13. Similarly, in ***Basanti Prasad Vs. Chairman, Bihar School Examination Board and others (2009) 6 Supreme Court Cases 791***, in which case, the services of the incumbent therein were terminated after he stood convicted in a criminal case, which sentence was subsequently set aside in appeal and the incumbent was acquitted, Hon'ble Supreme Court was pleased to hold that since the punishment imposed was based on an order of conviction and since the same stood set aside by an order passed by a superior Forum and that order has become final for various reasons, the natural corollary of the same is that the order of the Department terminating the services of the incumbent was required to be set aside.

14. Ordinarily, in such like cases, this Court does not interferewith the decision of the employer because in case a person applies for a post and does not disclose true facts, then such person has to face the consequences. But herein we are dealing with the petitioner, who at the relevant time was 18 to 19 years old. Therefore, as has been held by the Hon'ble Supreme Court in *Commissioner of Police and others (supra),* the approach has to be to give opportunity to such a person to reform instead of branding him as a criminal all his life. As has been held by the Hon'ble Supreme Court, at young age, people often commit indiscretions

and such indiscretions can often be condoned, as after all, youth will be youth. Hon'ble Supreme Court has also observed in the said case that at such age, young people are not expected to behave in as mature a manner as older people. Therefore, approach has to be to condone minor indiscretions rather than to brand them as criminals for rest of their lives.

15. While respectfully concurring with the findings so returned by the Hon'ble Supreme Court, this Court is of the view that this benefit in the present case also deserves to be given to the present petitioner, taking into consideration his age when said indiscretion was committed by him.

16. In this view of the matter, this petition is allowed. Annexures A-4 dated 07.01.2011, A-7 dated 07.06.2012, A-9 dated 05.05.2014 and A-10 dated 17.06.2016 are ordered to be quashed and set aside, with a direction to the respondent-Department to offer appointment to the petitioner against the post of Constable in 6th IRBn. Sirmaur, District Shimla or other Battalions. It is further directed that in case the petitioner has become over age, then he shall be offered appointment by exercising the power of relaxation. However, it is clarified that the appointment of thepetitioner, for all intents and purposes, shall be prospective as from the date of his appointment, which be offered to him not less than 60 days from today. The petitioner shall be ranked at the bottom of the seniority list as on the date of appointment and he shall not claim any benefit whatsoever prior to the date of his appointment.

With these observations, the petition stands disposed, so also pending miscellaneous applications, if any.

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

1. SHRI DAULAT RAM, SON OFLATE SH. BARDU RAM, RRESIDENT OF VILLAGE MATOGRI, P.O. CHABA, TEHSIL SUNI, DISTT. SHIMLA, H.P., PRESENTLY SERVING ASA PEON IN DIRECTORATE OF RURAL

DEVELOPMENT,SHIMLA, H.P.

2. SH. GHANSHYAM DASS, SON OF SH. KANIYA LAL, RESIDENT OF VILLAGE AND
P.O. HIMARI, TEHSIL SUNI, DISTT. SHIMLA, H.P., PRESENTLY SERVING AS A CLERK IN B.D.O. OFFICE BILASPUR, DISTT. BILASPUR,H.P.

...PETITIONERS

(BY M/S A.K. GUPTA & BABITA KUMARI,ADVOCATES)

AND

1. THE STATE OF H.P. THROUGH THE PRINCIPAL SECRETARY (PANCHAYATI RAJ & RURAL DEVELOPMENT) WITHHEADQUARTER AT SHIMLA, H.P.

2. THE DIRECTOR OF RURALDEVELOPMENT WITHHEADQUARTER AT SHIMLA, H.P.

...RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 02 of 2021
Dated: 14.09.2021

Constitution of India 1950 - Article 226 – The onus is not upon the daily wager to approach the Department for conferment of work charge status upon completing requisite years as per policy and it is for the Department to keep a track of all such daily wagers and confer upon them the status of Shamawork charge once they complete the requisite number of years in terms of the policy at the State Government in vogue- Petition allowed.

Cases referred:

Mathew David Vs. State of Kerala and others (2020) 14 Supreme Court Cases 577;

State of Uttar Pradesh and others Vs. Arvind Kumar Srivastava and others (2015) 1 Supreme Court Cases 347;

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 writ petition, the petitioners have, *inter alia*,prayed for the following relief:

> *"(i) That the petitioners may be ordered to be granted work charge status from the date they completed 8 years of service at par with Sh. Shiv Kumar and others, with all the benefits incidental thereof such as back wages, seniority and pay fixation etc."*

2. The case of the petitioners is that they were engaged as Daily Wagers by the respondent-Department in the year 1996 and their services were regularized in the year, 2007. According to the petitioners, similarly situated persons approached this Court by way of CWP No. 755 of 2011, titled as *Shiv Kumar and others Vs. State of H.P. and another*, wherein, they made a prayer for grant of work charged status upon completion of 8 years' service as daily waged workers, with all benefits incidental thereto, including full back wages, seniority and pay fixation. Said writ petition was disposed of by the Hon'ble Division Bench of this Court vide judgment dated 25th February, 2011 in the following terms:-

> *"2. The petitioners claim work charge status on completion of eight years of continuous service as daily wagers. According to the petitioners, the issue is covered in their favour by the judgment of this Court rendered in CWP No. 2735 of 2010, Rakesh Kumar Vs. State of H.P. and others. It is for the respondents to examine the matter. Therefore, this writ petition is*

> *disposed of directing the respondent concerned to examine the matter in the light of the judgment referred to above and take appropriate action thereon within a period of four months from the dae of production of a copy of this judgment alongwith a copy of the writ petition and the copy of the judgment, referred above by the petitioner concerned."*

3. Learned counsel for the petitioners submits that as the petitioners are similarly situated as the writ petitioners in CWP No. 755 of 2011 (*supra*), they will be satisfied in case this petition is disposed of with the direction to the competent authority to consider the case of the petitioners in terms of the law laid down by this Court in *CWP No. 2735 of 2020, titled as Rakesh Kumar Vs. State of H.P. and others*.

4. In rebuttal to the prayer of the petitioners, learned Additional Advocate General submits that this petition is hit by delays and laches. According to him, the relief being prayed for is nothing but an afterthought and the petitioners now after regularization of their services have filed this petition without any explanation in the pleadings as to why they did not approach the appropriate Court of law with the prayer of conferment of work charge status upon them on completion of 8 years of service as daily waged workers. He has also relied upon the judgment of Hon'ble Supreme Court in ***State of Uttar Pradesh and others Vs. Arvind Kumar Srivastava and others (2015) 1 Supreme Court Cases 347,*** in which, Hon'ble Supreme Court has been pleased to hold that though the normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit, but this principle is subject to well- recognized exceptions in the form of laches and delays as well as acquiescence.

5. On the other hand, Mr. A.K. Gupta, learned counsel appearing for the petitioners has relied upon the judgment of the Hon'ble Supreme Court in ***Mathew David Vs. State of Kerala and others (2020) 14 Supreme Court Cases 577***, in which, the Hon'ble Supreme Court was pleased to hold that it did not agree with the High Court that the appellant therein was not entitled for the relief which was granted to a person similarly situated to him on the ground of delay. Hon'ble Supreme Court was pleased to hold that the appellant therein resorted to redressal of his remedy immediately after he learnt about the relief granted to persons similarly situated to him and, therefore, the appellant was entitled for the reliefs prayed.

6. Having heard learned counsel for the parties, this Court is of the considered view that as far as the present case is concerned, it cannot be said that the same is hit by the principle of delays and laches. It is not in dispute that the persons similarly situated as the petitioners and working in the same Department as the petitioners, had approached this Court by way of CWP No. 755 of 2011 (*supra*), in which, the Hon'ble Division Bench of this Court was pleased to issue direction to the respondents to examine the matter in the light of the judgment passed by this Court in ***Rakesh Kumar's case (supra)*** and take appropriate action within the time stipulated therein. Said writ petition was decided by the Hon'ble Division Bench on 25th February, 2011 and the present petition stood filed in the month of June, 2011. Therefore, as from the date when indulgence was shown by this Court to persons similarly situated as the petitioners herein, the petition cannot be said to be barred by delays and laches. In addition, the relief being prayed for by the petitioners is for the grant of work charge status. It is not much in dispute that a daily wage worker upon completion of requisite number of years of service on daily

wages by putting in more than 240 days in each calendar year, gets a right conferred upon him of being regularized in terms of Government Policy, but of course, this right is subject to the availability of posts. This is wherein the work charge status comes into picture, because as from the date of completion of requisite number of years till the services of the daily wager are actually regularized, he is entitled to be conferred the work charge status, so that the sword of being unceremoniously removed from service no longer hangs on his head. This Court is of the considered view that onus is not upon the daily wager to approach the Department for conferment of work charge status upon completing requisite years as per Policy and it is for the Department to keep a track of all such daily wagers and confer upon them the status of work charge once they complete the requisite number of years in terms of the Policy of the State Government in vogue.

7. Be that as it may, in terms of the prayer made by learned counsel for the petitioners, this petition is disposed of with the direction to respondent No. 2 that the case of the petitioners be also examined in the light of the judgment passed in ***CWP No. 2735 of 2010, Rakesh Kumar Vs. State of H.P. and others*** and appropriate orders thereupon be passed within a period of three months from today. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

DR. PRATIBA HIMRAL, W/O
SHRI ASHWANI RAJ SHAH, R/O
TYPE-V, BLOCK A, SET NO.101,
RESIDENTIAL COMPLEX SLBSGMC

MANDI AT NERH CHOWK, DISTRICT
MANDI, H.P., PRESENTLY WORKING
AS ASSOCIATE PROFESSOR ON
CONTRACT BASIS IN THE DEPARTMENT
OF MEDICINE AT SLBSGMC MANDI
AT NERH CHOWK, DISTRICT
MANDI, H.P. ……PETITIONER.

(BY SH. KARAN SINGH PARMAR,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY HEALTH
TO THE GOVERNMENT OF H.P.,
SHIMLA-2.

2. DIRECTOR OF MEDICAL EDUCATION &
RESEARCH IN SHIMLA-2.

3. DIRECTOR HEALTH SERVICES,
SHIMLA-2.

4. PRINCIPAL SHRI LAL BAHADUR SHASTRI
GOVERNMENT MEDICAL COLLEGE
(SLBSGMC) MANDI AT NER CHOWK,
DISTRICT MANDI, H.P. ……RESPONDENTS.

(SH. AJAY VAIDYA, SENIOR
ADDITIONAL ADVOCATE GENERAL,
FOR RESPONDENTS- 1 TO 4)

CIVIL WRIT PETITION No. 1675 of 2021
DECIDED ON: 29.09.2021

Constitution of India 1950 - Article 226 – Entitlement for Maternity leave /Child care leave - Whether the petitioner who adopted a female child can

claim benefit of maternity leave of 180 days in terms of section 43 of CCS (Leave) Rules -Held – Not only the health issues of the mother and the child considered while providing for maternity leave, but the leave is provided for creating a bond of affection between the two-Distinguish between a mother who gets a child through adoption and natural mother who gives birth to a child, would result in insulting women hood and the intention of a woman to bring up a child - A woman cannot be discriminated as far as Maternity benefits are concerned as a newly born baby cannot be left at mercy of others as it needs rearing and that is the most crucial point during which the child requires care and attention of his mother -The petition found containing merits and accordingly allowed - Order of recovery against the petitioner is quashed-Petition allowed. (Paras 11& 12)

Case referred:

Devshree Bandhe versus Chhattisgarh State Power Holding Company Limited and others 2017 Labour Industrial Cases 1506;

Dr. Mrs. Hema Vijay Menon vs Sta te of Maharashtra and others AIR 2015 Bombay 231;

Rama Pandey vs.Union of India and others 2015 Labour Industrial Cases 3921;

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

CMP No.11621 of 2021.

For the reasons stated in the application, the amendment as prayed for, is allowed. Application stands disposed of.

Amended writ petition is taken on record.

CWP No. 1675 of 2021.

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

"i) That the Notification dated 07.03.2012 (Annexure PA-1 substituted as Annexure P-7A may very kindly be quashed and set aside.

ii) That the action of the respondents to deny maternity leave/Child Care Leave to the petitioner and order of recovery dated 08.02.2021 may be held illegal, wrong and respondents may be directed to pay the petitioner the payment for the period of 13.06.2020 to 25.09.2020 with the interest rate of 9% Annum on the account of recoveries made with all Consequential Benefits.

iii) That the respondents may very kindly be directed to treat the period from 13.06.2020 to 25.09.2020 as a Service Period.

iv) That the petitioner may also be held entitled for child care leave."

2. The undisputed facts are that the petitioner adopted a female child on 11.03.2020, who was born on 25.02.2020.

3. Now, the moot question is whether the petitioner can claim the benefit of maternity leave of 180 days in terms of Section 43 of the CCS (Leave) Rules, which is reproduced as under:-

"**43. Maternity Leave:**

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of [1][180 days] from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

NOTE:- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

[2][(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government servant in case of miscarriage including abortion on production of medical certificate as laid down in Rule 19:

Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule.]

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) upto a maximum of [1][two years] may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account."

4. Somewhat an identical issue came up before this Court in ***CWP No. 4509 of 2020,*** titled ***Sushma Devi*** versus ***State of Himachal Pradesh***

and others, decided on 04.03.2021, regarding entitlement of maternity leave to surrogacy parents and while dealing with this issue, the question of maternity leave to the adoptive mother was also considered in para-8 of the judgment, referred supra, which reads as under:-

> "8. Once, the respondents admit that the minor child is that of the petitioner, then she is entitled to the leave akin to the persons, who are granted leave in terms of the rules (ibid). The purpose of the said rules is for proper bonding between the child and parents. Even, in the case of adoption, the adoptive mother does not give birth to the child, yet the necessity of bonding of the mother with the adopted child has been recognized by the Central Government."

5. This issue has been considered in detail by the learned Single Judge of the Delhi High Court in ***Rama Pandey*** *versus* ***Union of India and others 2015 Labour Industrial Cases 3921*** wherein it was held that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child.

6. A Division Bench of the Bombay High Court in ***Dr. Mrs. Hema Vijay Menon*** *versus* ***State of Maharashtra and others AIR 2015 Bombay 231*** while following the aforesaid judgment observed as under:

> "7. On hearing the learned counsel for the parties, it appears that the Joint Director of Higher Education, Nagpur, was not justified in refusing maternity leave to the petitioner. According to Oxford English Dictionary, maternity means- motherhood. Maternity means the period during pregnancy and shortly after the child's birth. If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother

and a mother who has begotten a child through surrogacy or has adopted a child from the date of his/ her birth. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two. It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of

learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.

8. As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave. Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother, who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and

> a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of Rama Pande vs. Union of India, and relied on by the learned counsel for the petitioner, in this regard."

7. Similar reiteration of law can be found in the judgment rendered by the learned Single Judge of the Chhattisgarh High Court in ***Devshree Bandhe*** *versus* ***Chhattisgarh State Power Holding Company Limited and others 2017 Labour Industrial Cases 1506*** wherein it was held as under:

> "22.According to Shorter Oxford English Dictionary (Fifth Edition), "maternity" means (1) the quality or condition of being a

mother; motherhood and (2) the qualities or conduct characteristic of a mother; motherliness. According to other Oxford English Dictionaries, "maternity" means motherhood.

23. According to Black's Law Dictionary (Eighth Edition), "maternity" means the state or condition of being a mother, especially a biological one; motherhood.

24. Maternity means the period during pregnancy and shortly after the child's birth. If maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has begotten a child through surrogacy. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two.

25. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development.

26. The Supreme Court in Lakshmi Kant Pandey (AIR 1984 SC 469) (supra) while expanding the scope of right to life held that right to life includes the right to motherhood and also the right of every child to full development, and observed as under: -

> "**6. ... Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team**

> **on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. ..."**

27. In Municipal Corporation of Delhi (AIR 2000 SC 1274, paras 30 and 35) (supra), the question before the Supreme Court was whether female workers working in muster roll in the Corporation are entitled for maternity benefit at par with regular employees under the provisions of the Maternity Benefit Act, 1961. The Supreme Court noticed the constitutional provisions contained in Articles 38, 39, 42 and 43 of the Constitution of India and Sections 2 and 5 of the Maternity Benefit Act, 1961 as well as Article 11 of the "Convention on the Elimination of all Forms of Discrimination against Women" adopted by the United Nations on 18-12-1979 and held that female workers working in muster roll are entitled to all benefits conceived under the Maternity Benefit Act, 1961. It was observed as under: -

> "**33. ... To become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. ...**"
>
> 38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between the Municipal Corporation of Delhi and the women employees (muster roll); and so read these

> employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary notification under the proviso to sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages."

8. Article 42 of the Constitution of India reads as under:

> "**42. Provision for just and humane conditions of work and maternity relief**:- The State shall make provision for securing just and humane conditions of work and for maternity relief."

9. It was long felt that the working women were unable to depute their time towards their children due to exigencies of service. Hence, the concept of grant of child care leave was introduced to ensure the welfare of the child so as to enable the mother to avail child care leave whenever she feels that the child needs the care. This is in tune with the international covenants and treaties to which India is a signatory.

10. As rightly held by the Bombay High Court, the object of the maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance to the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention.

11. Not only are the health issues of the mother and the child considered while providing for maternity leave, but the leave is provided for creating a bond of affection between the two. To distinguish between a

mother who begets a child through adoption and a natural mother, who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through adoption. Motherhood never ends on the birth of the child and a commissioning mother cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through adoption. A newly born child cannot be left at the mercy of others as it needs rearing and that is the most crucial period during which the child requires care and attention of his mother. The tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. A bond of affection has also to be developed.

12. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and order of recovery dated 08.02.2021 (Annexure P-7) is quashed. The respondents are directed to sanction/grant maternity leave to the petitioner in terms of Rule 43(1) of the CCS (Leave) Rules, 1972 and treat the same as service period. Pending application, if any, also stands disposed of.

13. However, before parting, we make it clear that this judgment is being rendered in the peculiar facts and circumstances of the case, more particularly, in the background that the child that was adopted on 11.03.2020, was born on 25.02.2020 i.e. only 15 days old at the time of adoption. It is for this reason that we have not gone into the constitutional validity of the Notification dated 07.03.2012 (Annexure PA-1) whereby the benefits of Section 43 of the CCS (Leave) Rules, 1972, have been withdrawn.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MS. JUSTICE SABINA, J.

Between:

VISHAL BANSAL, SON OF SH. VINOD KUMAR, AGED ABOUT 36 YEARS, R/O WARD NO. 2, OLD AMB ROAD, GAGRET, TEHSIL GHANARI, DISTRICT UNA, H.P. THROUGH SUPERINTENDENT OF JAIL, CENTRAL JAIL NAHAN.

……PETITIONER (IN JAIL)

(BY MR. SUNIL KUMAR AND MR. PANKAJ SAWANT, ADVOCATES.)

AND

1. STATE OF HP, THROUGH ITS PRINCIPAL SECRETARY DEPARTMENT OF HOME (JAIL), SHIMLA, DISTT. SHIMLA-171002 (H.P.)
2. THE DIRECTOR GENERAL PRISON CORRECTIONAL SERVICES OFFICER AT SHIMLA-171009 (HP).
3. INSPECTOR GENERAL OF PRISONS & CORRECTIONAL SERVICES, HIMACHAL PRADESH, SHIMLA-171009.
4. THE SUPERINTENDENT OF JAIL, MODEL CENTRAL JAIL NAHAN, DISTRICT SIRMOUR, (HP).

…RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MS. RITTA GOSWAMI AND MR. NAND LAL THAKUR, ADDITIONAL ADVOCATE GENERAL AND MS. SEEMA SHARMA, DEPUTY ADVOCATE GENERAL.)

CIVIL WRIT PETITION
No. 3057 of 2021
DECIDED ON: 27.10.2021

Constitution of India 1950 - Article 226 – Grant of Parole - Director General prisons and Correctional Services Himachal Pradesh rejected the application filed by the petitioner for grant of Parole- Held - The purpose of grant of Parole is to give an opportunity to convict to look after his family left behind and also to join the mainstream of the society - There is no reason to assume that if the petitioner is granted the benefit of premature release he would once again display criminal tendency -The benefit of Parole granted for a period of 15 days on furnishing personal bonds with two sureties to the satisfaction of the Superintendent of Jail Model Central Jail Nahan HP granted in favour of petitioner and the petitioner directed to surrender immediately on expiry of 15 days of parole- Petition disposed off. (Paras 6 , 10 &11)

Cases referred:

Asfaq vs State of Rajasthan and others, 2017 (15) SCC 55;

Mohammad Shamsuddin vs State of Rajasthan & others, (2019) 14, SCC 333;

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

O R D E R

This writ petition has been filed by Vishal Bansal, challenging order dated 17th April, 2021 (Annexure P-3), whereby the application of the petitioner for grant of parole has been rejected by the Director General, Prison and Correctional Services, Himachal Pradesh.

2. It is contended that the petitioner was arrayed as accused in case FIR No. 26/2016, dated 26.03.2016, registered with Police Station Gagret, Distt. Una, for the offences under Sections 302, 392, 341, 120B & 201 of the Indian Penal Code. It is further contented that the petitioner had applied for anticipatory bail, which was dismissed by this Court and subsequently by the Hon'ble Supreme Court. However, the petitioner surrendered before this Court on 16.06.2016 pursuant to the order of the Hon'ble Supreme Court passed in SLA (Crl) No. 4371 of 2016 and faced trial.

He was eventually convicted for the offences punishable under Sections 302, 392, 201, 341 & 120B of IPC vide judgment dated 20th February, 2020 by the Additional Sessions Judge-1, District Una, H.P. Ever since he surrendered before this Court on 16.06.2016, he is in jail and thus, has completed incarceration of more than 5 years and 4 months. The application of the petitioner for regular parole has been dismissed by the Director General, Prison and Correctional Services, Himachal Pradesh on 17th April, 2021 on the ground that the District Magistrate has not recommended so.

3. Mr. Pankaj Sawant, learned Counsel for the petitioner, argues that the petitioner has a family comprised of his old aged mother, wife and two minor daughters. He further argues that the wife of the petitioner has also filed a petition under Section 13 of the Hindu Marriage Act, for divorce against the petitioner due to his inability to maintain her and their children. The petitioner wants to maintain and develop good relationship with his wife and make arrangements for the maintenance of his wife and children. He also wants to look after his old aged mother. For all these reasons, he had submitted application dated 27.08.2020 for grant of parole through proper channel. Respondent No. 4-the Superintendent of Jail, Model Central Jail, Nahan, District Sirmour, (HP) had duly recommended his case for release on parole. But the same has been mechanically rejected by respondent No. 2-the Director General, Prison Correctional Services Officer at Shimla. The District Magistrate in his report has stated that during verification, the statement of concerned Pradhan NAC Gagret namely Kiran Bala, W/o Sh. Shyam Verma, Up Pradhan NAC Gagret, mother of life convict have been recorded. He has recommended against release of the petitioner on parole as the son of the deceased had raised objection against release of the petitioner on parole and expressed the apprehension that if the petitioner is released on parole, he may abscond. It is contended that there is no justification for such apprehension, particularly when the Superintendent Jail, Model Central Jail, Nahan, in

Columns No. 13 and 17 of his report (Annexure P-5) has categorically recorded that the conduct of the petitioner in jail has throughout been satisfactory and there is no pending case against him. It is denied that the petitioner was absconding during trial. In fact, he had availed his right to apply for anticipatory bail upto the Supreme Court and was eventually allowed to surrender before this Court.

4. The learned Counsel for the petitioner in support of his submissions has relied upon the judgment passed by a Division Bench of this Court in *CWP No. 663 of 2020*, titled as *Sajid* versus *State of Himachal Pradesh & others*, decided on 29th June, 2020, in which case also, parole application of the petitioner seeking parole was rejected on the basis of non-recommendation of the District Magistrate, but later on, he was granted parole on the basis of his incarceration for about seven years and his good conduct in jail, with a rider that his parole would be liable to be cancelled, in case he breaches any of the conditions of the parole and/or creates law and order problems and the same shall be treated as a negative factor for consideration of his similar prayers in future.

5. On the other hand, Ms. Seema Sharma, learned Deputy Advocate General, argues that the petitioner did not immediately surrender during investigation and the proceedings under Section 82 of the Criminal Procedure Code for getting him declared as a proclaimed offender had to be initiated. But eventually, he surrendered before this Court on 16th June, 2016. She further argues that as per Rule 3 of the Himachal Pradesh Good Conduct Prisoners (Temporary Release) Rules, 1969, the Superintendent of Jail while considering the prayer for parole, shall take into consideration the prisoner's past criminal history and behavior in the prison since admission as recorded in his case file and the likelihood of his not abusing the concession of parole, if granted. Further, the District Magistrate, while recommending the parole/furlough cases of prisoners will specify whether the prisoner shall be

required to furnish the security bond or personal bond or both and while recommending release of the prisoner on his furnishing a personal bond, his family ties and relationships, his reputation, character and monetary conditions and his roots in the community shall also be taken into consideration. She referred to the supplementary affidavit filed on 8th September, 2021 and in particular, referred to the report dated 26.08.2021, of the Superintendent of Police, District Una, for providing antecedents of the petitioner.

6. We have given our anxious consideration to the rival submissions and perused the material on record.

7. The very purpose of grant of parole is to give an opportunity to the convict to look after his family left behind and also to join the mainstream of the society. It is intended to ensure that eventually when he comes out of the jail, he joins the society as a reformed citizen. In order however to decide whether or not he should be granted the facility of parole, conduct of the prisoner during his stay in jail is very much relevant. In the present case, the Superintendent of Jail, Model Central Jail, Nahan, in Columns No. 13 and 17 of his report dated 7th September, 2020 (Annexure P-5) has categorically recorded that the conduct of the petitioner in jail has throughout been satisfactory and there is no pending case against him. It is not in dispute that the petitioner has remained in jail for more than 5 years and 4 months. Merely because the family of the complainant has raised objections to the temporary release of the petitioner on parole and voiced apprehension of his absconding, the case of the petitioner for grant of parole cannot be rejected. Even otherwise, there is no basis for the assumption that if granted parole, he will abscond.

8. The Supreme Court in case titled as *Asfaq* versus *State of Rajasthan and others,* reported in *2017 (15) SCC 55,* while dealing with this aspect of the matter, has held that provisions of parole and furlough, provide

for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with the society. The observations made by the Hon'ble Supreme Court in paras 18 & 22 of the aforesaid judgment are relevant to be extracted hereinbelow:-

> *"18). The provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens. Furloughs or parole can help prepare offenders for success."*
>
> *22). Another vital aspect that needs to be discussed is as to whether there can be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorised as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would*

> *be a threat to the society. Mere nature of the offence committed by him should not be a factor to deny the parole out rightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced. We may hasten to put a rider here, viz. in those cases where a person has been convicted for committing a serious office, the competent authority, while examining such cases, can be well advised to have stricter standards in mind while judging their cases on the parameters of good conduct, habitual offender or while judging whether he could be considered highly dangerous or prejudicial to the public peace and tranquility etc."*

9. The principles laid down in the aforesaid judgment were reiterated by the Supreme Court in case titled as *Mohammad Shamsuddin* versus *State of Rajasthan & others,* reported in *(2019) 14, SCC 333.* It is relevant to extract para-3 of the judgment herein below:-

> *3. We may at this stage quote the observations of this Court in para 17 of its judgment in Asfaq v. State of Rajasthan which are: (SCC p. 62)*
>
> *"77. From the aforesaid discussion, it follows that amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to maintain family and social ties. For this purpose, he has to come out for some time so that he is able to maintain his family and social contact. This reason finds justification in one of the objectives behind sentence and punishment, namely, reformation of the convict. The theory of criminology, which is largely accepted, underlines that the main objectives which a State intends to achieve by punishing the culprit are: deterrence, prevention, retribution and reformation. When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for*

> *short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the society. Another objective which this theory underlines is that even such convicts have right to breathe fresh air, albeit for (sic short) periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners. They are ultimately aimed for the good of the society and, therefore, are in public interest."*

10. Even this Court in case titled as *Bir Singh Vs. the State of Himachal Pradesh and others*, reported in *1985 CRL. L.J. 1458,* in para 3 has observed that in the absence of an opportunity to watch his conduct outside jail for the reason of his not having been released on parole/furlough is again not a factor which could be legitimately pressed into service on the facts and in the circumstances of the case. There is no reason to assume that if the petitioner is granted the benefit of premature release, he would once again display criminal tendency. Such an assumption overlooks not only that the petitioner is not shown to be a habitual offender but also the reformatory aspect of the penalty procedure as well as the good record of the petitioner during the entire period of his imprisonment.

11. In view of the above deliberation, we are persuaded to allow the present writ petition filed by the petitioner by setting aside the order dated 17th April, 2021 (Annexure P-3) and extending the benefit of parole for a period of 15 days, on his furnishing personal bond in the sum of Rs. 1.00 lakh with two sureties in the sum of Rs. 15,000/- each, to the satisfaction of the Superintendent of Jail, Model Central Jail, Nahan, H.P. The petitioner shall surrender before the Superintendent of Jail, Model Central Jail, Nahan, H.P immediately on expiry of 15 days of parole. However, his parole shall be liable to be cancelled, in case the petitioner breaches any of the conditions of the

parole order and/or creates law and order problems, which shall be treated as a negative factor for consideration of his similar prayers in the future.

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

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

BETWEEN:-

SH. KAMAL JEET GUPTA, S/O LATE SH. SUBHASH CHAND GUPTA, R/O VILLAGE & POST OFFICE HOBAR, TEHSIL BHATTIYAT, DISTRICT CHAMBA, (H.P.).

....PETITIONER

(BY SH. NARESH KAUL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SPECIAL SECRETARY (RD) TO GOVT. OF (H.P.).

2. DIRECTOR, RURAL DEVELOPMENT & PANCHAYATI RAJ DEPARTMENT, KASUMPTI SHIMLA-09 (H.P.).

3. SH. MANOJ KUMAR SHARMA S/O SH. (NOT KNOWN TO THE PETITIONER AT PRESENT) VILLAGE LARTH, P.O. RAJA-KA-TALAB, TEHSIL FATEHPUR DISTT. KANGRA, H.P.

....RESPONDENTS

(BY SH. DINESH THAKUR, ADDITIONAL

ADVOCATE GENERAL FOR RESPONDENTS
NO. 1 AND 2.)

(BY MS.ANJALI SONI VERMA & SHIVANI TEKTA,
ADVOCATES, FOR RESPONDENT NO. 3)

CIVIL WRIT PETITION
No. 4123 OF 2020
DECIDED ON: 05.10.2021

Constitution of India 1950 –Article 226 – Service matter - Transfer of the petitioner on basis of D.O. Note causing displacement of petitioner within short span of 5 months -Held- Respondent authority is not precluded from transferring the petitioner or Response No.3 in consonance with law of the land and transfer policy but in administrative exigency or in larger public interest, but not to accommodate one and to harass other - Petition allowed. (Para 15)

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

J U D G M E N T

In the instant petition, petitioner, serving as Superintendent Grade-II in Panchyati Raj Department, Government of Himachal Pradesh, has assailed his impugned transfer order dated 25.9.2020 passed by Director Rural Development after considering representation of the petitioner in pursuance to judgment dated 1.9.2020 passed by a Division Bench of this High Court in CWP No. 2682 of 2020, titled Kamal Jeet Gupta Vs. State of H.P., whereby after quashing the earlier transfer order dated 23.7.2020 of petitioner and respondent No. 3, they were permitted to make representations to the Department to re-consider their transfer after giving them opportunity of hearing with further direction to maintain status quo qua posting of the petitioner and respondent No. 3 till decision by the Department.

2. Present petition is second round of litigation. Earlier transfer order dated 23.7.2020 was assailed by the petitioner on various grounds, including

that he was transferred after short span of 5 months after his joining at present place of posting i.e. Nurpur in February, 2020 in pursuance to his transfer from Kangra to Nurpur vide order dated 18.2.2020 issued on his request on medical ground and also that the said transfer order (dated 23.7.2020) was issued on the basis of D.O. Note number Secretary-CM-17006/2017-VIP-A-221477, dated 20.6.2020 approved at the instance of local MLA, whereby he had recommended transfer of respondent No. 3 vice versa petitioner after condonation of short stay without any administrative or any other justifiable reason. The said transfer was quashed by the Court vide judgment dated 1.9.2020 passed in CWP No. 2682 of 2020.

3. Director Panchyati Raj after considering representations of petitioner and respondent No. 3, in sequel to order dated 1.9.2020 passed by a Division Bench of this Court, has maintained posting of respondent No. 3 at Nurpur, vide order dated 25.9.2020, whereas petitioner has been ordered to be transferred to Chamba.

4. Grievance of the petitioner is that respondent No. 3 was accommodated on the basis of DO Note causing displacement of the petitioner from present place of posting within a short span of five months and the said transfer was quashed by the Court, but vide order dated 25.9.2020, the Director has again accommodated respondent No. 3, but has displaced the petitioner by posting him at a distant place, which indicates vindictive attitude of the respondents against the petitioner for approaching the Court for redressal of his grievances. Petitioner has placed on record recommendations made by local MLA on 18.6.2020 and D.O. Note dated 26.6.2020 issued in sequel thereto approving the transfer of respondent No. 3 vice versa petitioner from Dharamshala to Nurpur in relaxation of ban on transfer and also condonation of short stay of respondent No. 3.

5. Recommendations of Local MLA read as under:-

"I shall be grateful if following transfers approved as under please:-

1. Sh. Manoj Kumar Supdtt. Grade-II presently working at Office DRDA Dharamshala Distt. Kangra may please be transferred to o/o B.D.O. Nurpur Distt. Kangra against Kamal Jeet Gupta Supdtt. Grade-II & vice versa. Short stay of both may please be condoned.

2. … … … …"

6. The approved note reads as under:-

"*Hon'ble Chief Minister has approved the following"*

Sh. Maonj Kumar, Supdt. Grade-II may be transferred without TTA/JT in condonation of short stay from O/o DRDA Dharamshala, Distt. Kangra to O/o BDO Nurpur, Distt. Kangra against Sh.Kamal Jeet Gupta, Supdt. Grade-II & vice-versa, in relaxation of ban on transfers.

Director, Panchyati Raj & RD, Kasumpti, Shimla-9 is requested to take necessary action accordingly and report compliance."

7. Record of the Department was summoned and perused. Undoubtedly, a public representative has a right to recommend for transfer of an employee for various reasons for public welfare and public interest as well as redressal of grievance of an employee, but it must not be a dictate to the Department. Any proposal recommended by public representative must be processed by the Department independently taking into consideration all facts and circumstances including suitability of posting, hardship to be faced by either employee and other factors like short stay.

8. Perusal of record reveals that in present case, it was proposed by local representative and approved by competent authority without any application of mind. Approval of transfer has not been considered by the Administrative Department at any stage. The same has been given effect without any application of mind with observation that it was communicated by the Additional Secretary that Hon'ble Chief Minister had approved the transfer.

9. In the record produced by the Department details of posting and transfer of petitioner as well as respondent No. 3 were also available, perusal whereof reveals that both of them, except for short periods, have served in and around their native or choice places, mainly in District Kangra. Both of them belong to State cadre but have served for maximum period in or around a particular area. It is claim of the petitioner that he was accommodated by the Department for his health problem, whereas, there is no explanation for accommodating and posting respondent No. 3 during his maximum tenure of his service in District Kangra.

10. Transfer of the petitioner ordered on the basis of DO Note was quashed by the Court. Thereafter, the Director has again posted respondent No. 3 on the same station by displacing petitioner and posting him at a distant place, which amounts to punishment to the petitioner for approaching the Court against his transfer on the basis of DO Note.

11. Therefore, I am of the considered view that in the aforesaid facts and circumstances impugned order dated 25.9.2020 deserves to be quashed. Accordingly impugned order dated 25.9.2020 is quashed.

12. What cannot be done directly cannot be permitted to be done indirectly. Vide impugned order, the Director has given effect to the transfer approved on the basis of DO Note by maintaining the transfer order of respondent No. 3 as was ordered vide order dated 23.7.2020, approved at the instance of local public representative. Therefore, impugned order is not sustainable.

13. Without going into the issue of posting of petitioner as well as respondent No. 3, referred supra, impugned order is being interfered with mainly on the ground that vide this order respondent No. 3 has again been accommodated, on whose instance recommendation was made by public representative and on the basis of which DO note was approved and his transfer was ordered vice versa petitioner, whereas petitioner has been made to suffer to

approach the Court on whose instance the Court had quashed earlier transfer order of respondent No. 3 and petitioner.

14. During hearing, learned counsel for the petitioner, has submitted that petitioner is not adamant to remain at Nurpur only, but he would be satisfied in case he is posted in Development Block Bhatyat where post may be available on voluntary retirement of present incumbent Mr.Inder Singh Pathania posted there. In case Mr.Inder Singh is permitted to voluntarily retire and respondents-Department considers the petitioner and finds it suitable to post him at Bhatyat, then Department would also be at liberty to post respondent No. 3 at Nurpur, as in such eventuality transfer of petitioner from Nurpur will not amount punishment to him for approaching the Court for redressal of his grievance.

15 It is also made clear that respondent Authority is not precluded from transferring the petitioner or respondent No. 3 in consonance with law of the land and Transfer Policy, but in administrative exigency or in larger public interest, but not to accommodate one and to harass the other.

16. Petition is allowed in aforesaid terms and disposed of.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MS. JUSTICE SABINA, J.

Between:

YADVI SHARMA,
AGED 17 YEARS,
D/O SH. SANJAY AMRIT GOPAL,
THROUGH HER NATURAL
GUARDIAN AND FATHER
SH. SANJAY AMRIT GOPAL,
S/O LATE SH. NARESH KUMAR,
AGED 48 YEARS,
R/O V.P.O. GARH JAMULA,
VIA DROH,
TEHSIL PALAMPUR,

DISTRICT KANGRA (H.P.)

...PETITIONER

(BY MR. ADARSH K.
VASHISTA, ADVOCATE)

AND

1. CENTRAL BOARD OF SECONDARY EDUCATION THROUGH ITS SECRETARY, CBSE REGIONAL OFFICE, SECTOR 5, PANCHKULA (HARYANA).

2. RAINBOW INTERNATIONAL SCHOOL, THROUGH ITS PRINCIPAL, NAGROTA BAGWAN, DISTRICT KANGRA (H.P.)

...RESPONDENTS

(MS. RITTA GOSWAMI,
ADVOCATE, FOR R-1)

CIVIL WRIT PETITION
No. 4451 of 2021
DECIDED ON: 25.10.2021

Constitution of India 1950 – Article 226 – Correction of name of mother of petitioner from Sangeeta to 'Sangeeta Sharma' in the marks statement-cum-Certification of Secondary School Examination, March 2019 as the respondent has not allowed the request of the petitioner for the correction- Held - The certificate issued by Gram Panchayat Jamula, Development Block Sulah Tehsil Palampur, District Kangra indicates the name of petitioners mother as 'Sangeeta Sharma' - Even the certificate of Bonafide Himachali issued in favour of the mother of the petitioner by the Executive Magistrate on 4th June 2003 indicates the name of mother of petitioner as Sangeeta Sharma - Petition allowed and the order passed by Respondent No.1 dated 9th May 2021 is set

aside and the board is directed to issue fresh certificate with the correction and confirm it with directions issued by Hon'ble Supreme Court in para 194 of judgment within period of one month from the date when copy of this order is produced by the petitioner. (Paras 6 & 7)

This Civil Writ Petition coming on for admission this day, ***Hon'ble Mr. Justice Mohammad Rafiq,*** *passed the following:*

O R D E R

This writ petition has been filed by Yadvi Sharma, a student, who passed her Secondary School Examination from respondent No. 1-Central Board of Secondary Education (for short 'the Board') in the year 2019 as a regular student of Rainbow International School, Nagrota Bagwan, District Kangra, with a prayer that order, dated 3rd May, 2021 (Annexure P-14) issued by respondent No. 1-Board, rejecting the prayer of the petitioner seeking the correction of name of her mother from 'Sangeeta' to 'Sangeeta Sharma', be quashed and set aside and the Board may be directed to carry out change in the name of mother of the petitioner in her Marks Statement-cum-Certificate of Secondary School Examination, March 2019.

2. The learned counsel for the petitioner, at the outset, has cited a recent judgment of the Hon'ble Supreme Court in *Jigya Yadav (Minor) (Through Guardian/Father Hari Singh) versus Central Board of Secondary Education and others,* reported in *(2021) 7 Supreme Court Cases 535,* and in particular, para 37 of the judgment, where a similar request made by a student-Ishita Khandelwal in the Rajasthan High Court was granted, directing the change of the name of her mother from 'Seema Manak' to 'Sanyogeta Manak' and the Letters Patent Appeal filed by the Board was dismissed by the Rajasthan High Court in *CBSE versus Ishita Khandelwal,* reported in *2019 SCC OnLine Raj 7789.* It is argued that the Hon'ble Supreme Court has

upheld the aforesaid decision of the Rajasthan High Court and issued certain directions, in para 194 of the judgment as to the manner in which necessary corrections are required to be made.

3. Learned counsel for respondent No. 1-Board has opposed the prayer and submitted that the petitioner approached the Board and the application of the petitioner was rejected by the Board prior to the judgment of the Hon'ble Supreme Court in *Jigya Yadav's case (supra),* therefore, she may be required to again approach the Board with a fresh representation.

4. In our considered view, unlike in the case before Rajasthan High Court, the instant case does not involve the change of name of the mother of the petitioner, as her name continues to be 'Sangeeta'. The petitioner has only prayed for inclusion of the surname 'Sharma' with the name of her mother 'Sangeeta'.

5. The birth certificate of the petitioner, which is produced on record as Annexure P-1, indicates the name of the petitioner as 'Yadvi Sharma' besides the name of her mother as 'Sangeeta Sharma'. The date of registration of the birth of the petitioner is 3rd February, 2004. Therefore, even if the said certificate is issued on 15th October, 2020, it cannot be said that the entry has been made later on.

6. The certificate issued by Gram Panchayat Jamula, Development Block Suleh, Tehsil Palampur, District Kangra on 27th February, 2006 (Annexure P-2) also indicates the name of petitioner's mother as 'Sangeeta Sharma'. Even, the certificate of Bonafide Himachali (Annexure P-3) issued in favour of the mother of the petitioner by the Executive Magistrate on 4th June, 2003, indicates the name of the mother of the petitioner as 'Sangeeta Sharma'. The Performance Report of the petitioner (Annexure P-4) issued by respondent No. 2-Rainbow International School in respect of the academic year 2008-09 also indicates the name of her mother to be 'Sangeeta Sharma'. The reference may also be made to the Matriculation Certificate issued by

Himachal Pradesh Board of School Education on 15th June, 1992 (Annexure P-15) in favour of the mother of the petitioner, indicating her name as 'Sangeeta Sharma' with Roll No. 265348.

7. In view of the above discussion, we are persuaded to allow this writ petition and set aside the order passed by respondent No. 1-Board, dated 9th May, 2021 (Annexure P-14) and direct respondent No. 1-Board to issue fresh certificate with the correction prayed for, in conformity with the directions issued by the Hon'ble Supreme Court in para 194 of the judgment in *Jigya Yadav's case (supra),* within a period of one month from the date a copy of this order is produced by the petitioner.

8. Pending miscellaneous applications, if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

R.S. THAKUR
S/O LATE SHRI ROOP SINGH,
R/O ROOP NIWAS, LOWER CHAKKAR,
SHIMLA-171005, RETD. DEPUTY
DIRECTOR (PERSONNEL),
HPSEBL, SHIMLA

.....PETITIONER

(BY SH. M.L. SHARMA AND MS. MEGHNA KASHAVA, ADVOCATES)

AND

HIMACHAL PRADESH STATE ELECTRICITY
BOARD LTD., VIDYUT BHAWAN, SHIMLA-4,
THROUGH ITS EXECUTIVE DIRECTOR

.....RESPONDENT

(BY MS. RUMA KAUSHIK, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6583 of 2020
RESERVED ON : 28.10.2021
ANNOUNCED ON : 30.10.2021

Constitution of India 1950 – Article 226 – Medical reimbursement in case of treatment in a Non Empanelled Institution -Held- The petitioner was aware that the above mentioned private hospital is not empanelled with the State of Himachal Pradesh and further he applied to his employer for permission to undergo the knee replacement operation at Apollo Hospital, New Delhi which application was rejected and the decision was communicated to the petitioner well in time – Held- The petitioner in the instant case had not taken the treatment from non impanelled private hospital in emergency, so, petitioner's case not covered for medical reimbursement under the applicable policy – Petition dismissed. (Paras 4(ii) & 4(iii))

Cases referred:

Shiva Kant Jha Versus Union of India, (2018) 16 SCC 187;

This petition coming on for admission this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

The respondent-employer did not approve the medical reimbursement claim of the petitioner-employee in respect of his knee replacement operation carried out in a private hospital in New Delhi, which is not empanelled with the State of Himachal Pradesh. Aggrieved, petitioner has, therefore, filed this writ petition.

2. Facts:-

2(i). As per the pleadings, the respondent-Board has adopted the medical reimbursement policy issued by the State of Himachal Pradesh for reimbursement of medical claims. According to this policy, both outdoor and indoor patient treatment/diagnostic tests taken in government as well as empanelled private hospitals/health institutions/diagnostic labs located

within and outside the State of Himachal Pradesh are reimbursable subject to restrictions stipulated therein. Clause 9.9 of this policy pertains to situations where medical treatment taken in non-empanelled institutions in emergency is reimbursable subject to restriction of rates at par with the rates of Indira Gandhi Medical College & Hospital (IGMC), Shimla. In case the treatment is not available in IGMC, Shimla, then the reimbursement is to be at the rates prescribed in PGIMER Chandigarh/AIIMS Delhi/CGHS or actual, whichever is less. Clauses 9.9 and 9.10 in this regard read as under:-

> *"9.9. In case treatment is taken in a non-empanelled institution in emergency, reimbursement shall be restricted to the rates of IGMC Shimla/Government Dental College, Shimla. In case the procedure/treatment is not available in the IGMC, Shimla/Government Dental College, Shimla the rates of PGIMER Chandigarh/AIIMS, Delhi/CGHS or actual whichever is least shall apply. In case there are no such rates the CGHS rates or actual whichever is less shall apply.*
>
> *9.10. In cases where there are no CGHS Rates, the procedure being adopted under the CGHS will be applicable to the State of Himachal."*

Clause 11 of the policy stipulates that in case treatment is taken in emergency in an institution that is not empanelled within and/or outside the State, the question whether there was an emergency or not, being a question of fact, will be decided by the administrative department. This clause reads as under:-

> *"11. Emergency treatment in a non-empanelled institution: In case treatment is taken in emergency in an institution that is not empanelled or diagnostic tests are undertaken in a lab which is not empanelled within and/or outside the state, the question whether there was an emergency or not, being a question of fact, will be decided by the A.D. concerned. There will be no need to seek permission of the Government or Department of*

Health and Family Welfare in such cases. The decision of the A.D. whether there was an emergency or not shall be final."

Clause 12 of the policy stipulates that treatment for Cancer, Renal Failure/Kidney Transplant, the patient/dependent will be allowed to undergo treatment in any super-specialty hospital whether empanelled or not, subject to the condition that the reimbursement amount will be restricted to CGHS rate or actual, whichever is less.

2(ii). The petitioner on 11.09.2018, applied to his employer/ respondent for permission to undergo knee transplant operation from Apollo Hospital, Sarita Vihar, New Delhi. The petitioner stated in the application that he was suffering from knee pains and was advised to undergo knee transplant operation or else in future, he would not be in a position to walk. That medical experts had advised him to undergo this operation at Apollo Hospital, New Delhi. The said hospital was not empanelled with H.P. Government/ HPSEBL (respondent employer). That his family members were settled in Delhi and could look-after him there during and post his operation. He further stated in the application that his operation dates, tentatively had been fixed by Apollo Hospital during second and third week of October, 2018.

2(iii). The application of the petitioner seeking permission to undergo operation/replacement of his knees in the above-mentioned private hospital was rejected by the respondent-employer vide communication dated 24.09.2018, which was duly communicated to the petitioner. While rejecting petitioner's application, the respondent stated that as per the provisions contained in the reimbursement policy, the medical reimbursement from non-empanelled hospital is permissible only in case of emergency. In petitioner's case, such contingency was missing. The petitioner had opted to undergo operation at New Delhi only on the basis of appropriateness of treatment.

2(iv). Regardless of rejection of his prayer, the petitioner underwent his knee transplant/replacement operation from Apollo Hospital, New Delhi in

the month of October, 2018 and submitted his medical bills amounting to Rs.5,12,512/- for reimbursement to the respondent. The medical reimbursement claim of the petitioner was rejected by the respondent on 09.01.2019 with the remarks that the treatment was taken from a non-empanelled hospital and that the permission sought by the petitioner to undergo operation from the above-mentioned private hospital had already been declined on 24.09.2018.

2(v). Against the above backdrop, the petitioner has filed the instant petition, praying for quashing of communication dated 09.01.2019, whereby his medical reimbursement claim was turned down by the respondent. Petitioner has prayed for direction to the respondent to reimburse the medical expenses incurred by him in knee replacement operation as per the medical bills submitted by him alongwith interest @ 12% per annum.

3. We have heard learned counsel for the parties and gone through the record available on the case file.

Learned counsel for the petitioner submitted that the petitioner had to undertake knee transplant operation in a non-empanelled private hospital in case of emergency, therefore, he is entitled for medical reimbursement of the expenses incurred by him on his treatment at par with the rates of IGMC, Shimla. In support of such contention, learned counsel relied upon the judgment rendered by the Hon'ble Supreme Court in ***Shiva Kant Jha Versus Union of India, (2018) 16 SCC 187***.

Opposing the prayer, learned counsel for the respondent-employer submitted that there was no medical emergency in the case of the petitioner. The petitioner had sufficient time to take treatment of knee replacement/operation in an empanelled hospital. Despite having knowledge that the aforesaid private hospital was not empanelled with the Government of Himachal Pradesh and despite rejection of his application seeking permission to undergo knee replacement operation in that non-empanelled private

hospital, the petitioner had still taken treatment from non-empanelled private hospital. The petitioner, therefore, is estopped by his own act and conduct and is not entitled for medical reimbursement.

4. Having heard learned counsel for the parties, we are of the considered view that this petition deserves to be dismissed for the following reasons:-

4(i). The applicable medical reimbursement policy is not under challenge. As per this policy, in case the treatment is taken in a non-empanelled institution in **emergency**, the reimbursement is permissible restricted to the rates specified therein.

The petitioner had not undertaken the operation in an emergent situation. In his application dated 11.09.2018 itself, the petitioner had mentioned that he was suffering from knee pains. That his family members were residing in Delhi and, therefore, it was easier for him to take medical treatment at Delhi. That Apollo hospital was the best hospital for knee replacement operation. That the medical experts had statedly advised him to undertake knee replacement operation in the best hospital at Delhi and, therefore, he wanted to undergo knee replacement operation in Apollo Hospital, New Delhi. This all goes to show that no medical emergency existed. Petitioner had opted to undergo the operation in the non-empanelled private hospital because of appropriateness of the medical treatment there, which suited him and not because of any medical emergency.

4(ii). The petitioner was aware that the aforementioned private hospital is not empanelled with the State of Himachal Pradesh. He had applied to his employer/respondent for permission to undergo the knee replacement operation at Apollo Hospital, New Delhi. His application was rejected by the respondent-employer. The decision was communicated to the petitioner well in time. Despite all this, the petitioner underwent operation from the aforementioned private non-empanelled hospital.

4(iii). The judgment relied upon by the petitioner in *Shiva Kant Jha's case, supra*, is on the basis of facts of that case. The petitioner therein had taken medical treatment at Fortis Escorts Heart Hospital, wherein he was admitted in emergency condition for survival of his life. It was in that background that the Hon'ble Apex Court had allowed the writ petition observing that the 'treatment of the petitioner (therein) in non-empanelled hospital was genuine because there was no option left with him at the relevant time'. Hon'ble Apex Court also observed in the judgment that the 'decision is confined to that case only'. The facts of instant case as noticed above are different. There was no emergent situation in petitioner's case, wherein he underwent knee replacement surgery in a non-empanelled private hospital.

In view of the aforesaid discussion, we hold that the petitioner in the instant case had not taken the treatment from non-empanelled private hospital in emergency. Petitioner's case was not covered for medical reimbursement under the applicable policy. We do not find any fault in respondent's rejecting petitioner's claim for medical reimbursement of the bills in question. Accordingly, there is no merit in the instant petition and the same is dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

SH. MEENA RAM S/O SH. FEKRU RAM,
R/O SHYAM BUILDING, BELOW
TRANSFORMER, CEMETRY ROAD,
SANJAULI, SHIMLA-6.

…APPELLANT

(BY SH. VIRENDER SINGH CHAUHAN,
SENIOR ADVOCATE, WITH SH. VIVEK DAREHAL,
ADVOCATE.)

AND

1. SH. VINAY NANDA S/O SH. P.L. NANDA,
   R/O VILLAGE AND P.O. PANOG,
   TEHSIL KOTKHAI, DISTT. SHIMLA, H.P.
2. THE NEW INDIA ASSURANCE COMPANY LTD.
   BHAGRA NIWAS, THE MALL SHIMLA, H.P.
   THROUGH ITS BRANCH MANAGER.

.... RESPONDENTS

(NONE FOR RESPONDENT NO.1)

(SH. B.M.CHAUHAN, SENIOR ADVOCATE
WITH SH.AMIT HIMALVI, ADVOCATE, FOR
RESPONDENT NO.2.}

FAO (WCA) No. 279 of 2012
RESERVED ON: 01.10.2021.
DECIDED ON: 08. 10.2021.

Employees compensation Act, 1923 - Section 4A – Specific case of the petitioner is that he has suffered disability at 40% but due to the nature of disability was unable to drive the commercial vehicle, therefore his loss of earning was to the extent of 100% - Employees Compensation Commissioner assessed the disability suffered by the petitioner at 40% -Held – Appellant used to earn his livelihood by driving commercial heavy vehicle for which one needs to have lots of endurance and physical capacity and one has work for long and even at odd hours whereas one can drive a private vehicle at leisure and according to his convenience -Petitioner cannot drive commercial vehicle ,hence award is modified to the extent that respondent number 2 is held liable to indemnify the Respondent Number -1 and pay Rs. 4,35,288/- as compensation with interest at the rate of 12% per annum from 2.5.2007 plus 50% penalty to the appellant -Appeal disposed of.(Paras 21 and 22)

Cases referred:

ChanapaNagappaMuchalagoda vs. Divisional Manager, NIC Limited 2020 (1) Him.L.R. (SC) 269;
K. Sivaraman and others vs. P. Sathishkumar and another (2020) 4 SCC 594;
Kerala State Electricity Board and another vs.Valsala K. and another (1999) 8 SCC 254;
PratapNarain Singh Deo vs. Srinivas Sabata and another (1976) 1 SCC 289;
PuranDutt vs. H.R.T.C. 2006 (3) Shim.L.C. 222;

This appeal coming on for admissionafternotice this day, the Court deliveredthe following:

J U D G M E N T

By way of instant appeal, appellant has assailed award dated 08.06.2012 passed by the Commissioner under Employees Compensation Act (for short 'Commissioner') in Case No.9-2 of 2011/2008.

2. Appellant was employed as driver by respondent No.1 to drive a bus. During the course of his employment with respondent No.1, on 02.05.2007, the bus owned by respondent No.1 met with an accident while being driven by the appellant. Appellant suffered multiple injuries. His right arm got seriously fractured, resulting in permanent disablement to the extent of 40% to the appellant.

3. Appellant approached the Commissioner for award of compensation under the Employees Compensation Act (for short 'Act'). His specific case was that though the disability suffered by appellant was assessed at 40% but due to the nature of the injuries/disability, he was unable to drive the commercial vehicle, therefore, his loss of earning capacity was to the extent of 100%. His plea before the Commissioner was that he was paid Rs.5000/- per month as salary, besides Rs.100/- per day as daily allowance. As per appellant, his age was 41 years at the time of accident. He accordingly prayed for grant of Rs.6,00,000/- as compensation alongwith interest and penalty.

4. Respondent No.1, being owner of the vehicle, contested the petition on the grounds that he had suitably compensated the appellant immediately after the accident and, as such, he was estopped from filing the petition. The factum of employment of appellant as also the accident was not denied. It was, however, denied that the appellant had been totally disabled from being driving the vehicle. It was stated that the salary of appellant was

Rs.3500/- per month and there was no allowance paid to the appellant in addition to the salary.

5. Respondent No.2 being insurer of the vehicle vide its separate reply has denied each and every averment made by the appellant. Respondent No.2 had raised specific objection that the person driving the vehicle at the time of accident was not holding valid and effective driving licence. The vehicle was being driven in violation of terms and conditions of the insurance policy. The petition was termed to be collusive between the appellant and respondent No.1.

6. On the pleadings of the parties, the following issues were framed on 06.08.2009:

1. Whether the petitioner is entitled for compensation? If so, to what extent and from whom? OPP
2. Whether the petition is not maintainable in this form? OPRs
3. Whether the petitioner is estopped from filing the present petition due to his own acts, deeds and conduct? OPRs
4. Whether the petitioner has been duly compensated immediately after the accident by respondent No.1? OPR-1.
5. Whether the vehicle in question was driven in violation of terms and conditions of the Insurance Policy? OPR-2.
6. Relief.

7. The Commissioner decided issue No.1 in affirmative and all other issues were decided in negative. An award of Rs.1,74,115.20 alongwith interest @ 12% per annum w.e.f. 2.6.2007 was passed. The Commissioner assessed the above said compensation by taking total wages of the appellant as Rs.7500/- per month, but confined the same at Rs.4000/- per month for the purposes of assessment of compensation in accordance with the provisions of Section 4A of the Act as it stood on the date of accident. The

disability was assessed at 40%. By application of relevant factor, the sum was adjudged in the aforesaid terms.

8. Aggrieved against the award passed by the Commissioner, the appellant has assailed the same primarily on the grounds that the restriction of income at Rs.4000/- per month by the Commissioner was against the law as the cap of Rs.4000/- per month fixed under Section 4A of the Act was removed in the year 2010 and secondly that the appellant had suffered loss of 100% earning capacity as he was not able to drive the commercial vehicle much less the bus.

9. Initially, the appeal was admitted on 17.07.2012 on a single substantial question of law as under:

> "Whether the learned Commissioner below has wrongly assessed the income of the appellant and erred in awarding penalty against the respondents?"

10. During the course of hearing, on an application filed by the appellant, another substantial question of law was framed on 01.10.2021 to the following effect:

> "Whether the injury sustained by the appellant/claimant to the extent of 40% disability which renders him incapable of performing his employment can be determined as 100% functional disability?"

11. Heard.

12. As regards the first substantial question of law framed on 17.7.2012, it can be noticed that the findings of the Commissioner with respect to monthly income of appellant as Rs.7500/- per month had become final against the respondents as none of them had assailed such findings. Now, the question arises whether the Commissioner had rightly restricted the

income at Rs.4000/- per month for assessment of compensation under the Act? The answer, without any doubt, is Yes. The date of accident is 02.05.2007 and at that stage the relevant provision of the Act provided for capping of monthly wages of an employee at Rs.4000/- even where an employee was able to prove the payment of monthly wages in excess of Rs.4000/-. This was the situation prior to 18.01.2010, whereafter by virtue of amending Act 45 of 2009 Explanation-II to Section 4 had been deleted.

13. It is no more *resintegra* that a person becomes entitled to compensation under the Act on the date on which cause of action arises. In this case, the cause of action arose on 02.05.2007 i.e. before the Act 45 of 2009 came into being. The provisions of the said amending Act have no retrospective effect. Reference can be made in this regard to the judgments rendered by the Hon'ble Supreme Court in **Kerala State Electricity Board and another vs.Valsala K. and another (1999) 8 SCC 254**and also **K. Sivaraman and others vs. P. Sathishkumar and another (2020) 4 SCC 594.**Thus, no fault can be found in the findings recorded by the Commissioner to this effect.

14. Insofar as the non-grant of penalty is concerned, the impugned award is completely silent. Section 4A (b) of the Act provides that if, in the opinion of the Commissioner there is no justification for delay in payment of compensation by employer to the employee under Section 4 of the Act, the Commissioner shall direct the employer to pay by way of penalty, a further sum, in addition to the amount of compensation and interest thereon, exceeding 50%of such amount by way of penalty.

15. As observed earlier, the Commissioner has not taken this aspect of the matter into consideration. In the given circumstances of the case, in my considered view, no reasonable or plausible justification was placed and proved on record by respondent No.1 (owner of the vehicle) for delay in payment of compensation. The case of respondent No.1 that he had suitably

compensated appellant immediately after accident and had also incurred expenses for his treatment, has remained not proved and has attained finality. The Act being beneficial legislation has to be applied in favour of the employee except there are justifiable reasons to withhold the benefits of the Act. No purpose shall also be served by remanding the case back to the Commissioner only for this purpose as it will cause further agony to the claimant/appellant, who despite being entitled to compensation in the year 2007 is fighting his legal battle even after 14 years. The appellant is thus held entitled to penalty to the extent of 50% of the total amount of compensation hereafter awarded in his favour.

16. The second substantial question of law arises from issue with respect to sufferance of the extent of loss of earning capacity by the appellant. The document Ex.PW-3/C is the disability certificate issued by a Medical Board in favour of the appellant whereby the appellant is certified to have suffered permanent disability to the extent of 40%. The entitlement of appellant for compensation, in the given circumstances, shall be dealt with in Section 4 (1) (c) (ii). As per this provision of law, the appellant is entitled to such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified Medical Practitioner) permanently caused by the injury. The Section unequivocally speaks about the assessment of compensation to be made in proportion to the loss of earning capacity permanently caused by the injury. The case of the appellant is that he has been disabled totally from driving the bus and other commercial vehicle. His statement on oath to this effect has remained unshattered. In addition, PW-3 Dr. RavinderMokta while deposing before the Commissioner as a witness, has categorically stated that with the injury suffered by the appellant he would not be able to drive the commercial vehicle. In his cross-examination also, a similar suggestion has been put to this witness on behalf of respondent No.2, which has been

answered by the witness in affirmative. PW-3 however, admitted that the appellant can drive light motor vehicle. This evidence has remained unrebutted. This being so, there is no escape from conclusion that the appellant though had suffered 40% disability, had suffered the loss of earning capacity to the extent of 100% as he was rendered incapable of performing the work which he was capable of before the accident. Section 2 (1) (l) of the Act defines total disablement as under:

> "2(1)(l) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates (an employee) for all work which he was capable of performing at the time of the accident resulting in such disablement:
>
> Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred percent or more."

17. Four Judges Bench of the Hon'ble Supreme Court in **PratapNarain Singh Deo vs. Srinivas Sabata and another (1976) 1 SCC 289** held as under:

> "The expression "total disablement" has been defined in Section 2(1) (l) of the Act as follows:
>
> > "(l) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement."
>
> It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement

incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

> "The injured workman in this case is carpenter by profession....By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 41/2" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established."

18. In **PuranDutt vs. H.R.T.C. 2006 (3) Shim.L.C. 222,** a Co-ordinate Bench of this Court in paras 7 and 8 held as under:

> 7. From a bare perusal of the Act and the judgment of the Apex Court it is clear that if in a particular case from the evidence led on record it is proved that the workman has been incapacitated to do the work which he was capable of performing before the accident it would mean that he is totally disabled and his loss of earning capacity is 100 per cent.
>
> 8. In the present case claimant himself has stated that he cannot work as a driver. In this behalf he has also examined Dr. Anil Bansal, Orthopaedic Surgeon, Zonal Hospital, Solan as PW 2 who clearly stated that the workman shall be unable to do the work of driving. Similarly, Dr. Dinesh Rana, PW 3, has stated that though the disability of the claimant is 30 per cent, as far as his loss of earning capacity is concerned, it is 100 per cent since he is unable to drive a vehicle. He also states that he has given this opinion on the application of the H.R.T.C. In fact, the evidence led by the respondent H.R.T.C. itself clinches the matter. The respondent examined one Jagdish Chand as RW 1 who has stated that PuranDutt (appellant) was found unfit to do the job of a driver and, therefore, he was compulsorily retired from the H.R.T.C. It is thus

clear that loss of earning capacity as far as the appellant is concerned was 100 percent and the compensation should have been assessed by taking the appellant to have suffered permanent total disablement. Question No. 1 is answered accordingly."

19. In **ChanapaNagappaMuchalagoda vs. Divisional Manager, NIC Limited 2020 (1) Him.L.R. (SC) 269**, the Hon'ble Supreme Court while dealing with almost identical fact position, as in the instant case, has held as under:

"**9.** Aggrieved, the Appellant has filed the present Civil Appeal before this Court for enhancement of the compensation awarded by the High Court.We have heard the learned Counsel appearing for the parties, and perused the pleadings on record.

It is the admitted position that the Appellant can no longer pursue his vocation as a driver of heavy vehicles. The medical evidence on record has corroborated his inability to stand for a long period of time, or even fold his legs. As a consequence, the Appellant has got permanently incapacitated to pursue his vocation as a driver.
This Court in Raj Kumar v. Ajay Kumar and Ors.,(2011) 1 SCC 343.

held that:

"10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging

> his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may." (emphasis supplied)

10. In K. Janardhan v. United India Insurance Co. Ltd.,(2008) 8 SCC 518, this Court examined the loss of earning capacity in the case of a tanker driver who had met with an accident, and lost one of his legs due to amputation. The Commissioner for Workmen's Compensation assessed the functional disability of the tanker driver as 100% and awarded compensation on that basis. The

> High Court however, referred to Schedule I to the Workmen's Compensation Act, 1923, and held that loss of a leg on amputation resulted in only 60% loss of earning capacity. This Court set aside the judgment of the High Court, and held that since the workman could no longer earn his living as a tanker driver due to loss of one leg, the functional disability had to be assessed as 100%.In S. Suresh v. Oriental Insurance Co. Ltd. &Anr., (2010) 13, SCC 777, this Court held that :
>
> > "8. … We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving license under the Motor Vehicles Act."
> >
> > (emphasis supplied)
>
> The aforesaid judgments are instructive for assessing the compensation payable to the Appellant in the present case. As a consequence of the accident, the Appellant has been incapacitated for life, since he can walk only with the help of a walking stick. He has lost the ability to work as a driver, as he would be disqualified from even getting a driving license. The prospect of securing any other manual labour job is not possible, since he would require the assistance of a person to ensure his mobility and manage his discomfort. As a consequence, the functional disability suffered by the Appellant must be assessed as 100%.
>
> **11**. We affirm the judgment of the High Court on assessing the income of the Appellant at Rs. 4,000/- p.m. as per the evidence of his employer. The "functional disability" of the Appellant is assessed as 100%, and the relevant factor would be 201.66 as per Schedule IV to the Act. Consequently, the compensation payable to the Appellant would work out to Rs. 4,83,984/- under Section 4 of the Act."

20. From the above noted exposition of law, it can be said with certainty that the appellant having suffered loss of earning capacity to the extent of 100% was entitled for grant of compensation as per Section 4 (1) (b) of the

Act. 60% of the monthly income of appellant (Rs.4000/- per month) was to be multiplied by the relevant factor which in this case would be 181.37 on the basis of age of the appellant being 41 years. The appellant was, therefore, entitled to a compensation of Rs.2400 x 181.37 =4,35,288/- on the date of accident i.e. 02.05.2007. Since the petitioner was not paid the due compensation within reasonable time, he is entitled to interest @ 12% per annum on the aforesaid compensation amount with effect from 02.05.2007 till the date of actual payment. In addition, the appellant is also entitled to the penalty as quantified hereinabove.

21. It has been contended on behalf of respondent No.2 that as per statement of PW-3, the appellant could drive light motor vehicle and that would include commercial vehicle also, hence appellant cannot be said to have lost earning capacity to the extent of 100%. This argument deserves rejection for the reason that the statement of PW-3 could not be construed in the manner as suggested on behalf of respondent No.2 (Insurer). Firstly, appellant used to earn his livelihood by driving commercial heavy vehicle and secondly there is lot of difference in driving commercial vehicle and private vehicle. For driving commercial vehicle one needs to have lots of endurance and physical capacity as one has to work for long and even at odd hours whereas one can drive a private vehicle at leisure and according to one's convenience. Above all, PW-3 has specifically stated that appellant could not drive commercial vehicle which would include light commercial vehicle also.

22. Substantial questions of law are answered accordingly.

23. The impugned award is modified to the extent as noted above. Respondent No.2 has failed to prove any breach of terms of contract of insurance inter se the respondents, therefore, respondent No.2 is held liable to indemnify respondent No.1 and to pay Rs.4,35,288/- as compensation

with interest @ 12% per annum from 02.05.2007 plus 50% penalty, to the appellant.

24. The appeal 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:-

1. SH. SONU S/O SH. SUSHIL KUMAR R/O VILLAGE AJIWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.
2. SH. GOVIND S/O SH. SUSHIL KUMAR R/O VILLAGE AJIWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.
3. SH. AMI CHAND S/O SH. JUBBAL,R/O VILLAGE AJIWALA, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

.....PETITIONERS

(BY M/S A.S. RANA AND KAMLESH KUMARI, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (HOME), GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-02.
2. SUPERINTENDENT OF POLICE, DISTRICT SIRMOUR, H.P.
3. MOHD. SULTAN, S/O SH. MOHD. HANIF, R/O VILLAGE AMARKOT, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.
4. SH. JAGPREET SINGH BAINS, S/O SH. PARAMJEET SINGH BAINS R/O

VILLAGE GONDPUR, TEHSIL POANTA SAHIB, DISTRICT SIRMOUR, H.P.

.....RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR R-1 AND R-2;
MR. ASHOK KUMAR, ADVOCATE FOR R-3 AND R-4.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 475 OF 2021
DECIDED ON: 01.10.2021

Code of Criminal Procedure 1973 – Section 482 Read with Sections 323, 342, 363 and 506 Read with Section 34 of Indian Penal Code -Quashing of FIR - Held - The statement of petitioner number 1 recorded in the court, wherein he has stated that he has entered into a compromise with respondents number 3 and 4 accused persons as the issue which led to registration of FIR in question has been amicably settled between them and he is not interested in pursuing present FIR – Ld. Advocate General has stated no objection in case petition is allowed and the FIR as well as consequential criminal proceedings in questions quashed- Petition allowed taking into consideration the compromise entered into between the complaint and accused persons - Petition disposed of. (Paras 4 and 5)

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

O R D E R

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioners have prayed for quashing of FIR No. 134 of 2021, dated 21.08.2021, registered under Sections 323, 342, 363 and 506 read with Section 34 of the Indian Penal Code, at Police Station Poanta Sahib, District Sirmaur, H.P.

2. I have heard learned Counsel for the petitioners as well as learned Counsel for respondents No. 3 and 4 and learned Additional Advocate General.

3. Petitioner No. 1, namely, Sh. Sonu, who is present in person in the Court, has been duly identified by his Counsel Mr. A.S. Rana, Advocate. His statement has also been independently recorded in the Court, wherein he has stated that he has entered into a compromise with the respondents No. 3 and 4/accused as the issue which led to registration of FIR in question has been amicably settled between them and he is not interested in pursuing further the FIR No. 134 of 2021, dated 21.08.2021, under Sections 323, 342, 363 and 506 read with Section 34 of the Indian Penal Code, at Police Station Poanta Sahib, District Sirmaur, H.P. A copy of compromise so arrived at between the parties is appended with the petition as Annexure P/2 and execution of the same as also the contents thereof have also been acknowledged by petitioner No. 1. He has also acknowledged his signatures on Compromise Deed Annexure P/2.

4. Learned Additional Advocate General has also very fairly submitted that the respondent-State has no objection in case petition is allowed and FIR as well as consequential criminal proceedings, if any, pending trial, are quashed and set aside.

5. Accordingly, in view of above, this petition is allowed and FIR No. 134 of 2021, dated 21.08.2021, registered under Sections 323, 342, 363 and 506 read with Section 34 of the Indian Penal Code, at Police Station Poanta Sahib, District Sirmaur, H.P. is ordered to be quashed and set aside, taking into consideration the compromise entered between the complainant i.e. petitioner No. 1 and the accused i.e. respondents No. 3 and 4 and statement to this effect, made by petitioner No. 1, namely, Sh. Sonu, in this Court, which shall form part of the judgment.

Petition is accordingly disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Between:-

1. MANISH SHARMA, S/O LATE SHRI OM PRAKASH SHARMA, R/O VPO PANJGAIN TEHSIL SADAR, DISTRICT BILASPUR, H.P. DEPARTMENT-SALES AS SALES MANAGER.
2. SUNIL KUMAR S/O LATE SHRI ANANT RAM R/O VILLAGE LALYAR, PO BAGWARA, TEHSIL TAUNI DEVI (BAMSAN), DISTRICT HAMIRPUR, H.P. HOUSEKEEPING AS TR. SUPERVISOR.
3. ANIL KAUSHAL, S/O SHRI MANOHAR KAUSHAL, R/O VILLAGE PADHIARA, PO KOSHALA, TEHSIL JWALAMUKHI, DISTRICT KANGRA, H.P. FRONT OFFICE AS SR. G.S.A.
4. ISHAN THAKUR S/O HAJ THAKUR, R/O VILLAGE KARIAN, PO HARDASPURA, TEHSIL AND DISTRICT CHAMBA, H.P. DEPARTMENT-FNB PRODUCTION.
5. HARNAM SHARMA, S/O SHRI CHAMAN LAL R/O VILLAGE SARAH, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P. HOUSEKEEPING, SNR. GSA.
6. KULJESH KUMAR S/O LATE SHRI AMAR NATH, R/O VILLAGE SAKRI, PO REHAN, TEHSIL DHARAMSHALA, DISTRICT KANGRA, HP. ENGINEERING PLUMBER.

7. MADAN LAL SON OF SITA RAM RESIDENT OF VILLAGE BANORU, YOL CANTT., TEHSIL DHARAMSHALA, DISTRICT KANGRA, HP. ENGINEERING PLUMBER.
8. MANOJ KUMAR SON OF LATE SHRI PARTAP CHAND R/O ODER PO GAROH, TEH. DHARAMSHALA, DISTRICT KANGRA, HP. DEPARTMENT-ENGINEERING AS AN ELECTRICIAN.

.....PETITIONERS

(BY MR. ANUP RATTAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THOUUGH SECRETARY (DISASTER MANAGEMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.
2. SECRETARY (LABOUR & EMPLOYMENT) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.
3. DEPUTY COMMISSIONER, KANGRA AT DHARAMSHALA, HIMACHAL PRADESH.
4. COMMISSIONER LABOUR AND EMPLOYMENNT, HIMACHAL PRADESH, SHIMLA.
5. H.P. CRICKET ASSOCIATION (HPCA), DHARAMSHALA, DISTRICT KANGRA, H.P.
6. HOTEL PAVILION BY H.P. CRICKET ASSOCIATION, (HPCA) THROUGH ITS

MANAGER, DHARAMSHALA,
DISTRICT KANGRA, H.P.

.....RESPONDENTS

(M/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS FOR RESPONDENTS NO. 1 TO 4;
MR. SUDHIR THAKUR, SENIOR ADVOCATE WITH MR. KARUN NEGI, ADVOCATE, FOR RESPONDENTS NO. 5 AND 6.)

CIVIL WRIT PETITION No.230 of 2021
Reserved on:20.09.2021
Decided on: 27.09.2021

Constitution of India 1950 – Article 226 – Grievance raised by the petitioners is that their services were arbitrarily terminated on 28.08.2020 by the employer without following the provisions of Industrial Disputes Act -Held- Services of the petitioners were laid of on account of the reasons specified and in the circumstances the issues primarily being disputed question of fact and otherwise also covered under the provisions of Industrial Dispute Act cannot be adjudicated by way of this Writ petition - The petitioners are not covered by the order passed by Honorable Supreme Court relied on by them - The issue of termination of petitioners by the private respondent cannot be decided by this court in exercise of its jurisdiction under Article 226 of Constitution of India - Petition Dismissed. (Paras 16 & 17)

Cases referred:

Ficus Pax Private Ltd. and Others vs. Union of India and others, (2020) 4 SCC 810;

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

O R D E R

By way of this writ petition, the petitioners have prayed for the following reliefs:-

"(i) That the respondents No 5 and 6 be directed to reinstate the petitioner immediately as per their statement made before Labour Inspector as recorded in the order dated 25.9.2020.

(ii) That termination of petitioner be declared illegal, null and void and respondents no. 5 and 6 be directed to engage the petitioner in service in a time bound manner.

(iii) That the respondents No. 5 and 6 may kindly be directed to pay salary to the petitioners from April, 2020 till the date of their engagement.

(iv) That the respondents No. 1 to 4 be directed to compassionate the petitioners for the loss suffered by them and also provide rehabilitation package to the petitioners.

(v) That the order dated 13.11.2020 (Annexure P-6) directing the petitioners to approach HMIC may kindly be declared illegal and the same may be quashed to such extent in the interest of justice and fair play.

(vi) that the respondents may kindly be burdened with costs.

(vii) that the entire record of the case may kindly be summoned.

Or

Such other orders which this Hon'ble Court deems fit and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioners and against the respondents."

2. The case of the petitioners is that they were serving with respondents No. 5 and 6 and said respondents disengaged and dispensed with their services at such a time when the petitioners were in dire need of employment. The details of the petitioners, with regard to their engagement with the respondents, as mentioned in the petition, is as under:-

Petitioner Sunil Kumar was engaged as Tr. Supervisor in Housekeeping, joined 1st August, 2016 and laid off on 28.08.2020;

Petitioner Anil Kaushal was engaged as Sr. GSA in Front Officer, joined on 1st December, 2016, laid off on 28.08.2020;

Petitioner Ishan Thakur was engaged in fnb production, joined on 12.03.2020, laid off on 28.08.2020;

Petitioner Harnam Sharma was engaged as Sr. GSA in Housekeeping department, joined on 01.07.2017;

Petitioner Manoj Kumar was engaged Electrician, joined on 01.01.2011, laid off on 22.09.2020,

Maneesh Sharma was engaged as Sales & Sales Manager, joined on 01.10.2018, laid off on 28.08.2020,

Petitioner Madan Lal was engaged as Plumber, joined 2.03.2011, laid off on 18.09.2020;

Petitioner Manohar Lal was engaged as a SYP Technician, joined on 01.11.2019, laid off on 02.09.2020;

Petitioner Kuljesh Kumar joined on 04.07.2016 and laid off on 01.09.2020.

3. According to the petitioners, the Hotel in issue (respondent No. 6), in which they were serving, is being run by respondent No. 5, which is an affiliated body of the Board of Cricket Control of India. During the lockdown, that was imposed on account of COVID-19 pandemic, a Notification was issued, i.e. Notification dated 24th March, 2020 (Annexure P-1), which was subsequently withdrawn by the Central Government. The Hotel Industry was unlocked in August, 2020, and since then, respondent No. 6 (Hotel) is functioning, and since September, 2020, all activities are going on in the State of Himachal Pradesh, including activities in Hotel industry. The contention of the petitioners is that they were terminated by respondents No. 5 and 6 in August, 2020, when Hotel Industry had re-started its operations. This termination was done by arbitrarily pressurizing the petitioners as well as by

adopting exploitive tactics by respondents No. 5 and 6. Petitioners made various representations to the respondents to allow them to serve. Respondents did not following the principle of last come first go and they also violated the provisions of the Industrial Disputes Act. Their requests fell upon deaf ears. Petitioners were not paid salary for the months of April and May, 2020, though, they remained on the rolls of the Hotel till August, 2020.

4. It is further the contention of the petitioners that after the termination of their services, they raised an industrial dispute and the Labour Officer called upon them and the respondents for conciliation. These proceedings were closed by the Labour Inspector with the direction that the petitioners and other employees may file an appropriate case before the Judicial Magistrate First Class. According to the petitioners, the Labour Inspector, rather than referring the matter to the Labour Court for taking recourse under Disaster Management Act, directed the petitioners to approach the Court of Judicial Magistrate First Class. The petitioners thereafter got a legal notice issued to the respondents in terms of the orders passed by Hon'ble Supreme Court of India in **Ficus Pax Private Ltd. and Others vs. Union of India and others**, (2020) 4 SCC 810, dated 12.06.2020 and called upon them to re-engage their services A copy of the order passed by Hon'ble Supreme Court of India is appended with the petition as Annexure P-7. Copy of legal notice is appended with the petition as Annexure P-8. Copy of the order passed by Labour Inspector, vide which, the petitioners were called upon to approach Judicial Magistrate First Class, dated 13.11.2020, is appended with the petition as Annexure P-6. According to the petitioners, act of the respondents of not re-engaging their services is highly arbitrary, unjust and discriminatory, and in this background, the petition stands filed with the prayers already enumerated hereinabove.

5. Respondents No. 1 and 3 have taken the stand in the response filed by them that as no fundamental right of the petitioners has been violated,

therefore, the writ petition is not maintainable. They have further taken the stand that they have acted under the provisions of Disaster Management Act to safeguard the source of livelihood of the people during COVID-19 pandemic, and as far as the petitioners are concerned, no representation was received from the petitioners by them with regard to the grievance mentioned in the petition.

6. In the reply filed by respondents No. 2 and 4, the stand of the said respondents is that after the receipt of the complaint, endeavour was made to have the matter reconciled but as reconciliation failed, the petitioners were directed by the Labour Inspector to raise demand notice under Section 2-A of the Industrial Disputes Act, however, this was not done by them and the petitioners approached the this Court by way of this writ petition.

7. Respondents No. 5 and 6 in their reply have taken the stand that it was incorrect that Hotel Industry was unlocked in August, 2020, or since then, respondent No. 5 was functioning. They have denied the claim of the petitioners that Hotel activities were going on in the State of Himachal Pradesh since August, 2020. According to these respondents, the services of the petitioners were not terminated but rather laid off and salary was paid to them till the month of August, 2020 alongwith one month's advance salary in lieu of notice, as was also evident from notices issued to the petitioners, which stand appended with the reply of said respondents as Annexure R-1 (colly.) Said respondents further took the stand that the petitioner No. 6 Harnam Singh submitted his resignation vide Annexure R-2 and when Labour Inspector, Dharamshala, was seized of the matter, the petitioners were directed to raise a Demand Notice under Section 2-A of the Industrial Disputes Act and to appear before him on 19.01.2020, but rather than doing so, they filed present writ petition. As per said respondents, the allegations made against them are incorrect, as they have not acted in any illegal and unconstitutional manner, as alleged by the petitioners.

8. By way of rejoinder filed to the reply filed by respondents No. 5 and 6, the petitioners have reiterated their stand.

9. During the course of hearing of this petition, this Court had directed the petitioners to place on record their appointment letters, and in response thereto, vide CMP No. 9366 of 2021, appointment letters of some of the petitioners were placed on record.

10. Mr. Anup Rattan, learned Counsel for the petitioners has argued that the petitioners are entitled to the reliefs in terms of the order of Hon'ble Supreme Court passed in **Ficus Pax Private Ltd. and Others vs. Union of India and others**, (2020) 4 SCC 810, dated 12.06.2020. According to him, the petitioners are squarely covered by this order, and therefore, this writ petition be allowed by directing the respondents to comply with the directions issued therein by the Hon'ble Supreme Court. In fact, during the course of arguments, no other point was urged by learned Counsel for the petitioners, as he, by relying upon paras 27, 29, 34 and 37 of the order passed by Hon'ble Supreme Court (supra), prayed that the directions so passed by the Apex Court be implemented qua the petitioners also.

11. On the other hand, learned Additional Advocate General has argued that the petition was not maintainable against the State as no relief was being prayed against them, whereas learned Senior Counsel appearing for respondents No. 5 and 6 has strenuously argued that the writ petition was not maintainable and the petitioners were not covered by the order passed by Hon'ble Supreme Court.

12. I have heard learned Counsel appearing for the parties and also gone through the pleadings, including the order passed by Hon'ble Supreme Court of India referred to above, which has been heavily relied upon by the petitioners.

13. If one carefully goes through the pleadings, same demonstrates that as per the petitioners, the cause of action accrued in their favour in the

month of August, 2020, when allegedly their services were "terminated" by respondents No. 5 and 6 illegally. When one peruses the order passed by the Hon'ble Supreme Court (supra), perusal thereof demonstrates that the Hon'ble Supreme Court therein was seized with the challenge, which stood made by the appellants before the Hon'ble Supreme Court of India, to the D.O. dated 20.03.2020, issued by the Secretary, Government of India, Ministry of Labour and Employment and Order dated 29.03.2020 issued by Government of India, Ministry of Home Affairs, in exercise of powers vested under Section 10(2)(I) of the Disaster Management Act, 2005. The prayers, which were made in the matters before it, stand quoted by Hon'ble Supreme Court in its order. Now a perusal of para-21 of the said order demonstrates that Order dated 29.03.2020 passed in exercise of power under Section 10(2)(I) of the Disaster Management Act, 2005, stood withdrawn by subsequent Order dated 17.05.2020 w.e.f. 18.05.2020. Hon'ble Supreme Court held that the consequence of subsequent Order dated 17.05.2020 was that the obligation cast upon the employer to make payment of wages of their workers at their workplace, without any reduction, for the period their establishments are under closure during the lockdown is no longer in operation, however, the issue regarding obligation of the employer, as per Order dated 29.03.2020, when it remained in force, is still to be answered. Thereafter, in para 34 of the order, Hon'ble Supreme Court was pleased to hold as under:-

> *"34. As noted above, all industries/establishments are of different nature and of different capacity, including financial capacity. Some of the industries and establishments may bear the financial burden of payment of wages or substantial wages during the lockdown period to its workers and employees. Some of them may not be able to bear the entire burden. A balance has to be struck between these two competitive claims. The workers and employees although*

were ready to work but due to closure of industries could not work and suffered. For smooth running of industries with the participation of the workforce, it is essential that a via media be found out. The obligatory orders having been issued on 29.03.2020 which has been withdrawn w.e.f. 18.05.2020, in between there has been only 50 days during which period, the statutory obligation was imposed. Thus, the wages of workers and employees which were required to be paid as per the order dated 29.03.2020 and other consequential notification was during these 50 days."

14. In this background, the directions, which were issued by Hon'ble Supreme Court are contained in para 37, which read as under:-

"37. We thus direct following interim measures which can be availed by all the private establishment, industries, factories and workers Trade Unions/ Employees Associations etc. which may be facilitated by the State Authorities: -

i) The private establishment, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees organization and enter into a settlement with them and if they are unable to settle by themselves submit a request to concerned labour authorities who are entrusted with the obligation under the different statute to conciliate the dispute between the parties who on

receiving such request, may call the concerned Employees Trade Union/workers Association/ workers to appear on a date for negotiation, conciliation and settlement. In event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the order dated 29.03.2020 issued by the Government of India, Ministry of Home Affairs.

ii) Those employers' establishments, industries, factories which were working during the lockdown period although not to their capacity can also take steps as indicated in direction No.(i).

iii) The private establishments, industries, factories shall permit the workers/employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days. The private establishments, factories who proceed to take steps as per directions (i) and (ii) shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

iv) The Central Government, all the States/UTs through their Ministry of Labour shall circulate and publicise this order for the benefit of all private establishment, employers, factories and workers/ employees."

15. Thus, it is evident from the order of the Hon'ble Supreme Court that the directions, which have been passed therein are relatable to those 50 days when the Notification which stood impugned before the Hon'ble Supreme Court was in force. This period when the obligatory Orders were in force, is from 29.03.2020 to 18.05.2020. However, when one peruses the pleadings made in the petition, the grievance of the petitioners is not relatable to this particular period, which stands mentioned in the order passed by Hon'ble Supreme Court of India as the contention of the petitioners expressly is that they are primarily aggrieved by termination of their services by respondents No. 5 and 6, which, as per the petitioners, was done on 28.08.2020. In other words, the cause of action, on the basis of which, this writ petition has been filed, is post the period contemplated in the order passed by Hon'ble Supreme Court referred to above, relied upon by the petitioners. In fact, in this background, when one peruses the documents appended by the petitioners, the first complaint appended therewith addressed to the authorities is dated 24.09.2020, i.e. post 18.05.2020 when the Notification stood rescinded. It is on the basis of this complaint that Labour Inspector undertook the reconciliation proceedings.

16. This Court is of the considered view that the case of the petitioners is not covered by the order passed by Hon'ble Supreme Court, upon which much reliance has been placed by them. As the allegation of the petitioners is that their services have been arbitrarily terminated without following the provisions of the Industrial Disputes Act and the stand of the private respondents is that services of the petitioners were laid off on account of the reasons specified in the reply, this court is of the considered view that these issues primarily being disputed questions of fact and otherwise also covered under the provisions of Industrial Disputes Act, cannot be adjudicated by way of this writ petition. The order of the Hon'ble Supreme Court being relied upon by the petitioners is dated 12.06.2020, yet, in the Annexure P-2,

there is neither any reference of it nor it can be inferred from the said Annexure that the grievance being raised by the petitioners was akin to the one with the Hon'ble Supreme Court was seized of.

17. At the cost of repetition, this Court is stating that the grievance raised vide Annexure P-2 by the petitioners was that their services were arbitrarily terminated on 28.08.2020 by the employer. Therefore, in view of discussion held hereinabove, this Court is of the considered view that as the petitioners are not covered by the order passed by Hon'ble Supreme Court, being relied upon by them, and further as the issue of their alleged termination by the private respondents cannot be decided by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, this writ petition, is devoid of merit. Accordingly the same is dismissed. No order as to costs. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

1. CT VIKASH JAMWAL, CT NO. 675, S/O SH MAKAL KUMAR, 2ND INDIA RESERVE BATALION, SAKOH, DISTT. KANGRA-(HP).
2. CT VIKRANT, CT NO: 773, S/O SH RAJ KUMAR, 3RD INDIA RESERVE BATALION, PANDOH, DISTT MANDI-(HP).
3. CT ANIL KUMAR, CT NO:780, S/O LATE SH PAWAN KUMAR, 3RD INDIA RESERVE BATTALION, PANDOH, DISTT MANDI-(HP).
4. CT. SAHIL MEHRA, CT No.: 481, S/O SH YOGRAJ, 3RD INDIA RESERVE BATTALION, PANDOH, DISTTT MANDI-(HP).

5. CRT. SHYAM LAL, CT. NO. 740, S/O SH. SOM KRISHAN, 3RD INDIA RESERVE BATTALION, PANDOH, DISTTT MANDI-(HP).
6. CT. ASHWANI KUMAR, CT. NO: 761, S/O SH KHOOB RAM, 3RD INDIA RESERVE BATTALION, PANDOH, DISTTT MANDI-(HP).

.....PETITIONERS

(BY MR. K.D. SHREEDHAR, SENIOR ADVOCATE WITH MR. SOURABH AHLUWALIA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THOUUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002, (H.P.) ROAD TRANSPORT
2. STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (FINANCE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002, (H.P.)
3. THE DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, NIGAM VIHAR, SHIMLA-171001, (HP).
4. THE ADDITIONAL DIRECTOR GENERAL OF POLICE, ARMED POLICE & TRANING, H.P. SHIMLA-171002.
5. THE COMMANDANT 2ND INDIA RESERVE BATTALION, SAKOH, DISTT KANGRA-(HP).
6. THE COMMANDANT 2ND INDIA RESERVE BATTALION, PANDOH, DISTT MANDI-(HP).

.....RESPONDENTS

(BYM/S ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH M/S J.S. GULERIA AND KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENEALS)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.102 of 2019
Reserved on : 11.08.2021
Decided on: 26.10.2021

Constitution of India, 1950 – Article 226 – Service matter - Petitioners joined as constable and agreed to serve in the pay scale of 5910 – 20200 +1900(GP) up to 8 years of service as a condition of recruitment and this process was not challenged by the petitioners - Held - It is settled law of the land that if a person participate in a process without protest he cannot challenge it - In this case, the government in it's wisdom issued a notification vide which, revised the period of grade of revised pay band and grade pay to constables from 2 years service to 8 years regular service -The notification vide which the confirmation of higher pay band plus grade pay was revised from 2 years to 8 years applicable to constables was issued by Finance Department on 14.01.2015 - This Notification dated 01.01.2015 was modified as being applicable to constables appointed on or before 01.01.2015 - In advertisement dated 05.03.2015 also it was clearly mentioned that the posts of constables were in the pay scale of 5910-20200 + grade pay of rupees 1900 up to 8 years of service in terms of Notification dated 14.01.2015 so the cut off date as has been fixed subsequently vide Notification dated 17.06.2016 is not arbitrary - This Court has serious doubts as to whether it can issue a writ of mandamus directing the State Government to alter this policy decision of changing the period of regular service to be rendered in grade pay of Rs.10300 – 34800 + 3400 (Grade pay) - The petition found without merits and accordingly dismissed. (Paras 38,39,41 and 42)

Cases referred:

Air Commodore Naveen Jain versus Union of India, (2019) 10, SCC 34;

Bhagwat Sharan (Dead Through Legal Representatives) vs *Purushottam and Others*, (2020) 6 SCC 387;

Chairman and MD, NTPC LTD. Versus Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663;

H.P. & Ors. versus Rajesh Chander Sood etc. etc. 2016 (10 SCC 77;
Haryana State Minor Irrigation Tubewells Corporation and Others Versus G.S. Uppal and Others and other connected matters (2008) 7 SCC 375;
Mewa Ram Kanojia Versus All India Institute of Medical Sciences and Others (1989) 2 SCC 235;
Municipal Corporation of Delhi versus Surender Singh and Others, (2019) 8 Supreme Court Cases 67;
Randhir Singh Versus Union of India and Others (1982) 1 SCC 618;
South Malabar Gramin Bank Vs. Coordination Committee of South Malabar Gramin Bank Employees' Union and South Malbbar Gramin Bank Officers' Federation and Others (2001) 4 SCC 101,
State Bank of India and Another Versus M.R. Ganesh Babu and Others (2002) 4 SCC 556;
Union of India and Another Versus International Trading Co. and Another (2003) 5 SCC 437;
Union of India and Others Versus Atul Shukla and Others (2014) 10 SCC 432;

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

O R D E R

This petition was initially filed as an original application before erstwhile learned Himachal Pradesh Administrative Tribunal and after the abolition of the learned Tribunal, the same has been transferred to this Court.

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

The case of the petitioners is that respondent-State vide recruitment notice dated 22.06.2012, invited applications from eligible desirous candidates for recruitment against the posts of constables (800

males) in the Himachal Pradesh Police Department in the pay scales of Rs. 5910-20200+Grade Pay Rs. 1900. A copy of the recruitment notice is appended with the petition as Annexure A-1. The pay structure of the constables sought to be so appointed was to be governed by Himachal Pradesh Civil Services (category/Post wise Revised pay) Rules, 2012 (hereinafter to be referred as the '2012 Rules' for short), copy of which is appended with the petition as Annexure A-2. Finance Department of the Government of Himachal Pradesh vide notification dated 28.09.2012 added certain provisions in the Schedule governing the pay structure of the employees of the Home Department in terms of Rule 9 of the 2012 Rules. The addition in the Schedule made with respect to the Constables in the Police Department was that revised pay structure of `10300-34800+`3200 Grade Pay was introduced post completion of two years of regular service w.e.f. 01.10.2012. A copy of said notification is appended with the petition as Annexure P-3.

3. It is further the case of the petitioners that in the year 2014, the Finance (Pay Revision) Department submitted a draft Cabinet Memorandum for approval before the Council of Ministers regarding grant of revised pay structure on completion of eight years to the new 800 constables, which were yet to be advertised. This was sought to be done by amending the 2012 Rules. The intent behind the said proposal was to prospectively lessen the so called recurring financial burden upon the State Government.

4. In the year 2015, the Finance (Pay Revision) Department issued impugned notification dated 14.01.2015, vide which, 2012 Rules were amended contrary to the opinion of the Home Department and the revised pay structure of `10300-34800+`3200 Grade Pay was now made available to Constables after completion of eight years of regular service. The amendment was made applicable w.e.f. 01.10.2013.

5. Thereafter, a fresh recruitment notice dated 15.03.2015 was issued for recruitment of 776 posts of Constables in the police department in the pay scale of Rs. 5910-20200+Rs.1900 (Grade Pay). It was mentioned in this recruitment notice (Annexure P-7) that said pay scales would be drawn by the future recruits after completion of eight years regular service from the date of initial appointment in terms of notification dated 14.01.2015.

6. The petitioners being eligible participated in the selection process so undertaken by the Department pursuant to notice dated 15.03.2015 and they were offered appointment to the said post in the month of September, 2015 as such. The petitioners were offered the job on an initial pay scale of `7810, which was to be revised to `10300-34800+3200 (Grade Pay) after completion of long span of eight years as Constables.

7. According to the petitioners, they had no alternative but to accept such offer from the department. They joined as such under the 2nd India Reserve Battalion, Sakoh, District Kangra, H.P. and 3rd India Reserve Battalion Pandoh, District Mandi, H.P.

8. It is further the case of the petitioners that the Constables, who were appointed before 01.01.2015 in terms of earlier advertisement, filed an Original Application No. 2076 of 2016, titled as Ct. Prashant Kumar and Others vs. State of H.P. in May, 2016, assailing the date of applicability of impugned notification dated 14.01.2015. Certain departmental correspondence was also assailed before the Tribunal and prayer was made for grant of revised pay structure upon completion of two years of regular service instead of eight years.

9. During the pendency of this original application, the Finance Department issued another notification dated 17.06.2016 (Annexure A-9), vide which, previous notification dated 14.01.2015, stood partially modified and the benefit of revised pay band and grade pay post completion of eight years of regular service was made applicable to the constables appointed on or after 01.01.2015.

10. As per the petitioners, despite their discharing same and similar duties, as were being discharged by Constables appointed before 01.01.2015, they have been deprived benefit of superior pay scale and grade pay on completion of two years of regular service, and thus, they are being treated unequally and are being discriminated against by the respondent-State, without any lawful authority which is contrary to the principles of equal pay for equal work.

11. It is further the case of the petitioners that Home Department vide letter dated 24.06.2016 (Annexure A-10), addressed to the Director General of Police endorsed the amendment of the Finance Department, which action of the Police Department was contrary to their own stand of proposing five years regular service for getting revised pay structure . The Director General of Police, vide letter dated 02.08.2016 (Annexure A-11), requested the Home Department to grant revised pay benefit after completion of five years regular service instead of eight years, and according to the petitioners, this request was *suo motu* made at the level of Director General of Police understanding their plight, and in view of the anomaly in the pay of Clerks who get revised pay scale of `10300-34800+3200 Grade Pay, on completion of two years of regular service, whereas the petitioners had to wait for similar benefit for eight years of regular service despite the fact that they perform hazardous duties.

12. According to the petitioners, the Home Department vide letter dated 17.03.2017 (Annexure A-12), in consultation with Finance Department, rejected the request of the Director General of Police without any reason whatsoever. Feeling aggrieved, the petitioners made a representation to the worthy Chief Minister, Himachal Pradesh, for the grant of revised pay scale. This representation was forwarded to the Home Department for further examination by the Chief Minister, however, the grievance of the petitioners did not stand redressed. It is in this background that this petition has been filed by the petitioners praying for the following substantive reliefs:-

"I. That the application is for quashing notification of the Government of Himachal Pradesh Finance (Pay Revision) Department dated 14.01.2015 (Annexure A-6) & partial modification of the said notification dated 17.06.2016 (Annexure A-9) whereby an arbitrary amendment has been given effect to w.e.f. 01.01.2015 purportedly in exercise of the powers conferred by Rule 9 read with Rule 3 of the Himachal Pradesh Civil Services (Category/Post wise Revised pay) Rules, 2012.

II. That the application is for setting aside the stand taken by the Government of H.P. (Home Department) in letter dated 24.06.2016 & 17.03.2017 (Annexure A-10 & A-12) as it is arbitrary and discriminatory.

III. That the application is for granting the applicants revised pay structure of Rs. 10,300-34800+3200 grade pay after putting in 2 years regular service as is being granted to constables appointed before 2015 and clerks even now, along with interest @ 10% from the date when it became first due on 01.09.2017 till its realization.

IV. That in the alternative the respondents may be directed under Rule 10 of the HPCS Rules, 2012 to relax the provision in column 5 of the amended schedule (Annexure A-6) suitably in order to release the benefit of revised pay structure of Rs. 10300-34800+Rs 3200 grade pay in favour of the applicants."

13. The petition is resisted by the respondents *inter alia* on the ground that the Government of Himachal Pradesh vide notification dated 28.09.2012 notified the pay scales of Constables in H.P. Police Department at the rate of `5910-20200+1900 (G.P.) at entry level and at the rate of `10300-34800+3200 (G.P.) after two years of regular service. Subsequently, the

Department of Finance vide notifications dated 14.01.2015 and 17.06.2015 substituted/amended serial No. 3 vide abovementioned notifications and ordered that Constables are to be granted higher pay band with `3200/- Grade Pay after completion of eight years of regular service w.e.f. 01.01.2015. It was clarified vide government letter dated 12.06.2015 that on or after 01.01.2015, the Constables would be entitled for pay structure of `10300-34800+3200 (GP) only after completion of eight years of regular service. According to the Department, the issue regarding grant of higher pay structure to the Constables who were appointed before 01.01.2015 but were completing two years of service after 01.01.2015, was re-considered by the government, and vide notification dated 17.06.2016, provisions contained in Notification 14.01.2015 were made applicable only to the Constables appointed on or after 01.01.2015. As per the Department, the petitioners having been appointed in Police Department as Constables on 01.09.2015 were not eligible for grant of higher pay band and Grade Pay after completion of two years of regular service in terms of government Notifications dated 14.01.2015 and 17.06.2015. This act of the government was not arbitrary, as provisions contained in Notification dated 14.01.2015 were made applicable to the Constables appointed on or after 01.01.2015, and as all the petitioners herein were appointed after 01.01.2015, therefore, they were eligible for grant of higher pay band and grade pay only after completion of eight years of regular service. The action of the State has been justified to be legally fair on the said basis.

14. By way of rejoinder, the petitioners have reiterated the averments made in the petition and denied the stand taken in the reply filed by the respondents.

15. Mr. K.D. Shreedhar, learned Senior Counsel appearing for the petitioners, has argued that as the petitioners are similarly situated to the Constables who were recruited vide recruitment process initiated by the Government dated 22.06.2012, because the nature of duties being performed

by one and all are the same and similar, therefore, there is no justification in the act of the respondent-Department of delaying the grant of revised pay scale and grade pay to the petitioners as compared to the Constables recruited earlier. According to him, the ground of financial burden cannot be allowed to be taken by the respondent-State to deny the higher/revised pay band+grade pay to the petitioners. According to him, this act of the respondent-State is highly arbitrary as similarly situated persons are being treated with a different yardstick. He has argued that need of grant of revised pay scale in favour of the petitioners has also been highlighted by the Director General of Police to the State, yet the cause of the petitioners is being defeated on account of the indifferent attitude, which has been adopted by the Finance Department by taking the plea of financial implications. He has argued that taking into consideration the nature of duties, which are to be performed by the petitioners, which as per office of Director General of Police, are hazardous as also risky and round the clock, the petitioners are entitled for parity as far as the revised pay band and grade pay is concerned vis-a-vis the Constables recruited in the year 2012. He has further argued that the cut of date which has been fixed by the government vide Notification dated 17.06.2016 is arbitrary as the same is not based on any reasonableness. He also submitted that as said notification was issued on 17.06.2016, at least those Constables, who stood appointed on or before 17.06.2016, should have been given similar treatment. On these grounds, he has prayed that the writ petition be allowed and the petitioners be granted revised pay band and grade pay, as prayed for. He has also relied upon the following judgments in support of his contentions:-

(i) Randhir Singh Versus Union of India and Others (1982) 1 SCC 618;

(ii) Mewa Ram Kanojia Versus All India Institute of Medical Sciences and Others (1989) 2 SCC 235;

(iii) South Malabar Gramin Bank Versus Coordination Committee of South Malabar Gramin Bank Employees' Union and South Malbbar Gramin Bank Officers' Federation and Others (2001) 4 Supreme Court Cases 101;

(iv) State Bank of India and Another Versus M.R. Ganesh Babu and Others (2002) 4 SCC 556;

(v) Union of India and Another Versus International Trading Co. and Another (2003) 5 SCC 437;

(vi) Chairman and MD, NTPC LTD. Versus Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663;

(vii) Haryana State Minor Irrigation Tubewells Corporation and Others Versus G.S. Uppal and Others and other connected matters (2008) 7 SCC 375;

(viii) Union of India and Others Versus Atul Shukla and Others (2014) 10 SCC 432;

16. On the other hand, Mr. Adarsh Sharma, learned Additional Advocate General has argued that there is no merit in the writ petition for the reasons that the advertisement to which the petitioners responded clearly and categorically contained the conditions on which the appointment was being offered to them. He argued that the advertisement in very unambiguous terms spelled out that posts of Constables were being advertised in the pay scale of `5910-20200+1900 (GP) upto eight years in terms of the notification of the government dated 14.01.2015. The petitioners, knowing full well the contents of this recruitment notice, participated in the process without any challenge to the same. He argued that as the petitioners participated in the recruitment process without any objection, they are stopped from assailing the condition of grant of revised pay scale after eight years of service because the petitioners

acquiescenced to the terms of the recruitment notice. He further submitted that the petitioners cannot equate themselves with the Constables who stood recruited before issuance of Notification dated 14.01.2015. According to him, the Constables, who were recruited earlier, were rightly given protection because in the recruitment notice to which they responded, it was mentioned that they would get revised pay scale after two years regular service. As per him, the petitioners are not being discriminated as alleged because in terms of the terms and conditions of the recruitment notice to which they responded, no alteration to their deterrent has been made by the State. He has also relied upon the following judgments in support of his contentions:-

Municipal Corporation of Delhi versus Surender Singh and Others, (2019) 8 Supreme Court Cases 67;

Air Commodore Naveen Jain versus Union of India, (2019) 10, Supreme Court Cases 34;

Bhagwat Sharan (Dead Through Legal Representatives) vs. Purushottam and Others, (2020) 6 Supreme Court Cases 387;

State of H.P. & Ors. versus Rajesh Chander Sood etc. etc. 2016 (10 SCC 77;

17. I have heard learned Counsel for the parties and also gone through the pleadings as well as record of the case.

18. The petitioners in the present case were appointed as Police Constables w.e.f. 01.09.2015. They participated in the recruitment process, which was initiated by the respondent-State by way of issuance of recruitment notice dated 05.03.2015 (Annexure P-7). A perusal of this notification demonstrates that it was mentioned therein that applications stood invited from eligible candidates for recruitment to the post of Constables in the Himachal Pradesh Police Department in the pay scale of `5910-20200+Grade Pay @ `1900/- upto eight years of service as per H.P. Government's Notification No. Fin(PR)-B(7)-64/2010, dated 14.01.2015.

19. The impugned Notification (Annexure A-6) is dated 14.01.2015. A perusal thereof demonstrates that it stands mentioned in it that in exercise of powers conferred under Rule 9 read with Rule 3 of the Himachal Pradesh Civil Services (Category/Post wise Revised Pay Rules, 2012), Governor of Himachal Pradesh was pleased to henceforth substitute the words and figures appearing against Sr. No. 3 under Heading 15 Home Department of the Schedule appended to Rules ibid, notified vide Department's Notification of even number dated 28th September, 2012 as mentioned therein.

20. Now, by way of this notification, an incumbent, who was appointed to the post of Constable, was to get the pay band of `5910-20200+1900 (GP) with initial start of `7810 as entry level scale and the pay band of `10300-34800+ Grade Pay of `3200 after eight years of regular service. The date of applicability of this notification was mentioned as 01.01.2015.

21. This notification was subsequently clarified vide Notification dated 17.06.2016 (Annexure A-9), in which, it was mentioned that in partial modification of the department's notification of even number dated 14th January, 2015, the Governor of Himachal Pradesh was pleased to order that the provisions contained in this notification would be applicable on or after 01.01.2015.

22. There is on record a communication dated 02.08.2016 addressed from the office of Director General of Police, Police Headquarters, Himachal Pradesh, to the Principal Secretary to the Government of Himachal Pradesh on the subject of revision of pay band and grade pay of Constables after completion of five years regular service instead of eight years. A perusal of this communication demonstrates that it was recommended in the same that the category of Constables are entitled for pay structure of `10300-34800+3200 (GP) on completion of eight years of regular service as per H.P. Government Notification dated 14.01.2015, whereas the category of Clerks enjoy the revised Grade pay after completion of two years of service. It was further

mentioned in this communication that in terms of policies of the government, the services of the contractual appointees were being regularized after completion of 5 years of service as on 31.05.2015 in the pay scale of `5910-20200+1900 (GP) with initial start of `7810. Clerks after completion of two years of regular service were being given pay band of `10300-34800+3200 (GP). The clerks were getting Grade Pay of `3200/- after completion of total seven years of service, including the services on contractual basis. Therefore, there was gap of one year as far as the Constables getting the revised Grade Pay of `3200/- was concerned. It was further mentioned in this communication that Constabulary comes under the category of trained manpower, whose nature of duties is hazardous, risky and round the clock, therefore, the disparity in pay scale was irrational. A request was made to re-examine the matter with the competent authority to reduce the condition of eight years to five years for the grant of revised pay band of `10300-34800+3200(GP) as the same would boost the morale of the Constables and result in more efficiency and effectiveness in discharging their duties.

23. In response thereto, the Director General of Police was intimated vide communication dated 17.03.2017 (Annexure A-12), that the matter was examined in consultation with the Finance Department, which did not accede to the request of the Police Department. It was further mentioned in the communication that in view of the nature of duties performed by the Police Constables, they were being appointed on regular basis whereas all other categories of employees are appointed on contractual basis.

24. There is also on record another communication addressed by the office of Director General of Police, Himachal Pradesh, to the Additional Secretary to the Chief Minister, Himachal Pradesh, dated 16.01.2019, on the subject 'request for reducing the time of grant of revised pay scale to Police Constables from eight years to three years'. In this communication, the Director General of Police has highlighted the need for grant of pay band of

`10300-34800+3200(GP) after completion of three years regular service of Police Constables taking into consideration the emergent nature of their service conditions.

25. Now this Court will refer to the judgments relied upon by learned Counsel for the parties in support of their respective case.

26. In **Randhir Singh** Versus **Union of India and Others** (1982) 1 SCC 618, Hon'ble Supreme Court of India was dealing with an issue wherein the petitioner therein who was working as a Driver Constable in the Delhi Police Force under Delhi Administration demanded that his pay scale be at least same as the pay scale of other drivers in the service of Delhi Administration. Hon'ble Supreme Court in the facts of the case held that construing Articles 14 and 16 in the light of the Preamble and Article 39(d) of the Constitution of India, the principle of 'equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

27. In **Mewa Ram Kanojia** Versus **All India Institute of Medical Sciences and Others** (1989) 2 SCC 235, Hon'ble Supreme Court was dealing with the issue of the petitioners therein who had raised the grievance that Hearing Therapist though was performing similar duties as that of Speech Therapists, Senior Physiotherapist etc. yet respondents therein were practicing discrimination in paying salary to the petitioner in a lower scale of pay. In the said judgment Hon'ble Supreme Court again reiterated that though the doctrine of 'Equal pay for equal work" is not expressly declared a fundamental right under the Constitution yet the same was applicable when employees holding the same rank perform similar functions and discharge similar duties and responsibilities are treated differently. Hon'ble Court further held that the application of the doctrine would arise where employees are equal in every

respect but they are denied equality in matters relating to the scale of pay. It held that it was open to the State to classify employees on the basis of qualifications, duties and responsibilities of the posts concerned and if the classification had reasonable nexus with the objective sought to be achieved, efficiency in the administration, the State would be justified in prescribing different pay scale but if the classification does not stand the rest of reasonable nexus and the classification was founded on unreal, and unreasonable basis it would be violative of Articles 14 and 16 of the Constitution. Hon'ble Court held that equality must be among the equals and unequal cannot claim equality.

28. In **South Malabar Gramin Bank** Versus **Coordination Committee of South Malabar Gramin Bank Employees' Union and South Malbbar Gramin Bank Officers' Federation and Others** (2001) 4 Supreme Court Cases 101, Hon'ble Supreme Court has been pleased to hold that as the award passed by the Justice S. Obul Reddy's Tribunal had become final and award in question not having been assailed and on the other hand having been implemented, it was futile attempt on the part of the employer as well as the Union of India to re-agitate the dispute, which has already been resolved and has been given effect to and it would no longer be open, either for the Bank or the Union of India to raise a contention that in determining the wage structure for the employees of the Regional Rural Bank, the financial condition would be a relevant factor.

29. In **State Bank of India and Another** Versus **M.R. Ganesh Babu and Others** (2002) 4 SCC 556, Hon'ble Supreme Court has been pleased to hold that equal pay must depend on the nature of work done and though functions may be same but the responsibilities make a difference.

30. In **Union of India and Another** Versus **International Trading Co. and Another** (2003) 5 SCC 437, Hon'ble Supreme Court has been pleased to hold that Article 14 of the Constitution applies also to matters of

government policy and if policy or any action of government, fails to satisfy the test of reasonableness, it would be unconstitutional.

31. In **Chairman and MD, NTPC LTD.** Versus **Reshmi Constructions, Builders & Contractors** (2004) 2 SCC 663, Hon'ble Supreme Court has been pleaded to hold that *necessitas non habet legem* is an age-old maxim which means necessity knows no law. Hon'ble Court held that a person sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

32. In **Haryana State Minor Irrigation Tubewells Corporation and Others** Versus **G.S. Uppal and Others and other connected matters** (2008) 7 SCC 375, Hon'ble Supreme Court has been pleaded to hold as under:-

> *"33. The plea of the appellants that the Corporation is running under losses and it cannot meet the financial burden on account of revision of scales of pay has been rejected by the High Court and, in our view, rightly so. Whatever may be the factual position, there appears to be no basis for the action of the appellants in denying the claim of revision of pay scales to the respondents. If the Government feels that the Corporation is running into losses, measures of economy, avoidance of frequent writing off of dues, reduction of posts or repatriating deputationists may provide the possible solution to the problem. Be that as it may, such a contention may not be available to the appellants in the light of the principle enunciated by this Court in M.M.R. Khan v. Union of India and Indian Overseas Bank v. Staff Canteen Workers' Union. However, so long as the posts do exist and are manned, there appears to be no justification for granting the respondents a scale of pay lower than that sanctioned for those employees who are brought on deputation. In fact, the sequence of events, discussed above, clearly shows*

that the employees of the Corporation have been treated at par with those in Government at the time of revision of scales of pay on every occasion."

33. In **Union of India and Others** Versus **Atul Shukla and Others** (2014) 10 SCC 432, Hon'ble Supreme Court has been pleased to hold that when officers are a part of the cadre, their birthmarks, based on how they joined the cadre is not relevant. They must be treated equal in all respects including salary and other benefits.

34. Hon'ble Supreme Court in **Municipal Corporation of Delhi** versus **Surender Singh and Others**, (2019) 8 Supreme Court Cases 67, has been pleased to hold that when a candidate responds to an advertisement, then if at all if he has any grievance with regard to a clause contained therein, which according to the candidate is arbitrary and might affect his right, then, the same is required to be assailed at the said stage itself. As per the Hon'ble Supreme Court, otherwise the principle of aprobate and reprobate would apply and a candidate who participated in the process cannot be heard to complaint in that regard.

35. Hon'ble Supreme Court in **Air Commodore Naveen Jain** versus **Union of India**, (2019) 10, Supreme Court Cases 34, has been pleased to hold that a party is stopped to challenge the policy after participating in the selection process on the basis of such policy. While holding so, Hon'ble Supreme Court has been pleased to rely upon its earlier judgment passed in Madan Lal vs. State of J & K, (1995) 3 SCC 486 and subsequent judgments in which this principle of estoppel has been followed.

36. In ***Bhagwat Sharan (Dead Through Legal Representatives)*** vs ***Purushottam and Others***, (2020) 6 Supreme Court Cases 387, Hon'ble Supreme Court, has been pleased to hold that doctrine of of election is a facet

of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party, which takes advantage of any instrument, must accept all that is mentioned in the said document. While arriving at the said conclusion, Hon'ble Supreme Court has referred to treatise 'Equity-A course of lectures' by F.W. Maitland, Cambridge University, 1947, wherein the learned author described principle of election in the following terms:-

> *"The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it...."*

37. Hon'ble Supreme Court in State of **H.P. & Ors.** versus **Rajesh Chander Sood etc. etc**. 2016 (10 SCC 77, has been pleased to hold that it is not possible for the Hon'ble Supreme Court to accept that any Court has the jurisdiction to fasten a monetary liability on the State Government, unless it emerges from the rights and liabilities canvassed in the *lis* itself. Hon'ble Supreme Court has been further pleased to hold that Budgetary allocations, are a matter of policy decisions, and in the facts of that case, as the State Government while promoting '1999 Scheme', felt that the same would be self-financing, as the State Government never intended to allocate financial resources out of State funds, to run the pension scheme, therefore, the State Government could not be burdened by the High Court for the liability, which it never contemplated.

38. Coming to the case in hand, this Court is of the considered view that as the petitioners participated in the process of recruitment knowing fully well that they were to serve in the pay band of `5910-20200+1900 (GP) up to eight years of regular service in terms of recruitment notice dated 14.01.2015, they cannot be now permitted to assail the same. Whether or not Notification

dated 14.01.2015, as amended subsequently, is sustainable in law, cannot be questioned by the petitioners for the reasons that by participating in the recruitment process, without any caveat qua the condition of serving in the pay scale of `5910-20200+1900 (GP) upto eight years of service, they impliedly consented to this condition, and thus of pay scale acquiescensed to the same by their act of participation. It is settled law of the land that if a person participates in a process without protest/prejudice, then such incumbent cannot assail the process thereafter. In this case, the condition of serving in the pay scale of `5910-20200+1900 (GP) up to eight years of service as a condition of recruitment notice to which the petitioners responded and participated. It is not in dispute that the petitioners did not lay challenge to this condition at the time of participating in the process of recruitment nor they participated in the process subject to their right to assail this condition. This Court is alive to the fact that bargaining power of the petitioners cannot be equated with that of mighty State but still the fact remains that it is not as if the conditions, as were contained in the recruitment notice, to which the petitioners responded, were subsequently altered to their disadvantage. Here is a case where the government in its wisdom issued a Notification vide which, it revised the period of grant of revised pay band and grade pay to the Constables from two years service to eight years regular service. This Court has no doubt that those Constables who stood recruited before issuance of said Notification and whose right of grant of revised pay band+grade pay was adversely affected by the Notification, had a right to assail the same. However, incumbents like the petitioners, who were not borne in the cadre as on the date when the Notification was issued, do have any locus to assail it. It is reiterated that pursuant to the issuance of recruitment notice dated 06.09.2015, it was open for the petitioners not to respond to the same, in case, they were not satisfied with the terms and conditions of the appointment, including the pay scale.

39. The plea of cut-off-date being arbitrary raised by learned Senior Counsel appearing for the petitioners also does not comes to their assistance for the following reasons. The notification vide which the conferment of the higher pay band + grade pay was revised from two years to eight years payable to Constables, was issued by the Finance Department on 14.01.2015. The recruitment notice to which the petitioners responded is dated 05.03.2015. Notification dated 14.01.2015 was modified as being applicable to Constables appointed on or before 01.01.2015 vide Notification dated 17.06.2016. However, fact of the matter remains that this notification stood issued so as to protect the interests of Constables upon whom, right of grant of revised pay band and grade pay had accrued after two years service in terms of earlier Notification dated 28.09.2012. As far as the petitioners are concerned, as already mentioned hereinabove, when the advertisement to which they responded to, was issued, Notification dated 14.01.2015, in terms whereof revised pay band and grade pay was payable to the Constables after eight years of regular service, was already in force. Not only this, in advertisement dated 05.03.2015 also it was clearly mentioned that the posts of Constables were in the pay scale of 5910-20200 + Grade Pay of Rs. 1900/- up to eight years of service in terms of notification dated 14.01.2015. Therefore, the cut-off-date, as has been fixed subsequently vide notification dated 17.06.2016, is not arbitrary, as has been argued by learned Senior Counsel appearing for the petitioners, for the reason that the classification which has been made by the department between the Constables appointed before 01.01.2015 and after 01.01.2015 is based on intelligible differentia because the right of grant of revised pay scale had already accrued upon the appointees who stood appointed before 01.01.2015 when the same was taken away from them vide notification dated 14.01.2015.

40. In view of above discussion, the judgments which have been relied upon by learned Senior Counsel appearing for the petitioners are also of

no assistance to them for the reason that it is not as if a right, which stood accrued in favour of the petitioners, has been subsequently arbitrarily taken away. Had that been the case, then obviously, the judgments relied upon by learned Senior Counsel appearing for the petitioners, would have had come to their assistance as this Court is of the considered view that even on the ground of financial implications, vested rights cannot be taken away. However, in this case, no vested right of the petitioners has been taken away. Even as far as the bargaining power of the parties is concerned, this Court is of the considered view that as the terms on which the appointment was being offered to which the petitioners responded were expressly mentioned in the advertisement itself, therefore, it cannot be said that the terms contained in the advertisement were dotted lined or that the petitioners have been forced to accept the conditions of service against their wish or will because of their diminishing bargaining power as compared to the State.

41. Coming to the communications, which have been addressed by the Director General of Police, to the State Government, all that this Court can observe is this that in case the government, taking into consideration the nature of duties, which are being performed by the Constables, takes a decision to reduce the period of regular service entitling the Constables for the revised pay scale and grade pay, then with regard to decision of the government, this Court can have no objection. However, this Court has serious doubt as to whether it can issue a writ of mandamus directing the State Government to alter this policy decision of changing the period of regular service to be rendered by a Constable, for being eligible to receive the revised pay band and grade pay of `10300-34800+3200 (Grade Pay).

42. Accordingly, in view of the discussion held herein above as well as law discussed, as the Court does not finds any merit in this petition, the same is accordingly dismissed.

43. However, it is clarified that though this Court is not concurring with the prayers of the petitioners, as they stand spelled out in the writ petition, however, this writ petition is being closed with the observation that non-grant of the relief to the petitioners by the Court shall not come in the way of the State Government, in case, it does intend to revisit the number of years of regular service, which a Constable has to put in after his appointment for the grant of revised pay scale and grade pay. With these observations, the petition is ordered to be closed.

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:-

FREEDOM HOME WELFARE SOCIETY, V.P.O. KINNU, TEHSIL BHARWAIN, DISTRICT UNA, THROUGH ITS PRESIDENT RAKESH KUMAR.

...APPELLANT

(BY M/S SUNEET GOEL & RAGHAV GOEL, ADVOCATES)

AND

CHIEF EXECUTIVE OFFICER, MENTAL HEALTH AUTHORITY, H.P. STATE, SHIMLA-5.

....RESPONDENT

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS)

FIRST APPEAL FROM ORDER
No. 221 of 2021
DECIDED ON:29.10.2021

Mental Healthcare Act, 2017- Sections 68, 69 and 83 - Appeal- office order to close petitioner Society by Senior Medical Superintendent HHMH & Rehab-cum-CEO, H.P. State Mental Health Authority has been challenged- Held- Provision of Sub-sections (3) & (4) of Section 68 of Act stand flagrantly violated while passing the impugned order by the Authority, as no opportunity of being represented or being heard or rectifying the purported shortcomings was given to the petitioner-Institution- Appeal allowed and impugned order quashed and set aside. (Para 10, 11, 12 & 13)

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

J U D G M E N T

By way of this appeal filed under Sections 69 and 83 of the Mental Health Care Act, 2017, the appellant herein has assailed Annexure A-11, i.e., office order dated 07.10.2021, passed by the Senior Medical Superintendent HHMH & Rehab-cum-CEO, H.P. State Mental Health Authority, Shimla-5, which reads as under:-

> *"OFFICE ORDER*
>
> *Whereas Freedom Home Welfare Society was provisionally registered at Sr. No. 063 dated 28.12.2019 with HP SMHA and subsequently renewed on dated 28.12.2019 at Sr. No. 063 to run SUD treatment and rehabilitation centre at VPO Kinnu, Tehsil Bharwain, District Una (H.P.)-177109.*
>
> *And whereas Chief Medical Officer, Una, vide letter No. HFW-UNA-(NMHP-MHEC)-2020/ 14875 dated 5.10.2021 has recommended closure on the basis of inspection carried out on 20.09.2021.*
>
> *You are therefore directed to close down your operations within 7 days and shift the patients to their families. And De-addiction and rehabilitation services carried out in said SUDs treatment and rehabilitation centre shall be*

considered as unlawful and shall be accordingly dealt under MHCA-2017.

Sr. Medical Supdt.HHMH & Rehab-cum-CEO
H.P. State Mental Health Authority, Shimla-5"

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

Petitioner-Society was registered provisionally under the provisions of The Mental Healthcare Act, 2017 (hereafter referred to as 'the 2017 Act') as a Mental Health Establishment in terms of the provisions of Sections 65 and 66 thereof w.e.f. 28.12.2019 (Annexure P-2). Thereafter, the said provisional registration was renewed for a period of twelve months vide order dated 28.12.2020 (Annexure A-3). In other words, the petitioner-Society was permitted to operate as a Mental Health Establishment up to 27th December, 2021. In the interregnum, on the basis of a general complaint received against the functioning of such like Institutions, the petitioner-Institute was inspected by the Chief Medical Officer, Una alongwith his Team Members on 20th September, 2021 and based upon said visit, he submitted his report dated 5th October, 2021, which has led to the issuance of impugned order.

3. Learned counsel for the petitioner has primarily argued that the impugned order is not sustainable in the eyes of law, as the same has been issued without following the procedure, which is laid down under the 2017 Act for cancellation of registration. He has drawn the attention of the Court to the provisions of Section 68 of the Act and has submitted that the statutory provisions contained therein, which are mandatory in nature and which have to be followed before cancellation of the registration, have not been followed and result thereof is that the impugned office order is rendered *void abinitio.* Accordingly, a prayer has been made that the appeal be allowed and the impugned order be quashed and set aside

4. Defending the order, learned Advocate General has argued that as the mandate of the Act was not being followed by the Institutions, including the petitioner-Institution, accordingly, they were inspected by the Chief Medical Officer and based upon the report of the said officer, appropriate office order was passed by the authority envisaged under the Act, as the same was in the larger interest of the patients, who were undergoing treatment in such like Institutions. He further submitted that the act was undertaken by the authority concerned without any discrimination, as the same parameters were applied for all the Institutions and whereever the infirmities were found, appropriate action was taken. On these basis, he has stated that there is no infirmity in the impugned order and the appeal being without merit, be dismissed.

5. I have heard learned counsel for the parties and also gone through the impugned order as well as other documents on record.

6. The Mental Healthcare Act, 2017 has been brought into force in place of The Mental Health Act, 1987 with the aim to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.

7. Chapter-X of the said Act deals with Mental Health Establishments. Section 65 thereof provides that no person or organization shall establish or run a mental health establishment unless it has been registered with the Authority under the provisions of this Act. Section 66 of the Act provides for procedure for registration, inspection and inquiry of mental health establishments. Section 67 provides for audit of mental health establishment and Section 68 thereof provides for inspection and inquiry and the same reads as under:-

> *"**Section 68. Inspection and inquiry**-(1) The Authority may, suo motu or on a complaint received from any*

person with respect to non-adherence of minimum standards specified by or under this Act or contravention of any provision thereof, order an inspection or inquiry of any mental health establishment, to be made by such person as may be prescribed.

(2) The mental health establishment shall be entitled to be represented at such inspection or inquiry.

(3) The Authority shall communicate to the mental health establishment the results of such inspection or inquiry and may after ascertaining the opinion of the mental health establishment, order the establishment to make necessary changes within such period as may be specified by it.

(4) The mental health establishment shall comply with the order of the Authority made under sub-section(3).

(5) If the mental health establishment fails to comply with the order of the Authority made under sub-section (3), the Authority may cancel the registration of the mental health establishment.

(6) The Authority or any person authorized by it may, if there is any reason to suspect that any person is operating a mental health establishment without registration, enter and search in such manner as may be prescribed, and the mental health establishment shall co-operate with such inspection or inquiry and be entitled to be represented at such inspection or inquiry."

8. Section 69 of the Act provides that any mental health establishment aggrieved by an order of the Authority refusing to grant registration or renewal of registration or cancellation of registration, may,

within the period of thirty days from such order, prefer an appeal to the High Court in the State.

9. Now, a perusal of Section 68 of the Act demonstrates that in terms thereof, the Authority prescribed under the Act may, *suo motu* or on a complaint received from any person with respect to non-adherence of minimum standards specified by the Act or with regard to contravention of any provision thereof, order an inspection or inquiry of any Mental Hhealth Establishment, to be made by such person as may be prescribed. This Section further provides that a Mental Health Establishment shall be entitled to be represented at such inspection or inquiry. It further provides that the authority shall communicate to the Mental Health Establishment the result of such inspection or inquiry and may after ascertaining the opinion of the Mental Health Establishment, order the establishment to make necessary changes within such period as may be specified by it. Section further provides that the Mental Health Establishment shall comply with the order of the Authority and in case it fails to comply with the order, then the Authority may cancel the registration of the Mental Health Establishment.

10. As has already been mentioned hereinabove, the petitioner-Institution was visited by the Chief Medical Officer on 20.09.2021 alongwith team members. This was done in compliance to letter, dated 10.09.2021, issued by the CEO, HPSMHA, Shimla. From the perusal of the inspection report, it is not evident as to whether the Mental Health Establishment was permitted to be represented during inspection or not. Be that as it may, the fact of the matter remains that after the petitioner-Institution was visited by the Authority concerned alongwith the team members and inspection report dated 05.10.2021 was prepared, on the basis of which, the impugned order has been passed. The inspection report admittedly was never communicated to the petitioner-Society nor any instructions were issued to the petitioner-Society to comply with the shortcomings, as stood pointed out in the inspection report. In

other words, the provisions of Sub-sections(3) & (4) of Section 68 of the Act stand flagrantly violated while passing the impugned order by the Authority, as no opportunity of being represented or being heard or rectifying the purported shortcomings was given to the petitioner-Institution before passing the impugned order.

11. This Court is of the considered view that as the respondents have failed to comply with the provisions of Section 68 of the 2017 Act, the subsequent order, which was passed by the appropriate authority, but natural, is *void abinitio* and not sustainable in law.

12. When the Act prescribes a procedure to be followed before arriving at a conclusion, then that procedure has to be *mandatorily* followed, especially in those cases where the final order is penal in consequences and nature. In this case, the final order has grave civil consequences. It is penal in nature and, therefore, the provisions which are enshrined in Section 68 to safeguard the interests of the Mental Health Establishments have to be followed before passing an order envisaged under Sub-section(5) of Section 68 of the Act, which admittedly was not done in this case.

13. In view of the observations made hereinabove, this appeal is allowed and order, dated 07.10.2021, passed by the Sr. Medical Supdt. HHMH& Rehab-cum-CEO, H.P. State Mental Health Authority, Shimla, is quashed and set aside, but with the observation that as the order has been set aside on technical ground, the Authority shall be at liberty to proceed against the appellant, in accordance with law afresh. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

SH. LOKESH GUPTA, S/O SH. BHUVNESH GUPTA, R/O 522/3, DEPOT

BAZAAR DHARAMSHALA, TEHSIL DHARAMSHALA, DISTRICT KANGRA.

...PETITIONER

(BY SHRI D. K. KHANNA, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH SECRETARY (PWD), TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA.

2. THE ENGINEER-IN-CHIEF (HPPWD), US CLUB, SHIMLA.

3. THE HIMACHAL PRADESH SUBORDINATE SERVICES SELECTION BOARD THROUGH ITS SECRETARY, HAMIRPUR.

4. ROLL NO. 433, SELECTED AS JUNIOR ENGINEER (ELECTRICAL HPPWD) THROUGH THE ENGINEER-IN-CHIEF, HPPWD, US CLUB, SHIMLA.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, AND MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERALS, FOR R-1 AND R-2
MS. ARCHANA DUTT, ADVOCATE, FOR R-3
SHRI PRAVEEN CHAUHAN, ADVOCATE, VICE SH. L.N. SHARMA, ADVOCATE, FOR R-4)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No.244
of 2019
Decided on: 25.10.2021

Constitution of India, 1950- Article 226- Selection criteria for the post of Junior Engineer (Electrical) - Screening test- held- The rules of procedure/ Business adopted by the Respondent-Board are not under challenge in this petition- There is no *per se* allegation of malafide contained in the petition to infer that the selection of selected candidates was for reason other than merit- Petition dismissed. (Para 7, 8 & 9)

These petitions 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 this petition are as under:-

Respondent No. 3 issued an Advertisement dated 16.10.2000, vide which, it advertised, *inter alia*, the posts of Junior Engineer (Electrical), which were to be filled from amongst General category candidates. A copy of the Advertisement is appended with the petition as Annexure -A/7. In terms thereof, a person possessing the qualification of Diploma/Degree in Electrical Engineering/AMIE or above from an Institute recognized by the Government, was eligible to participate in the selection process. According to the petitioner, he applied for the post by submitting his requisite documents. He appeared in the screening test and was declared qualified in the same. Besides the petitioner, candidates with Roll Nos. 128, 263, 272, 354 and 433 were also declared to have had passed the test. Roll Number of the petitioner was 182. Thereafter, the petitioner was invited for personal interview, which was scheduled for 18.07.2001. He appeared in the same. Respondent No. 3 declared the final result on 26.07.2001. Though the petitioner was not

selected, the candidates with Roll Nos. 283 and 433 were declared to be selected.

2. Feeling aggrieved, the petitioner filed this petition, *inter alia,* on the ground that non-selection of the petitioner, who was more qualified than the selected candidates, is not sustainable in the eyes of law, as higher qualification and work experience of the petitioner were ignored by the Board while recommending the names of other candidates. Further, as per the petitioner, the marks obtained by the candidates in the screening test were also taken into consideration while assessing the merit, which was totally illegal and bad in law, as the recommendations ought to have been made by the respondent-Board without taking into consideration the marks obtained by a candidate in the screening test.

3. In this background, when the case was listed before the Court on 06.09.2021, the following order was passed:-

> *"It is really unfortunate that this petition initially filed in the year 2001, till date has not been decided by the Court.*
>
> *Heard for some time. For continuation, list on 15th September, 2021, on which date, respondent No. 3 shall produce the record pertaining to the selection of petitioner and respondent No. 4. It is clarified that no further adjournment on any count shall be given by the Court in this regard."*

4. Thereafter, on 15.09.2021, the following order was passed:

> *"Record of the interviews has been produced by Ms. Archana Dutt, learned counsel appearing for the respondent-Commission. The record after perusal stands returned to Ms. Dutt, with the direction that the same be produced on the next date of hearing also. On the said date, respondent-Commission shall also apprise the Court as to w*hat was the mode of selection contemplated in the

> process of recruitments of Junior Engineer, which post is subject matter of this writ petition, because the contention of learned counsel for the petitioner is that the selection has been made on the basis of the marks obtained by the candidates in the Screening Test and the consideration of said marks for the purpose of appointment is in violation of the settled law of the land.
>
> List for further consideration on 25th October, 2021."

5. Today, learned counsel appearing for respondent No. 3 has produced the original record of the interview as well as instructions so imparted to her by respondent No. 3, alongwith which, relevant extract of the Rules of Procedure/Business adopted by respondent No. 3 has also been appended.

6. A perusal of the instructions so imparted to learned counsel for respondent No. 3 demonstrates that in terms of the Rules of Procedure/Business adopted by respondent No. 3, when a written test is held by the respondent-Board for assessing the suitability of candidates for a particular post, then the marks obtained in the same and the interview are entered in a sheet and total struck and category wise result declared for onward transmission. A perusal of the record of the written examination and interview further demonstrates that in the written test, the petitioner had scored 142 marks out of 200 marks, whereas the selected candidate, who later on was impleaded as respondent No. 4, scored 154 marks out of 200 marks and the other selected candidate, who incidentally has not been impleaded as party respondent, scored 142 marks out of 200 marks.

7. In the interview, the petitioner was given 8 marks out of 30 marks, whereas other selected candidate, who is not before the Court, was given 10 marks out of 30 marks. The Rules of Procedure/Business adopted by the respondent-Board are not under challenge in this petition. Further, there

is no *per se* allegation of *malafide* contained in the petition, from which, it can be inferred that the selection of the selected candidates was for reasons other than merit. The allegation of the petitioner that his experience etc. has not been taken into consideration is not being gone into by the Court for the reason that a perusal of the record demonstrates that under this Head, marks were not granted to any of the candidates. This means that suitability of the candidates was assessed by the Board only on the basis of the marks obtained in the written test and the marks alloted to them in the interview.

8. It is not the case of the petitioner that the selected candidates were not eligible for appointment to the post in issue. Therefore, the factum of the petitioner possessing higher qualification loses its significance, as it was nowhere mentioned in the Advertisement that a candidate possessing higher qualification would be given some added advantage. Besides this, another thing which is weighing with the Court very heavily, is the fact that the selection process which has been assailed by way of this petition, took place in the year, 2001 and today we are in the year 2021. The Court has also been informed that now the petitioner is also in job, though on contract basis. In this backdrop, the Court is of the considered view that in case any interference is made by this Court on merit with the selection under challenge, then it will unnecessarily disturb the selected candidates, who have been appointed to the post in question at least two decades back and one of whom is not even before the Court.

9. In view of the above discussions, this Court is of the considered view that there is no need for the Court to interfere in the process of recommendations made by the respondent-Board, which stands assailed by way of this petition and accordingly, the petition is dismissed, so also pending miscellaneous applications, if any.

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

Between:-

1. MANOJ KUMAR, S/O SH. MADHAV RAM, RESIDENT OF VILLAGE SEGLAGLU TEHSIL CHACHOIT, DISTT. MANDI, H.P., AGED 35 YEARS.

...PETITIONER/ACCUSED

2. DESH RAJ, S/O SH. MURALI LAL, RESIDENT OF VILLAGE SAINJ, CHACHOIT, GOHAR MANDI, H.P., AGED 37 YEARS

...PETITIONER/COMPLAINANT

(BY SHRI NAVEEN KUMAR BHARDWAJ, ADVOCATE)

AND

STATE OF H.P.

...RESPONDENTS

(SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S ADARSH SHARMA & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS)

CRIMINAL Misc. Petition (Main)
U/S 482 CRPC No. 449 of 2019
Decided on: 29.10.2021

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Held- The inherent powers so conferred upon this Court under Section 482 of Cr.P.C. cannot be exercised by it at the throw of the hat- Petition dismissed. (Para 4)

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

J U D G M E N T

By way of this petition filed under Section 482 of the Code of Criminal Procedure, a prayer has been made for quashing of FIR No. 110, dated 04.08.2017 and criminal proceedings ensuing therefrom, *inter alia,* on

the ground that the matter has been compromised between the accused-petitioner and the complainant.

2. I have heard learned counsel for the petitioners as well as learned Additional Advocate General.

3. A perusal of the record demonstrates that there are more than one accused in the FIR in issue. After completion of investigation, the investigation report was filed by the Investigating Agency before the learned Trial Court and pursuant thereto, as learned Trial Court found a *prima facie* case therein, charges were framed against the accused. Not only this, thereafter the process was undertaken by the learned Trial Court to proceed with the trial of the matter and as of now, the case is fixed for hearing. Now, it is on the basis of a compromise which has been entered into by the complainant with one of the accused, who in turn thereof, has filed this petition under Section 482 of the Code of Criminal Procedure.

4. This Court is of the considered view that the inherent powers, which stand conferred upon this Court under Section 482 of the Court of Criminal Procedure, cannot be exercised at the throw of the hat by the Court, simply because someone approaches the Court with the plea that the matter has been compromised between the parties. It is settled law that Criminal offence is not an offence against an individual, but against the State. It is for this reason that the State prosecutes the accused and not an individual. Here it is a typical case, wherein after lodging of the FIR, the investigation took place. After completion of the investigation, the challan was filed. Thereafter, the prosecution produced its witnesses in the Court and now the case is fixed for hearing. Lot of judicial time has been consumed in this entire process and now the accused-petitioner wants this Court to quash the FIR, simply on the ground that the matter has been amicably settled between him and the complainant. This Court has serious doubt about the credentials of the complainant also, who has entered into this exercise of partial compromise

with one of the accused in the FIR concerned. It speaks volume about the conduct of the complainant also. However, without going into this aspect of the matter, as this Court has already observed hereinabove that the inherent powers so conferred upon this Court under Section 482 of the Code of Criminal Procedure cannot be exercised by it at the throw of the hat, on the contention of an accused that the matter has been amicably settled, therefore, without further commenting on the issue, this petition is dismissed.

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

Between:-

SHRI RAJINDER KUMAR SOOD
SON OF LATE SHRI SANT RAM,
RESIDENT OF AMAR NIWAS,
THE MALL, SHIMLA-171001. .....PETITIONER

(BY SH. NEERAJ GUPTA SENIOR ADVOCATE
WITH SH. AJEET JASWAL, ADVOCATE)

AND

SHRI OM PRAKASH SOOD
SON OF LATE SHRI SANT RAM,
RESIDENT OF 17, RAELANE,
NORTHWALK,CT 06850 USA.
AT PRESENT RESIDENT OF
VILLAGE AND P.O. MATIANA,
TEHSIL THEOG,
DISTRICT SHIMLA (HP). .....RESPONDENT

(BY SMT. DEVYANI SHARMA, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 286 of 2018

Decided on: 04.10.2021

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order 7 Rule 11- **H.P. Land Revenue Act, 1953**- Sections 37, 171- Plaintiff has sought declaration in the suit with respect to the order passed by the Assistant Collector, IInd Grade, under Section 37 of the H.P. Land Revenue Act- Application of defendant for rejection of plaint under Order 7 Rule 11 of Code of Civil Procedure was dismissed by the Ld. Trial Court- Held- Section 171 of H.P. Land Revenue Act expressly bars the jurisdiction of Civil Court, as such civil suit filed by the plaintiff cannot proceed- Petition allowed- Application under Order 7 Rule 11 allowed. (Para 5(vii)

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

O R D E R

An application moved by defendant for rejection of the plaint under Order 7 Rule 11 of Code of Civil Procedure was dismissed by the learned trial court. This order has been assailed by the defendant in the present petition.

Parties to the litigation are real brothers, sons of late Shri Sant Ram. The status of the parties hereinafter has been referred to as it was before the learned trial court.

2. **Facts**

Plaint

2(a) a civil suit was filed by the respondent/plaintiff for-

i) declaration to the effect that the order dated 13.7.2012 passed by the Assistant Collector IInd Grade, Theog, District Shimla was illegal, null and void; **ii)** for permanent prohibitory injunction to restrain the petitioner/defendant from alienating transferring, encumbering, changing the nature of the suit property; and **iii)** for recovery of Rs. 2,00,000/- as damages on account of mental harassment.

2(b) The suit was in relation to property comprised in Khata No. 85/78, Khatauni No. 202/197, Khsra No. 1000, 1001, 1002, 1003, 1004 1005 and 1028 total measuring 02-04-41 Hect. situated in Up Mohal Kalinda, Tehsil Theog, District Shimla. It was pleaded that:-

2(b)(i) The suit property was initially owned by late Shri Sant Ram who had six daughters and three sons. The plaintiff and defendant had 1/9th share in the suit property. The possession of the suit property was with three sons of late Shri Sant Ram i.e. plaintiff, defendant and Shri Rajneesh Sood. Shri Rajneesh Sood, brother of the parties died during the year 1993.

2(b)(ii) Plaintiff shifted to USA in the year 1972. He kept coming to India to maintain and look after his share in the ancestral property. He filed a civil suit No. 67-S/1 of 95/93 against the defendant titled Om Prakash vs. Rajinder Kumar Sood for partition and rendition of accounts. The suit was partly decreed by the learned District Judge, Shimla on 16.9.2000. The decee has though been accepted by the defendant, however, the plaintiff has preferred an appeal against it before this Court. The appeal bearing RFA No. 365/2000 is as yet pending adjudication in this Court. In CMP No. 487/2000 filed in this Regular First Appeal, vide order dated 3.1.2001 the parties including the defendant were restrained from selling, transferring or encumbering the properties in dispute. The order dated 3.1.2001 was modified vide order dated 5.3.2002 to the extent that any transfer or alienation of the subject matter of dispute by any of the parties was made subject to final decision of the appeal and further that the parties will not create any equity in favour of third party. This order is still in force. Suit property involved in the present suit is part and parcel of the properties involved in Civil Suit No. 67-S/1 of 95/93.

2(b)(iii) During pendency of RFA No. 365 of 2000, the defendant moved an application before Assistant Collector IInd Grade (in short A. C. IInd Gade), Theog under Section 37 of the H.P. Land Revenue Act, 1953 (hereinafter 'Act')

for correction of entries of possession in the revenue record with respect to the suit property. The A.C. IInd Grade allowed the application vide order dated 13.7.2012. On the basis of this order, mutation No. 15 was attested on 11.9.2012. The order dated 13.7.2012 is to be declared void and illegal for the reasons that:-

a) Defendant in his application for correction of revenue entries moved before the A.C. IInd Grade had suppressed the orders passed by the High Court in RFA No. 365/2000.

b) Defendant in a fraudulent manner mentioned wrong address of the plaintiff in his application under Section 37 of the Act with a view to obtain order behind the back of the plaintiff.

c) Defendant impleaded Shri Rajneesh Sood (brother of parties) in the application by his nickname 'Kuka' despite being aware that Shri Rajneesh Sood had died during the year 1993.

d) The plaintiff was not served in the application moved by the defendant under Section 37 of the Act.

2(b)(iv)The order passed by the A.C. IInd Grade on 13.7.2012 came to the knowledge of plaintiff in July 2014. The defendant was trying to lease out and encumber the suit property to third party not only in violation of the orders passed by the High Court in RFA No. 365 of 2000 but also causing detriment to the rights, title and interest of the plaintiff.

2(c) With the above averments, the suit was filed for the following prayers:-

"(a) Declaration be given in favour of the plaintiff and against the defendant to the effect that the order dated 13.7.2012 in Case No. 2/2012 titled as Sh. Rajinder Kumar Vs. Sh. Om Prakash & Other passed by Ltd. Assistant Collector, IInd Grade Theog, Shimla is illegal, null and void and not binding on the rights, title and interest of the plaintiff and consequently mutation No. 15 dated 11.9.2012 entered on the basis of said order is factually incorrect,

illegal, null and void and not binding upon the rights, title and interest of the plaintiff in any manner whatsoever and same is a result of fraud and deception.

(b) Decree for permanent prohibitory injunction be also passed in favour of the plaintiff and against the defendant thereby restraining the defendant from alienating, transferring, encumbering, changing the nature of the property or creating any third party interest in any manner whatsoever in the property comprised in Khata No. 85/78, Khatauni No. 202/197, Khasra No. 1000, 1001, 1002, 1003, 1004, 1005 and 1028 total measuring 02-04-41 Hct. Up Mohal Kalinda, Tehsil Theog, District Shimla.

(c) Decree for recovery of Rs. 2,00,000/- (Rs. Two lakhs only) as damages for mental harassment and agony suffered by the plaintiff as also expenditure incurred by the plaintiff in coming from USA to India for the purposes of taking remedial measures illegal and unlawful acts of the defendants and protecting his rights and interest"

2(d) **Written statement**

Present petitioner took following defence in his written statement:-

2(d)(i) Civil Suit No. 67-S/1 of 95/93 filed by the plaintiff was for partition and rendition of accounts of the entire property co-owned by the parties. The entire estate involved in that suit was initially owned by the parents of the parties i.e. late Shri Sant Ram and Smt. Shakuntla Devi. The three brothers including the present parties were owners to the extent of 1/3rd share each in the entire suit land-the subject matter of civil Suit No. 67-S/1 of 95/93. The shares of the three brothers were separated by their mother Smt. Shakuntla Devi during her life time. Subsequent thereto, the plaintiff, defendant and the third brother late Shri Rajneesh Sood had been managing their respective shares. Possession of the suit property involved in the instant suit i.e. Kharsra Nos. 1000-1005 was given to the defendant who had raised an apple

orchard thereupon and had been managing the same independently. In the civil suit No. 67-S/1 of 1995/93, the plaintiff had challenged the authenticity, validity and legality of the Will dated 26.3.1974 executed by Shri Sant Ram and the Will dated 10.2.1975 executed by Smt Shakuntla Devi. The suit was partly decreed by the learned District Judge, Shimla on 16.9.2000. The suit property involved in the present lis, is one of the many properties involved in the aforesaid Wills and subject matter of civil suit No. 67-S/1 of 1995/93.

2(d)(ii) The judgment and decree passed by learned District Judge on 16.9.2000 in civil suit No. 67-S/1 of 1995/93 has been challenged by the plaintiff in RFA No. 365/2000. This appeal is pending adjudication. Pursuant to the interim orders passed therein, the parties have been restrained from alienating or creating third party rights over the entire joint property including the present suit property. Injunction, therefore, has already been granted with respect to suit property. Matter in issue in the present suit was also directly and substantially in issue in civil suit No. 67-S/1 of 1995/93. It is now pending adjudication in RFA No. 365/2000.

2(d)(iii) The defendant moved an application under Section 37 of the Act before the A.C. IInd Grade for correcting the revenue record pleading therein that the plaintiff was wrongly shown to be in joint possession of the suit property whereas suit property was in exclusive possession of the defendant on the spot. The application was proceeded in accordance with law. It was allowed on 13.7.2012. The existing revenue entries in respect of possession over the suit property were ordered to be corrected and changed in favour of the applicant/defendant. Plaintiff is not entitled to take the plea of alleged wrong impleadment of third brother late Shri Rajneesh Sood. Defendant denied that there was infraction of any procedure or law in passing the order dated 13.7.2012 and stated that order dated 13.7.2012 was passed after following due process of law. The plaintiff was aware of the order. The order dated 13.7.2012 was appealable. Plaintiff had already taken legal recourse

against this order by filing an appeal under Section 14 of the Act. The fact that the plaintiff had already availed the statutory remedy available to him against the order dated 13.7.2012 was not disclosed by him in the plaint. Plaintiff cannot simultaneous avail two remedies against a single order.

2(d)(iv) Section 171 of the Act expressly bars the jurisdiction of the civil court in matters within the jurisdiction of the revenue officers. Correction of revenue entry in record of rights, in accordance with law, was within the domain of the revenue officer. Statutory remedy was available to the plaintiff against the order dated 13.7.2012. The statutory remedy was availed by the petitioner. The civil suit filed by plaintiff cannot proceed in view of bar of jurisdiction created by Section 171 of the Act.

2(d)(v) It was denied that the procedure contemplated in law was not followed by Assistant Collector IInd Grade in deciding the application moved by the defendant under Section 37 of the Act. The Kanungo was directed to submit his report. The Kanungo visited the spot, recorded the statements and submitted in his report that the defendant was in exclusive possession over the suit property. After complying the procedure in law, the order was passed by A.C. IInd Grade on 13.7.2012 for changing the existing revenue entries in respect of possession over the suit land in favour of the defendant/applicant. The other contentions raised by the plaintiff were also denied in the written statement.

2(e) **Application under Order 7 Rule 11 CPC**

2(e)(i) Alongwith the written statement, the defendant moved an application under Order 7 Rule 11 CPC for rejection of the plaint. The defendant submitted that plaintiff had sought declaration in the suit with respect to the order dated 13.7.2012. This order was passed by the Assistant Collector IInd Grade, Theog under Section 37 of H.P. Land Revenue Act. In terms of the order the exiting revenue entries of possession over the suit property were changed in favour of defendant. Section 14 of the Act provides remedy of

filing an appeal against the order dated 13.7.2012. The plaintiff, at the time of filing the civil suit had simultaneously availed the statutory remedy by challenging the order dated 13.7.2012 before the Collector, Shimla. He cannot simultaneously avail two remedies in respect of single cause of action against same order of 13.7.2012. Invoking Section 171 of the Act, bar of jurisdiction of civil court against the order dated 13.7.2012 was also pleaded. On the basis of these averments, it was prayed that the plaint deserved to be rejected.

2(e)(ii) Opposing the application, the plaintiff submitted in his reply that the plaint was not hit by Section 171 of H.P. Land Revenue Act as the civil suit filed by the plaintiff was for declaration with consequential reliefs of permanent prohibitory injunction and damages. That the plaintiff had raised intricate question of title in the civil suit. Determination of such question was within the sole domain of the civil court. The question raised in the plaint could not be answered by the revenue court. The order dated 13.7.2012 was passed behind the back of the plaintiff and on the basis of this illegal order, the mutation was attested on 11.9.2012. Under the garb of order dated 13.7.2012, the defendant was usurping the apple crop from the suit property and was trying to dispossess the plaintiff. It was admitted that plaintiff had filed an appeal before the Collector under Section 14 of the Act against the order dated 13.7.2012 passed by Assistant Collector IInd Grade. However, it was submitted that the appellate authority being the revenue court could only adjudicate regarding the mutation entries and could neither delve into question of title nor could restrain the defendant from selling, alienating and encumbering the suit property. That grant of such relief was only within the domain of the civil court. The possession and ownership rights of the plaintiff can only be protected by the civil court and, therefore, plaintiff was within his right to file the suit for the reliefs prayed by him.

3. Order passed by trial Court

Learned trial Court after hearing the parties, vide order dated 11.7.2018 dismissed the application moved by the defendant under Order 7 Rule 11 CPC holding that question of title involves complex issues of fact and law, which can be referred by the revenue court for decision by the civil court. That non-following of the statutory provisions or principle of natural justice would invoke the jurisdiction of the civil court. That in the instant case the revenue court had yet neither ascertained the facts nor denied the relief to the plaintiff. The

trial court dismissed the application for the following reasons:-

> "It is also significant to mention that the question of title involves complex issues of fact and law for which even a revenue Court can refer the matter through parties to be decided by the civil court. But non following of the statutory provisions or principle of the natural justice makes the invoking the jurisdiction of civil Court. However, the revenue Court has yet not ascertained the truth of the fact and not denied the relief to the plaintiff/non applicant. The basic ground over which the challenge has been made is that the order has been passed against dead person and he has been proceeded against ex-parte intentionally to defeat his right and interest. So far as the non following of the statutory procedure or not proceedings in accordance with the natural justice is concerned it has yet not been concluded. But the civil suit filed before this Court pertains to declaration and injunction in which no evidence has been led as yet. Without these being anything prima-facie, this Court cannot conclude that it lack express or implied jurisdiction to try the case."

Aggrieved against this order, the defendant has moved the present petition under Article 227 of the Constitution of India.

4. **Contentions**

Mr. Neeraj Gupta, learned Senior Counsel for the petitioner/defendant painstakingly argued for rejection of the plaint and reiterated the stand taken by the defendant in his application under Order 7 Rule 11 CPC. Learned counsel in support of his argument for rejecting the plaint under Order 7 Rule 11(d) CPC relied upon ***(2019) 3 SCC 692,*** titled ***Pyare Lal*** vs. ***Shubhendra Pilania, minor through natural guardian father Pradeep Kumar Pilania*** and ***(2020) 12 SCC 680***, titled ***South Delhi Municipal Corporation*** versus ***Today Homes & Infrastructure.***

Mrs. Devyani Sharma, learned counsel for the respondent/plaintiff vehemently defended the impugned order and the stand taken by the plaintiff in reply to the application moved under Order 7 Rule 11 CPC. In support of her submissions, learned counsel relied upon ***AIR 1969 SC 78,*** titled ***Dhulabhai etc.*** vs. ***State of Madhya Pradesh & another***, ***1992 (1) Sm. L.C. 320***, titled ***Dalip Singh & others*** vs. ***State of H.P. & others***, ***(2003) 1 SCC 557,*** titled ***Saleem Bhai & others*** vs. ***State of Maharashtra & others***, ***(2005) 7 SCC 510***, titled ***Popat & Kotecha Property*** vs. ***State Bank of India Staff Association,*** ***2008 (1) Shim. L.C. 45,*** titled ***Jagannath*** vs. ***Om Prakash***, ***2008 (2) Shim. L.C. 421***, titled ***Smt. Bhekhalu Devi*** vs. ***Smt. Ram Ditti & other***, ***(2009) 4 SCC 299***, titled ***Rajasthan State Road Transport Corporation & another*** vs ***Bal Mukind Bairwa***, ***(2010) 8 SCC 329,*** titled ***Shalini Shyam Shetty & another*** vs. ***Rajendra Shanka Patil***, ***Latest HLJ 2002 (H.P.) 197***, ***titled Roshan Lal*** vs. ***Krishan Dev*** and ***2021 SCC Online 567,*** titled ***Ratul Mahanta*** vs. ***Nirmalendu Saha.***

5. **Observations**

After hearing learned counsel for the parties at length and on going through the record, I am of the considered view that this petition deserves to be allowed for the following reasons:-

5(i) The application was moved by the defendant for rejection of the plaint in terms of Order 7 Rule 11 (d) of the Code of Civil Procedure, which reads as under:

> "11. Rejection of Plaint:- The plaint shall be rejected in the following cases:-
>
> (a) to (c)xxxxxxxxxxxx
>
> (d) where the suit appears from the statement in the plaint to be barred by any law."

The remedy under Order 7 Rule 11 CPC is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence and conducting a trial on the basis of evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in the provision. A duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon or whether the suit is bared by law. It is not permissible to cull out a sentence or a passage and to read it in isolation. It is the substance and not merely the form, which has to be looked into. If on a meaningful reading of the plaint, it is found that suit is manifestly vexatious and without any merit and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC [Refer (***2020) 7 SCC 366,*** titled ***Dahiben*** vs. ***Arvind Bhai Kalyanji Bhanusali***].

5(ii) The basic relief sought by the plaintiff in the plaint is in respect of order dated 13.7.2012 passed by Assistant Collector IInd Grade Theog, District Shimla. Under relief No. 1, plaintiff has prayed for declaration that this order be declared null, void and not binding on his rights over the suit property. In terms of the order dated 13.7.2012, the Assistant Collector IInd Grade had allowed an application moved by the defendant under Section 37 of the Land Revenue Act. The defendant in this application had prayed for correction in the existing revenue entry, which showed the suit property to be jointly owned and possessed by the three brothers i.e. the plaintiff, defendant and Shri Rajneesh Sood. The case of the defendant before the Assistant Collector IInd Grade was that the suit property was in his exclusive possession, over which he had planted an apple orchard. Therefore, revenue entry in respect of the possession of the suit property should be changed in his favour. After getting an inquirty conducted in this regard through Kanungo, the Assistant Collector IInd Grade recorded in the order dated

13.7.2012 that it was the defendant who was in possession over the suit property. The Assistant Collector IInd Grand by resorting to the provisions of Section 37 of the Act allowed the application moved by defendant and ordered change of the revenue entry for reflecting defendant's possession over the suit property. Chapter IV of the H.P. Land Revenue Act encompassing sections 32 to 46 pertains to 'Records- of rights and Periodical Records'. Sections 32-34 provide for preparation of record of rights. Section 35 onwards lay down the procedure for making the records. Section 37 provides for determination of disputes in respect of any entry in a record or in a register of mutations. It would be appropriate at this stage to take note of the Section 37 of the Act, which reads as under:

> 37. Determination of dispute.- (1) If during the making, revision or preparation of any record or in the course of any enquiry under this Chapter, a dispute arises as to any matter of which an entry is to be made in a record or in a register of mutations, a Revenue Officer may of his own motion or on the application of any party interested, but subject to the provisions of the next following section and after such inquiry as he thinks fit, determine the entry to be made as to that matter.
>
> (2) If in any such dispute the Revenue Officer is unable to satisfy himself as to which of the parties thereto is in possession of any property to which the dispute relates, he shall ascertain through the Gram Panchayat constituted under the Himachal Pradesh Panchayati Raj Act, 1994 (Act No. 4 of 1994) or any other agency so prescribed by the Financial Commissioner or by summary inquiry who is the person best entitled to the property and shall by order direct that, that person be

> put in possession thereof, and that an entry in accordance with that order, be made in the record or register.
>
> (3) A direction of a Revenue Officer under sub-section (2) shall be subject to any decree or order which may be subsequently passed by any Court of competent jurisdiction.

The order dated 13.7.2012 was passed by the A.C. IInd Grade in exercise of powers under Section 37 of the Act. It is not the case of the plaintiff that the A.C. IInd Grade had no jurisdiction to pass the order dated 13.7.2012 for correction of revenue entry.

5(iii) The order passed by Assistant Collector IInd Grade on 13.7.2012 was appealable under Section 14 of the Act. This remedy admittedly has been availed by the plaintiff. He has filed an appeal against the order dated 13.7.2012 before the Collector. Simultaneously, the plaintiff has filed present civil suit for declaration that the order dated 13.7.2012 is illegal, void and not binding upon his right, title and interest. On that basis, he has also sought injunction against the defendant from interfering over the suit property and for recovery of Rs. 2,00,000/- for damages.

5(iv) The grievance in the plaint is in respect of order dated 13.7.2012. It has been contended that the A.C. IInd Grade had embarked upon question of title regarding the suit land in the order dated 13.7.2012. During hearing of the case, with the consent of learned counsel for the parties, certain documents produced by them viz order dated 13.7.2012 and related proceedings, the judgment and decree dated 16.9.2000 were looked into. It is significant to notice that under order dated 13.7.2012 the A.C. IInd Grade had not decided any title dispute between the parties. He had only ordered to

change the existing revenue entry of possession over the suit land. The assertion of the plaintiff that A.C. IInd Grade under the order dated 13.7.2012 had decided question of title is not correct. Neither any question of title was raised before the A.C. IInd Grade nor he decided any question of title.

5(v) It was also contended for the plaintiff that plaint involved intricate question of title which could not be determined by the revenue court. That determination of such questions was within the sole domain of civil court. However, examination of plaint leads to the conclusion that it is only the order dated 13.7.2012 passed by the A.C. IInd Grade, which is challenged in the plaint. Declaration sought is with respect to this order. The plaint per se does not raise any question of title. Various issues including question of title etc. raised by the plaintiff are presently pending adjudication before this Court in another litigation i.e. RFA No. 365 of 2000 filed by the plaintiff, arising out of judgment and decree dated 16.9.2000 passed by learned District Judge in civil suit No. 67-S/1 of 1995/93 instituted by the plaintiff. The observations of learned trial court and contentions advanced by the plaintiff that intricate question of title has been raised in the plaint, which could be decided only by the civil court are not borne out from the record.

5(vi) Learned Senior Counsel for the defendant raised an objection that the civil suit filed by the plaintiff was barred in terms of Section 171 of the Act, relevant part of which reads as under:

> "171. Exclusion of jurisdiction of Civil Courts in matters within the jurisdiction of Revenue Officers.- Except as otherwise provided by this Act-
>
> (1) A Civil Court shall not have jurisdiction in any matter which the State Government or a Revenue Officer is empowered by this Act, to dispose of or take cognizance of the manner in which the State Government or any

> Revenue Officer exercises any powers vested in it or him by or under this Act; and in particular-
> (2) a Civil Court shall not exercise jurisdiction over any of the following matters, namely-
> (i) to (v) xxxxxxxxxxx
> (vi) the correction of any entry in a record-of-rights, periodical record or register of mutations."

Section 9 of Code of Civil Procedure provides for jurisdiction of the Civil Court as under:

> **"Section–9. Courts to try all civil suits unless barred .-** The Courts shall (subject to the provisions herein contained) have jurisdiction to try all Suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
> Explanation I—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
> Explanation Il—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place."

It was argued that record of rights are to be maintained and entries are to be recorded in accordance with law and procedure mandated under Chapter IV of the Act. The disputes in relation to the record of right are to be determined as per Section 37 of the Act. Section 171 of the Act expressly

bars the jurisdiction of civil court in matters of correction of entries in record of rights or register of mutations. It was further contended that the existing revenue entry showed the joint owners including the plaintiff to be in possession over the suit land. The entry was contrary to the spot position. It was only the defendant, who was in possession of the suit land. Therefore, defendant moved an application for correction of revenue entry to show his exclusive possession over the suit land. The application was moved under Section 37 of the H.P. Land Revenue Act and was decided in his favour by A.C. IInd Grade vide order dated 13.7.2012. Against such an order, jurisdiction of civil court was barred in view of bar imposed by Section 171 of the Act.

Learned counsel for the respondent/plaintiff submitted that the plaintiff had alleged that while passing order dated 13.7.2012, principles of natural justice were not adhered to and mandatory provisions of law and procedure were not complied with. In view of these assertions and the grounds taken in the plaint, the civil court had the jurisdiction to entertain and adjudicate the dispute raised in the plaint.

Hon'ble Apex Court in ***(2020) 12 SCC 680,*** titled ***South Delhi Municipal Corporation and another*** versus ***Today Homes and Infrastructure Private Limited and others*** held that jurisdiction of civil court cannot be completely taken away in spite of either an express or implied bar. Civil courts despite such bar continue to have jurisdiction to examine a matter in which there is an allegation of non compliance with statutory provisions or any fundamental principle of judicial procedure. Principles on point of ouster of jurisdiction of civil courts laid down in *Dhulabhai vs. State of M.P. (1968) 3 SCR 662* were reiterated in para-9 of the judgment as under:-

> *"9. Section 17 of the Madhya Bharat Sales Tax Act, 1950 barred the jurisdiction of any court in matters pertaining to assessments made under the Act. The recovery of Sales Tax under the said Act was the subject*

matter of civil suits filed by the asessees. The State objected to the maintainability of the civil suits on the ground that jurisdiction of civil court was barred. After taking note of several judgements of this Court on the point of ouster of jurisdiction of the civil courts, Hidayatullah, J. in Dhulabhai and Ors. vs. The State of M.P. observed as follows:

(1) Where the Statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the Statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said Statute or not.
(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

> *(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.*
> *(5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.*
> *(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.*
> *(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."*

Apex Court also held that wherever a right or liability, not pre-existing in common law is created by a statute and that statute itself provides a machinery for enforcement of such right or liability, both the right/liability and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the jurisdiction of the civil court is impliedly barred. In the facts of the case, the Hon'ble Apex Court observed that remedy by way of an appeal against an order of assessment was provided under the statute. The remedy provided was adequate and effective. Therefore, applying the criteria laid down in Dhulabai's case, it was held that jurisdiction of civil court was impliedly barred. Suit was held to be not maintainable with following concluding observations:-

> "12. Wherever a right or liability, not pre-existing in common law is created by a statute and that statute itself

> provides a machinery for enforcement of such right or liability, both the right/liability and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the jurisdiction of the civil court is impliedly barred.
>
> 13-16 xxxxxxxxxxx
>
> 17. We have examined the plaint filed by the Respondents carefully. We do not see any allegation made regarding the violation of any provisions of the statute. There is also no pleading with regard to non-compliance of any fundamental provisions of the statute. It is settled law that jurisdiction of the civil courts cannot be completely taken away in spite of either an express or implied bar. The civil courts shall have jurisdiction to examine a matter in which there is an allegation of non-compliance of the provisions of the statute or any of the fundamental principles of judicial procedure. A plain reading of the plaint would suggest that the order impugned in the suit is at the most an erroneous order. No jurisdictional error is pleaded in the plaint. Therefore, the question of maintainability of the suit does not arise. In the absence of any pleadings in the plaint, the High Court ought not to have remanded the matter back to the learned Single Judge."

In ***(2019) 3 SCC 692***, titled ***Pyarelal*** vs. ***Shubhendra Pilania (Minor) through Natural Guardian (Father) Shri Pradeep Kumar Pilania and Others,*** the Apex Court while considering the provisions of Rajasthan Tenancy Act vis-a-vis an application moved under Order 7 Rule 11(d) CPC held that jurisdiction to declare khatedari rights exclusively vests with the Revenue Court. Only after declaration of rights by Revenue Court, suit in respect of land in question can be maintained. Relevant paras from the judgments are as under:-

"22. The appellant has prayed that the gift deed dated 10-2-2011 be declared void to the extent of the share claimed by the appellant and that respondent Nos. 1 to 5 be restrained from alienating the share of the appellant. The civil court may decree the relief prayed only if it is first determined that the appellant is entitled to khatedari rights in the suit property. Under the provisions of the Tenancy Act, the jurisdiction to declare khatedari rights vests exclusively with the revenue courts. Only after such determination may the civil court proceed to decree the relief as prayed. The explanation to Section 207 clarifies that if the cause of action in respect of which relief is sought can be granted only by the revenue court, then it is immaterial that the relief asked from the civil court is greater than, or in addition to or not identical with the relief which the revenue court would have granted. In view of this matter, the civil court may not grant relief until the khatedari rights of the appellant have been decreed by a revenue court.

27. In the present case, the High Court has proceeded on the basis that the suit seeking a declaration of the gift deed relating to disputed agricultural land situated in Sikar as void and restraining Respondent Nos. 1 to 5 from transfer or sale of the agricultural land before the civil court is squarely covered by the bar to the jurisdiction of the civil court under the provisions of the Tenancy Act. The claim of the appellant to khatedari rights is pending adjudication by a revenue court which has the exclusive jurisdiction to adjudicate upon such a

> claim. The appellant has no right to seek relief before the civil court without first getting his khatedari rights decreed by the revenue court."

In the instant case, as observed earlier, the basic order challenged in the civil suit by the plaintiff was dated 13.7.2012. This order was passed by A.C. IInd Grade. The order was passed on an application moved by the defendant under Section 37 of the Act. Section 171 of the Act bars jurisdiction of the civil court in respect of matters falling within jurisdiction of the revenue officers. Correction of revenue entry in record of rights is within the domain and jurisdiction of revenue officers in terms of Chapter IV of the Act. In the civil suit the plaintiff alleged that he was not served in the application moved by defendant under Section 37 of the Act and that the order was passed behind his back. Assuming that on these grounds, plaintiff could have filed the civil suit challenging the order dated 13.7.2012, then also, the fact remains that on these very assertions the plaintiff has also filed statutory appeal under Section 14 of the Act. Plaintiff could not simultaneously resort to two parallel remedies on same cause of action on same set of facts against the same order. Having availed statutory remedy against order dated 13.7.2012, plaintiff could not file civil suit on the same cause of action. Having chosen to avail the statutory remedy which the plaintiff is still pursuing, civil suit filed by him was not maintainable. It would be apt to refer to ***(2007) 6 SCC 120,*** titled ***Arunima Baruah*** versus ***Union of India and Others,*** where the Supreme Court following the judgment in Jai Singh vs. Union of India reported in (1977) 1 SCC 1 deprecated pursuing two parallel remedies by the parties in respect of one subject-matter and held as under:-

> "18. There is another doctrine which cannot also be lost sight of. The court would not ordinarily permit a party to pursue two parallel remedies in respect of the same subject matter……."

5(vii) **Conclusion**

(a) Plaintiff in the instant civil suit prayed for declaring the order dated 13.7.2012 as illegal, null and void.

(b) Order dated 13.7.2012 was passed by the A.C. IInd Grade in an application moved by the defendant under Section 37 of the H.P. Land Revenue Act 1953. In the application, defendant had prayed for correction of existing revenue entry, showing the defendant and his brothers including the plaintiff-the joint owners of the suit land, to be in joint possession of the same. Defendant asserted in the application that he was in exclusive possession over the suit land. The A.C. IInd Grade allowed defendant's application vide order dated 13.7.2012. Thereby revenue entry of possession over the suit land was corrected in defendant's favour. The A.C. IInd Grade had the jurisdiction to pass the order dated 13.7.2012.

(c) Plaint does not raise any question of title. It only challenges order dated 13.7.2012 passed by A.C. IInd Grade. A.C. IInd Grade had not decided any question of title under order dated 13.7.2012. Defendant had not raised any question of title in his application moved under Section 37 of the Act before the revenue officer. Plaintiff and defendant both continue to be joint owners of the suit land. The possession over suit land was however found by A.C. IInd Grade to be that of the defendant. Correction of revenue entry to this effect was accordingly ordered on 13.7.2012.

(d) Plaintiff had statutory remedy under Section 14 of H.P. Land Revenue Act against correction of revenue entry ordered on 13.7.2012. Plaintiff availed this statutory remedy and challenged the order before the

Collector. Appeal filed by him is pending adjudication. Plaintiff is pursuing this remedy.

(e) Having elected to avail statutory remedy against the order dated 13.7.2012, plaintiff cannot simultaneously institute civil suit against the same order dated 13.7.2012. In the facts of the case, two parallel remedies against the same order, on same cause of action on same set of grounds cannot be simultaneously resorted to. Plaintiff is pursuing the statutory remedy of appeal, which is pending adjudication before the revenue courts.

(f) Plaintiff has already filed another civil suit No. 67-1/S of 95/03 for partition and rendition of accounts against the defendant and others with respect to various parcels of lands/properties jointly owned by plaintiff, defendant and others. Suit property involved in the present case is also part of suit property involved in civil suit No. 67-1/S of 95/93. Question of title is raised in that civil suit (67-1/S of 95/93), which was partly decreed by learned District Judge on 16.9.2000. RFA No. 365/2000 filed by the plaintiff arising out of this judgment and decree is as yet pending adjudication. In terms of interim orders passed in the RFA No. 365/2000, parties have already been restrained from creating third party rights over the subject matter of suit. The subject matter of RFA No. 365/2000 includes property involved in the instant suit. The injunction order passed in RFA No. 365/2000 is already operating with respect to the property involved in the present suit and is also applicable to the parties herein.

For all the aforesaid reasons, this petition is allowed. The application moved by the defendant under Order 7 Rule 11 of Code of Civil Procedure is allowed. The order passed by learned trial court on 11.7.2018 in CMA No. 28-6 of 2018/16 in Civil Suit No. 43/1 of 17/14 is set aside. Consequently, plaint is ordered to be rejected. Pending miscellaneous applications, if any, shall also disposed of.

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

Between:-

1. GURMEETO
   WD/O JAGDISH CHAND

2. KAMLESH,
   D/O JAGDISH CHAND

3. JASBINDER,
   S/O JAGDISH CHAND

4. SHASHI,
   S/O JAGDISH CHAND

5. SIKANDAR,
   S/O JAGDISH CHAND
   S/O CHINTA RAM

6. KULDEEP CHAND,
   S/O CHINTA RAM
   (SINCE DECEASED THROUGH HIS LRS):-

6(A) SMT. SWARNI DEVI (WIFE)

6(B) SH. AJAY KUMAR (SON)

BOTH ARE RESIDENTS OF VILLAGE BATHU,
TEHSIL HAROLI, DISTRICT UNA, H.P.

7. JANAK RAJ,
   S/O CHINTA RAM

8. ASHA DEVI,
   WD/O MANGAT RAM

9. SHAMINDER SINGH,
S/O MANGAT RAM

10. KRISHAN KUMAR,
S/O MANGAT RAM

11. ANITA DEVI,
D/O MANGAT RAM

12. KAMLA DEVI,
D/O CHINTA RAM

13. BACHAN LAL,
S/O SHANKAR DASS

14. JOGINDER LAL,
S/O FAQIR CHAND

15. SUNNI LAL,
S/O FAQIR CHAND

16. SANDHYA DEVI,
WD/O FAQIR CHAND

17. CHANCHALA DEVI,
D/O FAQIR CHAND

18. SURINDRA DEVI,
D/O FAQIR CHAND

19. SWARNI DEVI,
D/O SHANKAR DASS

20. CHANAN SINGH,
S/O KABUL CHAND

21. JEETO DEVI,
WD/O KABUL CHAND

ALL CASTE BAHTI,
R/O VILLAGE BATHU,
TEHSIL HAROLI, DITRICT UNA, H.P.

.....PETITIONERS

(BY SH. PRAMOD THAKUR, ADVOCATE)

AND

1. PRITAM CHAND,
S/O THUNIA

2. KASHMIR CHAND,
S/O THUNIA

3. BAKTAWAR CHAND,
S/O THUNIA

4. GURDIAL SINGH,
SINCE DECEASED THROUGH HIS LRS:

4(A) JEETO DEVI (WIFE)

4(B) SHADI LAL (SON)

4(C) ASHA DEVI (DAUGHTER)

4(D) AVTAR SINGH (SON)

4(E) SANTOSH DEVI (DAUGHTER)

4(F) SUSHMA DEVI (DAUGHTER)

4(G) SEEMA DEVI (DAUGHTER)

ALL ARE VILLAGE BATHU, TEHSIL HAROLI,
DISTT. UNA, H.P.

5. DURGA DASS
S/O ZULFI

6. SUBHASH CHAND,
S/O PRITAM SINGH,
S/O AGYA RAM

7. SAT PAL,
S/O PRITAM SINGH,
S/O HAKO

8. BHULLA RAM,
S/O PRITAM SINGH,
S/O HAKO,
ALL R/O VILLAGE BATHU, TEHSIL HAROLI,
DISTRICT UNA (H.P)

.....RESPONDENTS

(BY SH. AJAY SHARMA, SENIOR ADVOCATE WITH
SH. AMIT JAMWAL, ADVOCATE, FOR R-1,R-3 AND
R-4(A) TO R-4(G),

R-2, R-7 AND R-8 ALREADY EXPARTE,

NONE FOR R-5 AND R-6)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 294 of 2015
DECIDED ON:25.10.2021

Constitution of India, 1950- Article 227- Ld. Trial Court dismissed the suit filed by the petitioner having been abated- Held- Application moved by the plaintiff under Order 22 Rule 4(4) of Code of Civil Procedure after two years from the date of death of defendant seeking exemption to bring on record legal representatives already misconceived- No error committed by the Ld. Courts below- Petition dismissed. (Para 4(i) & 4(iii)(b)

Cases referred:

Amarjit Singh Kalra v. Pramod Gupta, (2003) 3 SCC 272;
Hemareddi (dead) through Legal Representatives vs Ramachandra Yallappa Hosmani and Others, (2019) 6 SCC 756;

Venigalla Koteswaramma vs. Malampati Suryamba and others, 2021 (4) SCC 246;

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

O R D E R

Learned trial court dismissed the suit filed by the present petitioners as having abated. This judgment has been up-held by the learned first Appellate Court. Aggrieved, the plaintiffs have preferred instant petition under Article 227 of Constitution of India.

The parties hereinafter are referred to as they were before the learned trial court.

2. Facts

2(i) The petitioners filed a civil suit on 31.1.2002 against the respondents/ defendants for declaration to the effect that:-

a. Land measuring 4 kanal 12 marlas, bearing khewat No. 414, khatauni Nos. 541 and 542, khasra Nos. 1334, 1339 as entered in the jamabandi for the year 1992-93, situate in village Bathu,, Sub Tehsil Haroli, Tehsil and District Una has been coming in possession of the plaintiffs as owners to the extent of 20/30 shares and as tenants to the extent of 10/30 shares.

b. The plaintiffs have become owners of 10/30 shares by operation of H.P. Tenancy and Land Reforms Act.

c. The revenue entries of suit land in the name of defendants in the revenue record more particularly, in the jamabandi for the year 1992-93 as *'khud kasht'* are wrong, illegal, null, void, ineffective and have no bearing upon the rights, title or interests of the plaintiffs.

d. Consequential relief to restrain the defendants from interfering in the plaintiffs' possession over the suit land was also prayed for.

2(ii) Defendant No. 6-Jagdish s/o Basant Ram was proceeded exparte in the civil suit vide order dated 1.3.2002. However, on the next date (1.4.2002), power of attorney on behalf of defendants No. 6 and 7 was filed in the court by Shri P.C. Sharma, learned Advocate who prayed time to file written statement on behalf of defendants No. 1,2,3,5,6 and 7. The prayer was allowed and the matter was fixed for 15.5.2002. On the next date i.e. 15.5.2002 written statement on behalf of defendants No. 1 to 7 was not ready. Learned counsel appearing for these defendants including defendant No. 6 prayed for adjournment to file the written statement. The prayer was not opposed by learned counsel for the plaintiffs and the matter was fixed on 6.8.2002 for filing of written statement. Written statement was not ready even on 6.8.2002. Further time was granted to the defendants No. 1 to 7 to file the written statement The same was eventually filed on 20.9.2002. Some relevant orders mentioned above are extracted hereinafter:-

"1.3.2002 Present: Sh. R.C. Seth, Adv., for the pltf.
Sh. R.K. Sharma, Adv. for deft. No. 1,2,3 and 5.
Deft. No. 7 in person.

Deft. No. 4,6,8 and 9 served but not present. Hence, they are proceeded as exparte. Now to come up for w.s. on 1.4.2002.

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1.4.2002 Present: Sh. R.C. Seth, adv. for the plaintiff.
Sh. P.C. Sharma, Adv. for defendants no. 1,2,3,5,6 and 7.
(power of attorney of defendants no. 6 & 7 is filed today)
Defendant no. 4 already exparte.

Written statement on behalf of defendants No. 8 and 9 is filed. Written statement on behalf of defendants no. 1,2,3,5,6 and 7 not ready. Adjournment is prayed which is granted. Now to come up on 15.5.2002 for written statement.

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15.5.2002 Present: Sh. R.C. Seth, Adv. for the plaintiffs.

Sh. P.C. Sharma, Adv. for defendants no. 1 to 7.

(power of attorney on behalf of defendant no 4 is filed today)

None for the defendants no. 8 and 9 despite the fact that they were personally present on the last date of hearing. Hence the case is ordered to be heard as exparte against the defendants no. 8 and 9.

Written statement on behalf of defendants no. 1 to 7 not ready. Adjournment is prayed which is granted as not opposed by Ld. Csl. for the plaintiffs. Now to come up on 6.8.2002 for written statement."

2(iii) During pendency of the civil suit, defendant No. 6 died on 8.9.2009. On 12.8.2011, the plaintiffs moved an application under Order 22 Rule 4 (4) of Code of Civil Procedure seeking exemption to bring on record legal representatives of defendant No. 6. The exemption was sought only on the ground that 'Jagdish Singh defendant No. 6 was proceeded ex-party on 1-3-2002. He failed to appear and contest the suit and had not filed any written statement.' The defendants opposed the application by submitting that defendant No. 6 was a contesting defendant. He had already filed his power of attorney as well as written statement. The defendants prayed for dismissal of

the civil suit as having abated since long and also prayed for dismissal of the application moved by the plaintiffs under Order 22 Rule 4(4) CPC.

2(iv) Learned trial Court after hearing the parties concluded that the plaintiffs had claimed reliefs against all the defendants jointly and not separately. The relief claimed by the plaintiffs was joint and common against all the defendants. Hence death of defendant No. 6 and failure to bring on record his legal representatives would result in abatement of the suit. The legal representatives of deceased defendant No. 6 would be affected by the litigation. Passing of any decree in the facts of the case would be nullity in the eyes of law. The suit was, therefore, held to have been abated and dismissed as such. Accordingly, the application under Order 22 Rule 4(4) CPC was also dismissed vide order dated 28.9.2012. The plaintiffs challenged this order before the learned Additional District Judge under Order 43 Rule 1 CPC. The appeal was also dismissed on 30.7.2014. Aggrieved against the aforesaid two judgments, the plaintiffs have now filed present petition.

3. I have heard Sh. Pramod Thakur, learned counsel for the petitioners and Sh. Ajay Sharma, learned Senior counsel for the respondents. With their assistance, I have also gone through the record.

4. Learned counsel for the petitioners/plaintiffs submitted that both the learned courts below erred in law in dismissing the suit filed by the petitioners as having abated. The application moved by the plaintiffs under Order 22 Rule 4(4) CPC seeking exemption to bring on record deceased defendant's legal heirs deserved to be allowed Learned Senior counsel for the respondents/defendants defended the impugned judgments.

4(i) The first contention raised by learned counsel for the petitioners was that defendant No. 6 was proceeded as exparte vide order dated 1.3.2002. No application was filed by defendant No. 6 for setting aside the order vide which he was proceeded against exparte. The order dated 1.3.2002 was not set aside, therefore, it cannot be said that defendant No. 6 was allowed by the

Court to join the proceedings. It was also submitted that written statement filed on behalf of defendants No. 1 to 7 did not bear the signature of defendant No. 6. Under these circumstances, the plaintiffs were entitled to be exempted under the provisions of Order 22 Rule 4 (4) CPC from bringing on record his legal representatives.

The aforesaid contentions are not tenable on facts for the following reasons:-

a) No doubt, defendant no. 6 was proceeded exparte by the learned trial Court on 1.3.2002. However, the record shows that Shri P.C. Sharma, learned Advocate filed power of attorney on behalf of defendants No. 6 and 7 in the Court on 1.4.2002. The said power of attorney was taken on record by the Court. No objection to this course was raised by the plaintiffs.

b) Learned counsel appearing for defendant No. 6 prayed for time to file written statement on behalf of defendants No. 1 to 7. This prayer was also not opposed on behalf of the plaintiffs. With the consent of the plaintiffs, time to file written statement on behalf of defendants No. 1 to 7 was granted by the learned trial Court on 1.4.2002 and further enlarged vide orders dated 15.5.2002 and 6.8.2002. The written statement was filed on 20.9.2002 on behalf of defendants No. 1 to 7.

c) The written statement filed on behalf of defendants No. 1 to 7 bears signatures of some of the defendants. Admittedly, it does not bear signature of defendant No. 6. However, learned counsel for the petitioners/plaintiffs could not point out any legal requirement that the written statement has to be signed by all the defendants. The title of the written statement clearly reflects that it has been filed on behalf of defendants No. 1 to 7 including defendant No. 6.

In light of above admitted facts, it was not necessary for defendant No. 6 to file a separate application for setting aside the order dated

1.3.2002. The order dated 1.3.2002 has to be deemed to have been set aside in view of subsequent orders passed in the civil suit.

d) The written statement filed by defendants No. 1 to 7 was taken on record. In the written statement, defendants No. 1 to 7 including defendant No. 6 had contested the claim put forth in the plaint. The petitioners/plaintiffs filed replication thereto. Therefore, it cannot be said that defendant No. 6 was not a contesting defendant in the civil suit. His legal representatives, therefore, were required to be brought on record in accordance with the provisions of law. No application was moved by the plaintiffs to bring on record legal representatives of deceased defendant No. 6. In fact learned trial Court in the impugned order dated 28.9.2012 records a factual observation that "in the present case, no application for bringing on record the LRs of deceased defendant No. 6 aforementioned has been filed either in time prescribed or till date nor the same is sought to be filed even yet." Not only that the defendants did not file application to bring on record deceased defendant's legal heirs but also they never offered any explanation for not filing such application within time. Such prayer made during hearing of the present case, cannot be accepted in the facts of the case. The application moved by the plaintiffs under Order 22 Rule 4(4) CPC after more than two years from the date of death of defendant No. 6 seeking exemption to bring on record his legal representatives was clearly misconceived.

4(ii) The next contention raised by learned counsel for the petitioners/plaintiffs is that even assuming that legal representatives of defendant No. 6 were required to be brought on record and had not been brought on record within the limitation period then also the suit filed by the plaintiffs could not be dismissed as having abated as a whole. In such situation, the suit should have been dismissed as abated only qua defendant No. 6. It could not be dismissed as abated against remaining defendants. Learned counsel for the petitioners argued that it can be easily inferred from

the plaint and documents on record that the reliefs claimed against defendant No. 6 was separate and severable from the reliefs claimed against the remaining defendants. Therefore, the entire suit could not have been dismissed as abated.

The contention has been vehemently opposed by leaned Senior counsel for the respondents/defendants. Referring to the pleadings and the documents, learned Senior Counsel submitted that in the facts of the case, the reliefs claimed by the plaintiffs were joint and common against all the defendants. The cause of action raised in the plaint and the prayers made therein, the grounds for the prayers could not be separated vis-a-vis individual defendants Therefore, no error was committed by the learned Courts below in dismissing the entire suit as abated.

4(ii)(a) Legal position with respect to the above contention may be considered first. In ***2021 (4) SCC 246***, titled ***Venigalla Koteswaramma*** versus ***Malampati Suryamba and others***, one of the questions involved for consideration was about the effect and consequences of the fact that legal representatives of defendant No. 2 therein who expired during the pendency of the appeal in the trial court were not brought on record. In para 42.4 of the judgment it was observed that by virtue of Rule 4 read with Rule 11 of Order 22 of the Code, in case of death of one of the several respondents, where right to sue does not survive against the surviving respondent or respondents as also in the case where the sole respondent dies and the right to sue survives, the contemplated procedure is that the legal representatives of the deceased respondent are to be substituted in his place and if no application is made for such substitution within the time limited by law, the appeal abates as against the deceased respondent. For dealing with the question as to whether the appeal could have been proceeded against the surviving respondents, the Apex Court referred to the relevant principles concerning effect of abatement of appeal against one respondent in case of multiple respondents, as enunciated

and explained by the Court in various decisions. One of the decisions noted by the Apex Court was the Constitution Bench's decision in ***Amarjit Singh Kalra*** v. ***Pramod Gupta***, reported in ***(2003) 3 SCC 272.*** The Apex court noted in paragraph 44.5 that *Amarjit Singh Karla's* case supra arose out of proceedings under the Land Acquisition Act, 1894 where different proprietors had different claims concerning their respective land but joined together in appeals against the orders passed in reference proceedings. Some of the appellants expired and no steps were taken within time for bringing on record their respective legal representatives but at some later stage, applications were filed by the heirs of the deceased parties for bringing them on record as legal representatives alongwith applications for condonation of the delay to set aside abatement. These applications were rejected by the High Court. The submission of the remaining appellants that the appeals abated partially qua the deceased appellants only was also not accepted by the High Court. The Constitution Bench did not approve the decision of the High Court after recording a finding that the award/decrees, which were subject matter of challenge before the High Court were not joint or inseparable but in substance, a mere combination of several decrees depending upon the number of claimants and, therefore, were joint and several or separable vis-a-vis the individuals or their claims. The directions passed in *Amarjit Singh Karla's* case were noticed in *venigalla's* case supra as under:

> "44.6 Although the appeals were restored for reconsideration of the High Court but, in the process, the Constitution Bench surveyed the relevant case-law including the aforesaid decision in Nathu Ram's case and laid down the principles for dealing with such matters; and therein, also underscored the consideration about inconsistent decrees coming into operation in case of proceeding with the appeal even after its abatement

qua one of the respondents. The enunciations of the Constitution Bench could be usefully noticed as follows (Amarjit Singh Karla case):-

"34. In the light of the above discussion, we hold:

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether

> the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

Para 44.7 of the judgment in Venigalla's case supra also notices another judgment rendered in ***(2019) 6 SCC 756,*** titled ***Hemareddi (dead) through Legal Representatives*** versus ***Ramachandra Yallappa Hosmani and Others,*** wherein judgment of the High Court holding that the appeal had abated, was affirmed. One of the appellants therein had died during the pendency of the appeal. His legal heirs were not brought on record. The High Court held that the decree that could be granted in appeal, if surviving appellants were successful, would be inconsistent with decree which had attained finality between deceased appellant and the defendants due to abatement. The relevant part from the judgment is as under:

> "28. Is this a case when the appellant and his brother were having distinct and independent claims and rights and for the sake of convenience they had joined as plaintiffs originally in the suit and as appellants subsequently in the appeal? Is this a case where there is joint decree or is it is a case where the decree is severable? Is it therefore a severable decree or a combination of two decrees? Whether the decree if passed by the appellate court in favour of the appellant would result in a decree which is contradictory to the decree passed by the trial Court.

29. In this case, undoubtedly as we have noted the appellant and his late brother sued as plaintiffs for a declaration that the first defendant was not the adopted son and he has no rights. They also sought a prohibitory injunction. The suit stood dismissed by trial court. Let us take the converse position. Assuming that the suit was decreed by the trial court and appeal was carried by the defendants, and pending the appeal by the defendants, if the late brother of the appellant had died and if the defendants had not impleaded the legal representatives of late brother and the appeal abated as against him, would it then not open to the appellant as respondent in the appeal to contend that if the appeal was to be allowed to proceed in the absence of the legal representatives of his late brother and succeed, there would be an inconsistent decree. On the one hand, there will be a decree by the trial Court declaring that the first defendant was not the adopted son and had no interest in the property qua the late brother of the appellant. On the other hand, the appellate court could be invited to pass a decree which should be to the effect that the first defendant was found to be the adopted son and had right and interest over the property and a declaration to that effect would have to be granted. Would not the appellate court then have to necessarily hold though the decree in favour of the deceased brother of the appellant has become final, and under it, a declaration is granted that the defendant No.1 is not the adopted son and he has no right to claim the property and there is an injunction against him that he is

> the adopted son opposed to the decree which has been passed by the trial court which has attained finality. We would think that the appellate court would indeed have to refuse to proceed with the appeal on the basis that allowing the appeal by the defendants would lead to an appellate decree which is inconsistent with the decree which has become final as against the deceased brother of the appellant.
>
> 30. We would think that the situation cannot be any other different, when we contemplate the converse of the aforesaid scenario which happens to be the factual matrix obtaining in this case. The right which was set up by the appellant alongwith his late brother was joint. They were members of the joint Hindu family consisting of their late father and which consisted of late Govindareddi, their father Shriram Reddy and Basavareddi, who was none other than the husband of the second defendant. This is not a case where their claims were distinct claims. This is not the situation which was present in the case dealt with by the Constitution Bench under the land acquisition case. Therein, several persons came together and sought relief in one proceeding. We would think that this is not the position in this case."

4(ii)(b) In the background of above legal position, it is now to be seen whether the reliefs claimed by the petitioners/plaintiffs were common or joint against all the defendants or the same were separable and individual against the defendants. Whether even after holding the suit to have been abated against

defendant No. 6, could it have continued against the remaining defendants or not ? The reliefs prayed by the plaintiffs have been extracted earlier. According to the plaintiffs, suit land has been wrongly and incorrectly reflected in the revenue record (jamabandi for the year 1992-93) in self cultivation (khud kasht) of the defendants. That these revenue entries in favour of the defendants are null and void. The plaintiffs have prayed for decree of declaration that they are owners in possession over the suit land to the extent of 20/30 shares. That they were tenants to the extent of 10/30 shares in the suit land and by operation of law i.e. H.P. Tenancy and Land Reforms Act, have become owners of 10/30 shares in the suit land. It is pleaded that they were inducted as tenants by the predecessors of defendants. The declaratory reliefs claimed are common and joint against all the defendants. Plaintiffs also claim that existing revenue entries of the suit land be declared null and void and that defendants have no rights over the joint suit land. Most importantly, the prayers in the civil suit operate in common against all the defendants including defendant No. 6. In view of the pleadings and the documents on record, it cannot be said that the reliefs prayed for by the plaintiffs are not joint against all the defendants or that the plaintiffs had claimed distinct and separable reliefs vis-a-vis the claim against defendant No. 6 and the remaining defendants. Also, even if for argument sake it is assumed that suit is to be dismissed as abated only qua defendant No. 6, then it might lead to a situation where in respect of same suit land, for the same revenue entries, inconsistent and different positions would be reflected in revenue record qua the different defendants on same set of facts and grounds, which would be impermissible.

For all the aforesaid reasons, I find no error committed by the learned Courts below in dismissing the suit filed by the plaintiffs as having abated as a whole. The dismissal of application moved by plaintiffs under Order 22 Rule 4(4) of Code of Civil Procedure seeking exemption to bring on

record deceased defendant No. 6's legal representatives, was also in order. Accordingly, the instant petition fails and is dismissed. Pending application(s), if any, also stand disposed of.

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

Between:-

1. SMT. PARVEEN,
D/O SH. SABIR ALI,
R/O DEVI NAGAR,
PAONTA SAHIB,
DISTRICT SIRMAUR,
HIMACHAL PRADESH

2. SMT. NASEEM AKHTAR,
D/O SH. SABIR ALI,
R/O VILLAGE CHIRANWALI,
TEHSIL NAHAN, DISTRICT
SIRMAUR, HIMACHAL PRADESH

……PETITIONERS

(BY SH. KARAN SINGH KANWAR, ADVOCATE)

AND

YASIN,
S/O SH. SHARIF,
R/O VILLAGE AND POST OFFICE
MOGINAND, TEHSIL NAHAN,
DISTRICT SIRMAUR,
HIMACHAL PRADESH

……RESPONDENT

(BY SH. BIMAL GUPTA, SENIOR ADVOCATE WITH SH. GURINDER SINGH PARMAR, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 57 of 2017
DECIDED ON:30.09.2021

Constitution of India, 1950- Article 227- Ld. Trial Court dismissed plaintiff's objections to the report of the Local Commissioner and confirmed the demarcation report- Held- Demarcation report was confirmed without summoning the Local Commissioner to face cross-examination by the parties, thus, the order passed by the Ld. Trial Court cannot be sustained- Petition allowed with the direction to Trial Court to decide objections afresh. (Para 4(v)

Cases referred:

Gopal Dass and others Vs Bismanchali, Latest HLJ 2009 (HP) 959;
Gourhari Das and another v. Jaharlal Seal and another, AIR 1957 Calcutta 90;
Municipal Council, Bawal and another Versus Babu Lal and other, (2018) 4 SCC 369;
Om Parkash v. Ved Parkash and others, AIR 2000 Himachal Pradesh 45;
Ram Chandra & Anr. Vs District Judge, Gorakhpur & Ors., 2000 (1) CCC 468 (All);

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

O R D E R

Learned Trial Court vide order dated 27.05.2016, dismissed plaintiff's objections to the report of Local Commissioner and confirmed the demarcation report. This order has been assailed by the legal representatives of the deceased plaintiff in the instant petition filed under Article 227 of the Constitution of India.

The parties are hereinafter referred to as they were before the learned Trial Court.

2. Facts:-

2(i). Suit for permanent injunction for restraining the defendant from cutting, digging, raising construction or interfering over the suit land

comprised in Khata/Khatauni No.10/18 min, Khasra No.605/533, measuring 0-15 Bigha of Mouza Moginand, Tehsil Nahan, District Sirmour, H.P., was instituted by the plaintiff. The plaintiff pleaded that he was absolute owner in possession of the suit land. The defendant was a complete stranger to it, having no right, title, interest or concern with the suit land.

The defence taken was that the construction raised by the defendant existed over Khasra Nos.771/604/358 abutting to the suit land. The averments made in the plaint were denied.

2(ii). During pendency of the suit, the plaintiff placed on record a report of demarcation carried out by the Assistant Collector 2nd Grade on 08.02.2011. The demarcation report stated that the defendant had encroached over Khasra No.605/533 (suit land) to the extent of 0-0-6 Biswansi.

2(iii). Learned Trial Court appointed a Local Commissioner on 31.03.2012 to demarcate the suit land. In compliance to the order, the Local Commissioner, i.e. Tehsildar, Nahan, submitted the demarcation report dated 23.12.2014alongwith enclosures. During demarcation, statements of the parties were also recorded. The plaintiff in his statement, inter alia, stated that he was though satisfied with the demarcation, but at the same time, requested for demarcating the suit land from the backside of defendant's house. In his report dated 23.12.2014, the Local Commissioner gave reasons for declining such request of the plaintiff and concluded that the defendant had not encroached over the suit land.

2(iv). The plaintiff preferred objections to the report of Local Commissioner. The gist of his objections was that:-

(a) No pucca points were taken or fixed during demarcation.

(b) No statement regarding pucca points was recorded.

(c) As per report of the Local Commissioner, a Kuhal (narrow water channel) was considered as a pucca point. However, on the spot, no kuhal was in existence.

(d) Kuhal cannot be considered a pucca point as its dimensions vary from place to place.

(e) The plaintiff had requested the Local Commissioner to demarcate the land from old pucca houses. This request went unheeded. Had the demarcation been conducted as requested by the plaintiff, then, the encroachments made by the defendant over the suit land would have figured in the demarcation report.

The plaintiff prayed in these objections for summoning the Local Commissioner for the purpose of his cross-examination and for setting aside the demarcation report.

2(v). On considering the objections filed by the plaintiff, learned Trial Court dismissed the same and confirmed the demarcation report of the Local Commissioner vide order dated 27.05.2016. Aggrieved against this order, the petitioners (legal representatives of deceased plaintiff) have preferred instant petition.

3. Contentions:-

Sh. Karan Singh Kanwar, learned counsel for the petitioners/plaintiff argued that the learned Trial Court fell in error in rejecting the objections filed by the plaintiff without giving due opportunity to the plaintiff to lead evidence. In his objections, the plaintiff had prayed for calling the Local Commissioner for his cross-examination. The prayer was declined. Without giving opportunity to the plaintiff to cross-examine the Local Commissioner, the demarcation report of the Local Commissioner could not be confirmed. Prejudice, therefore, has been caused to the plaintiff because of the impugned order.

Sh. Bimal Gupta, learned Senior Counsel for the respondent/defendant contended that in terms of the impugned order, learned Trial Court had only confirmed the report of the Local Commissioner. The report was yet to be duly proved in evidence in accordance with law. The prayer of the plaintiff for cross-examination of the Local Commissioner was premature at this stage. In support of these submissions, reliance was placed upon a judgment passed by the Co-ordinate Bench of this Court on 08.04.2016 in ***CMPMO No.88/2014***, titled ***Dharam Pal*** Versus ***Bal Krishan and others*** and a judgment passed by the Allahabad High Court in ***Ram Chandra & Anr.*** Versus ***District Judge, Gorakhpur & Ors.***, ***2000 (1) CCC 468 (All)***.

4. Observations:-

Having heard learned counsel for the parties and on going through the record, I am of the considered view that the impugned order deserves to be set aside for the following reasons:-

4(i). The plaintiff had objected to the report of the Local Commissioner on various grounds. The prayer was made in the objections for setting aside the demarcation report and to call the Local Commissioner for the purpose of his cross-examination. A Division Bench of the Calcutta High Court in ***AIR 1957 Calcutta 90***, titled ***Gourhari Das and another*** *v.* ***Jaharlal Seal and another***, in context of Order 26 Rule 14 of the Code of Civil Procedure, held that the Commissioner, whose report is under consideration if proposed to be examined by either of the parties, should be called. If after examining the Commissioner and cross-examining him by either party, the Court finds that materials are available either to accept the report on the face of it or to remit the report either to the old Commissioner or to a fresh Commissioner, the Court will proceed to do the same. If, however, the Court finds, it necessary that further materials should be made available,

it may in an exceptional case allow fresh evidence as to the valuation (in dispute therein) being put before the Court.

4(ii). ***AIR 2000 Himachal Pradesh 45***, titled ***Om Parkash*** *v.* ***Ved Parkash and others***, was a case, where the objections to the report of the Local Commissioner were dismissed. The report was affirmed and final decree was passed. The matter reached this Court. While deciding the matter, it was observed that no opportunity was given to the defendant to lead evidence in support of his objections to the report of the Local Commissioner. His request to summon the Local Commissioner was not acceded to. In view of these two grounds, the appeal filed by the defendant was allowed. Relevant paras from the judgment are as under:-

> *"18. The case was reheard on 9-7-1997 and orders were pronounced on 11-7-1997, whereby the objections were dismissed, the report of Local Commissioner was affirmed and a final decree in terms thereof was passed.*
>
> *19. A reading of the orders passed by the learned trial Court since after the receipt of the report of the Local Commissioner till 11-7-1997, the date on which final decree was passed brings out the following facts:-*
>
> *(1) No opportunity was given to the defendant to lead evidence in support of his objections to the report of the Local Commissioner.*
>
> *(2) Even his request made to summon the Local Commissioner was not acceded to. In fact the application made by defendant No. 1 in this behalf on 5-5-1997 was never disposed of and without deciding the said application, the learned trial Court had proceeded to dismiss the objections.*
>
> *20. The Calcutta High Court in Gourhari Dass's case (supra) has held that the examination of the Commissioner, when the report submitted by him is being questioned is essential, if any of the parties requires it. The omission by the Court to examine the Commissioner was not correct and that the Court ought to have allowed the Commissioner to be called and then to proceed with*

the case in accordance with law. The High Court, therefore, after allowing the appeal set aside the order of the trial Court and remitted the case for re-hearing according to law.

21. *In the present case as well, the learned trial Court failed to call the Commissioner and examine him though a specific prayer was made in this regard by defendant No. 1 vide his application made on 5-5-1997. The ratio laid down by Calcutta High Court with which 1 am in full agreement, applies to the facts of the present case.*

22. *Resultantly, both the appeals are allowed. The judgment and decree dated 11-7-1997 of the learned trial Court as affirmed in appeals by the learned District Judge vide judgments and decrees dated 11-11-1997, are set aside and the ease is remanded to the learned trial Court (Senior Sub Judge, Nahan), for disposal afresh in accordance with law and in the light of the observations made above. No orders as to costs."*

4(iii). In ***(2018) 4 SCC 369***, titled ***Municipal Council, Bawal and another*** *Versus* ***Babu Lal and others,*** it has been observedby the Hon'ble Apex Court that in case the cross-examination of the author of the demarcation report is not requested, then no objections on that count can be taken later on by the parties raising that ground. Relevant para of the judgment is as under:-

"3. In the impugned judgment, the High Court has entered a finding based on the report that it was the appellants who had encroached upon the part of the land of the plaintiffs without acquiring the same. Further, it was held that: (Babu Lal case, SCC OnLine P&H para 5)

"5. … It was the stand of the defendant in the written statement that the land measuring 1 kanal on the western-southern side was owned by one Satbir Singh. The Plaintiffs have purchased the said 1 kanal from Satbir Singh. Therefore, the defendants cannot deny the title of the plaintiffs over such land. The Tahsildar was appointed as Local Commissioner to demarcate the suit land. Such

demarcation has been carried out in accordance with law and in the presence of the representative of the Municipal Council. The Tahsildar was not cross-examined in respect of the process of demarcation."

4(iv). In ***Latest HLJ 2009 (HP) 959***, titled ***Gopal Dass and others*** *Versus* ***Bismanchali***, the substantial question of law No.2 formulated in the second appeal pertained to affording an opportunity to parties to cross-examine the Local Commissioner. The question of law was as under:-

"2. When the Local Commissioner has submitted the mode of partition for the joint property without making a reference as envisaged under the Code of Civil Procedure, could such report be accepted at its face value by rejecting the objections made by the respective parties to the said report without affording any opportunity either to cross examine the Local Commissioner or for leading evidence to show that the mode suggested is wholly inequitable, illegal, erroneous and perverse?"

The question of law was decided following the judgment reported in Om Parkash's case, supra. It was held that the reasoning of the learned First Appellate Court that opportunity was not asked for and hence cannot be granted, was unacceptable. It was the duty of the Court to grant sufficient opportunity to the parties to lead evidence in support of their respective objections. The Court was bound in law to provide an opportunity to the defendant (therein) to lead evidence in support of the objections filed to substantiate that the report was either not in concord or it deserves to be varied, set aside, altered or changed. The appeal was allowed, holding that examination of the Commissioner was required and that sufficient opportunity was not granted to the appellants to lead evidence against the report.

4(v). In the instant case, learned Trial Court after holding following in para 4 of the impugned order, dismissed the objections of the plaintiff and confirmed the demarcation report of the Local Commissioner:-

> *"4. The Local Commissioner after recording the presence of the parties has clearly stated that he took fixed points after verification from the revenue record and measured fixed points and after to be correct as per record has conducted the demarcation. He has also submitted request made by the applicant that demarcation be done from the back side of the Abadi, but he did not accept the request because there was no fixed points nearby and he chose to take the nearest fixed points. Furthermore, New Mahal had started and it was not possible to combine two different documents and read them together to demarcate the suit land as it would have certainly given way to errors if demarcation was taken as per request of the applicant. Hence, he did not accept the request and chose fixed points which were nearest to the spot in dispute."*

No opportunity was granted to the plaintiff to lead evidence in support of his objections. The plaintiff's prayer to summon the Local Commissioner for cross-examination with respect to his demarcation report was not acceded to. In such circumstances, the contention of the respondent/defendant that the plaintiff was at liberty to summon the Local Commissioner at the stage of evidence and that under the impugned order, learned Trial Court had only accepted the demarcation report of the Local Commissioner by simply taking it on record, is not correct. Reliance placed by the respondent upon 2000 (1) CCC 468 (All) is misplaced. The tone and tenor of the impugned order is very specific in dismissing the objections on merits and in confirming the report of the Local Commissioner. Judgment passed in CMPMO No.88/2014 is on the basis of facts of that case and is not applicable to the instant case.

Learned Trial Court vide impugned order, had dismissed plaintiff's objections and 'confirmed' the demarcation report on merits without calling for the evidence. Plaintiff was not permitted to lead evidence in that regard. Demarcation report was confirmed without summoning the Local

Commissioner to face cross-examination by the parties. In view of legal position discussed above, the order passed by the learned Trial Court cannot be sustained.

For the foregoing reasons, the instant petition is allowed. The impugned order dated 27.05.2016 (Annexure P1), passed by the learned Civil Judge (Senior Division), Sirmaur District at Nahan, is set aside. Learned Trial Court shall decide the objections preferred by the petitioners to the demarcation report of the Local Commissioner afresh, in accordance with law, keeping in view the above observations. The parties, through their learned counsel, are directed to remain present before the learned Trial Court on ***18.10.2021***.

It is made clear that observations made above are confined only to the adjudication of the instant petition and shall have no bearing on the merits of the matter. Learned trial Court shall decide the civil suit without being influenced by above observations.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous application(s), if any.

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

Between:-

1. SMT. KANTA DEVI,
   W/O SH. ROOP LAL,
   R/O OM PRAKASH BUILDING,
   LOWER TOTU, SHIMLA HP

2. SH ROOP LAL,
   S/O SH. PARAS RAM,
   R/O OM PRAKASH BUILDING,
   LOWER TOTU, SHIMLA HP

....PETITIONERS

(BY MR.BHAGWATI CHANDER VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
   THROUGH SECRETARY HOME,
   SHIMLA-5.

2. THE STATION HOUSE OFFICER,
   POLICE STATION BOILIEUGANJ,
   DISTRICT SHIMLA HP ...RESPONDENTS

(BY SH. DINESH THAKUR, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO. 165 OF 2021
DECIDED ON:29.09.2021

Code of Criminal Procedure, 1973- Sections 482, 195- **Indian Penal Code, 1860**- Sections 188, 34- Quashing of F.I.R.- Cognizance has been taken by Ld. J.M.F.C. against the petitioner for an offence alleged to have been committed under Section 188 of I.P.C. read with Section 34 I.P.C.- Held- The provisions of Section 195 Cr.P.C. are mandatory and its non-compliance would vitiate the prosecution and all other consequential orders- Ld. Magistrate was not having jurisdiction to take cognizance- Proceedings quashed. (Paras 6, 8, 9, 10)

Cases referred:
C.Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567;
Daulat Ram vs. State of Punjab, AIR 1962 SC 1206;

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

O R D E R

In the instant petition, order dated 7.12.2018 passed by learned Judicial Magistrate First Class, Court No. VI, Shimla in Case No. 429 of 2018, has been assailed by petitioners, whereby on the basis of final report submitted by police under Section 173 of Code of Criminal Procedure (in short 'Cr.PC), cognizance has been taken by learned Judicial Magistrate First Class

against the petitioners for an offence alleged to have been committed under Section 188 of IPC read with Section 34 IPC.

2 It is the case of prosecution that on 15.7.2018, on the basis of statement of Smt. Usha Sharma, complainant, recorded by Investigating Officer, a case under Section 188 read with Section 34 IPC was registered by police for violation of order passed by Municipal Corporation Shimla, restraining the petitioners from carrying out construction and repair of building.

3 Learned counsel for petitioners has submitted that in view of provisions of Section 195 of Cr.P.C., cognizance of offence committed under Section 188 of IPC can only be taken on the basis of complaint, made in writing, of public servant concerned or some other public servant administratively superior to him, whereas, in present case, neither the public servant concerned, who had issued the order, nor any other officer superior to him, has made any complaint either to police or to the Court. Therefore, he has prayed for quashing the FIR as well as proceedings in reference in this case.

4 Learned counsel for petitioners, to substantiate his plea, has placed reliance upon ***Daulat Ram vs. State of Punjab,*** reported in ***AIR 1962 SC 1206;*** and ***C.Muniappan and others vs. State of Tamil Nadu,*** reported in ***(2010)9 SCC 567.***

5. Section 195 Cr.P.C. reads as under:-

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.
>
> (1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or
(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.
(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

> (3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.(4) For the purposes of clause (b) of sub- section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

6 The Supreme Court in ***Dault Ram's case*** has held that Section 195 of Cr.P.C. contemplates that complaint must be in writing, made by public servant concerned, and that where there is non-compliance of provisions of Section 195 Cr.P.C., the Court cannot take cognizance of the case covered under the provisions of Section 195 Cr.P.C. and any trial conducted by the trial Court in absence of such compliance is without jurisdiction *ab initio* and conviction cannot be maintained in such situation.

7 In ***C. Muniappan's case*** the Supreme Court has observed:-

> "28. Section 195(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case

of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections. (vide Govind Mehta v. The State of Bihar, AIR 1971 SC 1708; Patel Laljibhai Somabhai v. The State of Gujarat, AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr., (1998) 2 SCC 391; K. Vengadachalam v. K.C. Palanisamy & Ors., (2005) 7 SCC 352; and Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr., (2005)7 SCC 370).

29. The test of whether there is evasion or non-compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293; and Durgacharan Naik & Ors v. State of Orissa, AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and

substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.

30. In *M.S. Ahlawat v. State of Haryana & Anr., AIR 2000 SC 168,* this Court considered the matter at length and held as under :

"5....Provisions of Section 195 CrPC are m*andatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein* unless there is a complaint in writing as required under that section."

(Emphasis added)

31. In *Sachida Nand Singh & Anr. v. State of Bihar & Anr., (1998) 2 SCC 493,* this Court while dealing with this issue observed as under :

"7. ..Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint to that extent curtailed. It is a well-recognised canon of interpretation that *provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise.....*" (Emphasis supplied)

32. In *Daulat Ram v. State of Punjab, AIR 1962 SC 1206*, this Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance had been taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. This Court held as under :

"4.....The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. *The trial was thus without jurisdiction ab initio and the conviction cannot be maintained.*

5. The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside."

(Emphasis added)

33 Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non- compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction."

8 Admittedly, in present case, there is no verbal much less written complaint either by officer concerned, whose order is stated to have been violated by the petitioners, nor by an officer superior to him.

9 In view of aforesaid exposition of law, I find that learned Magistrate was not having any jurisdiction to take cognizance in present case against the petitioners.

10. Accordingly, cognizance taken by passing summoning order dated 7.12.2018 passed by learned Judicial Magistrate First Class, Court No. VI, Shimla is quashed and proceedings of Criminal Case No. 429 of 2018 tilted State Vs. Roop Lal are quashed being void *ab initio* for want of jurisdiction.

Petition stands allowed and disposed of accordingly.

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

Between:-

SAINA DEVI AGED 42 YEARS WIFE OF SH. YOG RAJ RANA, RESIDENT OF WARD NUMBER 03, TAMHOL POSTOFFICE RAILA, SUB TEHSIL SAINJ, DISTRICT KULLU, HIMACHAL PRADESH.

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

THROUGH HER HUSBAND

YOG RAJ RANA, AGED 43 YEARS SON OF TIKH RAM, RESIDENT OF WARD NUMBER 03, TAMHOL, POST OFFICE RAILA, SUB TEHSIL SAINJ, DISTRICT KULLU, HIMACHAL PRADESH. ...PETITIONER

(BY SH. YADVINDER GUPTA AND MR. BUPINDER SINGH AHUJA, ADVOCATE)

AND

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

(BY SH. RAJINDER DOGRA, SR. ADDL. A.G., WITH SH. HEMANSHU MISRA, ADDITIONAL ADVOCATE GENERAL

CRIMINAL MISCELLENOUS PETITON (MAIN)

NO. 1493 OF 2021

Reserved on : 17.09.2021
Decided on : 24 .09.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 29- Recovery of 1 Kg. 555 gm charas- Held- Implication of petitioner prima facie cannot be said to be without justification- Therefore, section 37 of NDPS Act comes into play and petitioner's right, if any, to be released on bail gets clogged- Bail dismissed. (Para 19, 22, 23)

Cases referred:

Satpal Singh Vs. State of Punjab (2018) 13 Supreme Court Cases 813;

State of Kerala and others Vs. Rajesh and others, (2020) 12 Supreme Court Cases 122;

Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan, SLP (Crl) No. 1771 of 2021;

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

O R D E R

Petitioner is accused in case registered vide F.I.R. No. 14 of 2021 dated 27.03.2021, registered at Police Station Sainj, District Kullu, Himachal Pradesh, under Sections 20, 25 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short, ***"NDPS Act"***).

2. Petitioner seeks bail under Section 439 of Code of Criminal Procedure, in the above noted case, on the grounds that her implication is false. Nothing was recovered from her and she has been arrayed as an accused with the aid of Section 29 of NDPS Act. Her implication on the sole statement of co-accused Dabey Ram is not sustainable. Further, it has been

stated that because of land dispute with the petitioner herein, Dabey Ram named her. There is no corroboration to the statement of Dabey Ram.

3. It has also been canvassed on behalf of the petitioner that she has no previous criminal history. She is permanent resident of ward No. 03, Tamhol office Raila, Sub-Tehsil Sainj, District Kullu, Himachal Pradesh. The investigation of the case is complete and there is no justification to prolong the custody of petitioner. There is no apprehension of petitioner fleeing from course of justice.

4. On notice, respondent has placed on record status report. The case of the respondent is that on 27.03.2021, police party headed by HC Anupam Kumar No.13 had laid "Nakka" at place Larji. At about 4:30 A.M. a vehicle bearing No. HP-24B-6994 (Tata Tigor) was stopped for checking. Immediately, another vehicle bearing No. HP24C-6968 (Pick-Up) followed and stopped behind the Tata Tigor car. Two persons occupying vehicle bearing No. HP-24B-6994 immediately alighted and ran towards river. Vehicle bearing No. HP-24C-6968 (Pick-Up) was occupied by its driver named Vinod Kumar. On search of said vehicle HP-24C-6968 "Charas" was recovered, which weighed 1KG and 555 grams. Vinod Kumar was arrested. As per his version, the recovered "Charas" belonged to Ram Krishan and Deep Ram @ Nittu, who were occupants of the car bearing No. HP-24B-6994.

5. Ram Krishan and Deep Ram @ Nittu were arrested on 30.03.2021. They disclosed that they had purchased the recovered contraband from Dabey Ram, who was also arrested on the same day. As per disclosure made by Dabey Ram, he had purchased the contraband from the bail petitioner on 26.03.2021. The bail petitioner was arrayed as accused and was arrested on 01.06.2021.

7. Bail petitioner had earlier preferred a petition under Section 438 of Code of Criminal Procedure being Cr.M.P(M) No. 840 of 2021, which was dismissed by a co-ordinate bench of this Court on 31.05.2021.

8. As per the case of the respondent, during investigation bail petitioner has denied having sold contraband to Dabey Ram. Petitioner had raised a plea that Dabey Ram had named her due to a land dispute *inter-se* them. All the accused namely, Vinod Kumar, Ram Krishan, Deep Ram @ Nittu and Dabey Ram and bail petitioner are in judicial custody. The challan has been presented in the Court and the matter is pending before learned Special Judge, Kullu.

9. I have heard learned counsel for the petitioner as well as learned Additional Advocate General for the State.

10. It has been argued on behalf of bail petitioner that her implication on the sole statement of Dabey Ram, is not sustainable, especially, when there is no corroborative evidence against her. Learned counsel for the petitioner has submitted with vehemence that there has been no telephonic conversion between the bail petitioner and Dabey Ram. As per petitioner, the evidence collected by Investigating Agency only revealed exchange of telephone calls between her and Sarla Devi, wife of Dabey Ram and on the basis of alleged telephonic conversion between the bail petitioner and Sarla Devi, she cannot be said to be a privy to the crime.

11. It has also been submitted on behalf of petitioner that since no recovery was effected from petitioner, rigors of Section 37 of NDPS Act will not apply. Petitioner has no criminal history. Reliance has been placed on the bail orders passed by co-ordinate benches of this court in ***Cr.M.P(M) No. 705 of 2020, titled as Kundan Lal vs. State of Himachal Pradesh, decided on 4th June, 2020, Cr.M.P(M) No. 299 of 2020, titled as Satish Singh vs. State of Himachal Pradesh, decided on 29th June, 2020 and Cr.M.P(M) No. 1939 of 2020 titled as Nawal Kishore vs. State of H.P., decided on 31st December,2020.***

12. Per contra, Mr. Hemanshu Misra, learned Additional Advocate General has opposed the bail petition of petitioner with vehemence. His

submission is that there is sufficient material collected by Investigating Agency showing involvement of the petitioner in the crime. The call detail records of the mobile number of petitioner reveal that four calls were exchanged between petitioner and Sarla Devi on 26.03.2021 within a gap of about four hours and one call was made on 27.03.2021. As per him, prior to or after above noted five calls, no other calls were found to have been exchanged between petitioner and Sarla Devi, which suggests that the calls were made for the purpose of negotiating the deal of sale of contraband with Dabey Ram.

13. It is not in dispute that commercial quantity of contraband is involved in the instant case. The challan has been presented in the Court for the offences under Sections 20, 25 and 29 of NDPS Act. Thus, the rigors of Section 37 of NDPS Act will be applicable in the present case.

14. In **State *of Kerala and others Vs. Rajesh and others, (2020) 12 Supreme Court Cases 122,*** it has been held as under: -

> 19. *The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

15. Similarly, in ***Satpal Singh Vs. State of Punjab (2018) 13 Supreme Court Cases 813,*** the three Judges Bench of Hon'ble Supreme Court has held as under:-

3. *Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a*

person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."

16. Thus, in the teeth of section 37 of NDPS Act, accused can be released on bail in the cases involving commercial quantity of contraband, if all three conditions are satisfied viz opportunity of opposing the bail is granted to the prosecutor, the Court records satisfaction to the effect that there are reasonable grounds for believing the accused not guilty of such offence and that he/she with certainty can be believed not to commit the same offence during the period of bail.

17. Coming to the facts of the case no credible explanation has been given by petitioner regarding her repeated conversation with wife of Dabey Ram on 26th and 27th of March, 2021. Nothing has been placed on record to suggest that there was some pending dispute between Dabey Ram and petitioner which could be the reason for her false implication. Otherwise also it is not understandable that in case of dispute between them, what was the occasion to have frequent phone calls between petitioner and Sarla Devi on 26.03.2021 and 27.03.2021.

18. It is no one's case that Dabey Ram and his wife were not residing together or had strained relations. In the given situation, it could be the *modus operandi* of Dabey Ram not to converse with petitioner from his mobile and for that reason might have used mobile phone of his wife. Merely because mobile phones of petitioner and Sarla Devi were not seized by Police, will not help the cause of petitioner. The omission to seize mobile phones may not make a difference; in case it is otherwise proved that the alleged mobile numbers of petitioner and Sarla Devi in fact belonged to them.

19. Thus, the implication of petitioner prima facie cannot be said to be without justification. That being so, this court is unable to return findings

that there are reasonable grounds to believe that petitioner is not guilty of charged offence. In addition, the possibility of petitioner indulging in similar offence during bail can also not be ruled out. Therefore, section 37 of NDPS Act comes into play and petitioner's right, if any, to be released on bail gets clogged.

20. The ingredients of Section 37 of NDPS Act are to be read conjunctively and absence of any single condition thereof disentitles a person from relief of bail.

21. An argument has further been raised on behalf of petitioner that as per admitted case of respondent no recovery was effected from petitioner, therefore, Section 37 of the NDPS Act will not be applicable. The argument so raised deserves to be rejected for the reason that Section 29 of the NDPS Act speaks about abetment or conspiracy that makes the person liable for punishment for the same offence of which abetment or conspiracy is alleged. Section 29 of the NDPS Act carves out an independent offence and will be covered under the expression "and also the offences involving commercial quantity" used in Section 37 (1) (b) of the NDPS Act. Thus, whenever a person is accused of offence under Section 29 of the NDPS Act and the involvement is of commercial quantity of contraband, undoubtedly, the rigors of Section 37 of the NDPS Act shall apply.

22. Even otherwise, the mere absence of recovery of contraband from the possession of an accused shall not exempt him from the rigors of Section 37 of the NDPS Act. Reference can be made to a recent judgment dated 22.9.2021 passed by the Hon'ble Supreme Court in Criminal Appeal No. 1043 of 2021 (Arising out of SLP (Crl) No. 1771 of 2021), titled ***Union of India through Narcotics Control Bureau, Lucknow*** vs. ***Md. Nawaz Khan***, wherein it has been held as under:

> *"24. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we*

note that in Union of India vs. Rattan Mallik, (2009) 2 SCC 624, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37 (1) (b) and there was non-application of mind by the High Court.

25. In line with the decision of this Court in Rattan Mallik (Supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

23. With due deference to the bail orders cited by learned counsel for the petitioner, no help can be derived by petitioner from these orders for the reasons that those have been passed in peculiar facts and circumstances involved in each of them. The material available against the petitioner in present case, probably, was missing in such cases.

24. In view of above discussion, I find no merit in the petition and the same is accordingly dismissed.

25. The expression of opinion, if any, hereinabove shall be construed only for the purpose of disposal of this petition and shall in no manner influence learned trial court during the course of trial, which shall be decided on its own merits uninfluenced by this order.

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

Between:

GIRISH,
S/O SH. DHARAM PRAKASH,
R/O VILLAGE MALUKA,
BAHAN,
P.O. GHARSI,
TEHSIL KASAULI,
DISTRICT SOLAN, H.P.

....PETITIONER

(BY MR. DINESH KUMAR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(MR. SUDHIR BHATNAGAR, AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No.1900 of 2021
DECIDED ON 07.10.2021

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 506- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**- Sections 3(1)(w), 3(2), 5- Bail- Held- Delay in lodging of the F.I.R. and no plausible explanation rendered on record qua such delay- Prosecutrix refused to undergo the medical examination- Prosecutrix is aged 28 years as such it is difficult to conclude at this stage that the bail petitioner taking undue advantage of her innocence and of her being from lower caste, sexually exploited her- Prosecutrix of her own volition was in constant touch of the bail petitioner- Normal rule is of bail and not jail- Bail granted. (Para 4, 5, 11)

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

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

O R D E R

Bail petitioner namely Girish, who is behind bars since 19.8.2021, has approached this court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail, in case FIR No. 31/21 dated 18.8.2021, registered at WPS Solan, District Solan, Himachal Pradesh, under Sections 376 and 506 of the IPC and Sections 3(1) (w), 3 (2) 5 of the SC& ST Act.

12. Pursuant to order date 29.9.2021, respondent-state has filed the status report. Additional Superintendent of Police Mr. Ashok Verma, Solan is also present with the records. Records perused and returned. Close scrutiny of record/status report reveals that on 18.8.2021, victim-prosecutrix (name withheld), lodged a complaint at WPS Solan, alleging therein that she is in relation with the bail petitioner for the last two years. She alleged that the bail petitioner proposed her for marriage and thereafter kept on sexually assaulting her against her wishes on the pretext of marriage. She alleged that she became pregnant twice but bail petitioner compelled her to get the child aborted. She also alleged that the bail petitioner asked for the gold ornaments, enabling him to take loan so that he establishes his business. She alleged that she besides giving her gold, also gave money in cash to the bail petitioner, but now he refuses to marry her. She alleged that since she belongs to SC category, petitioner is not marrying her and as such, she is

under immense tension and pressure. She also alleged that prior to filing of the FIR at hand, she had also filed a complaint at Women Police Station, but she was forced to arrive at settlement with the petitioner. In the aforesaid background, as FIR detailed herein above, came to be lodged against the present bail petitioner on 18.8.2021 and since then, he is behind the bars. Prior to fling of the petition at hand, bail petitioner had approached the learned Sessions Judge, Solan, but such plea of him for grant of bail was rejected. Since investigation in the case is complete and nothing remains to be recovered from the bail petitioner, he has approached this court in the instant proceedings for grant of regular bail.

13. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting factum with regard to completion of investigation, submits that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of the offence alleged to have been committed by him, he does not deserve any leniency. Mr. Bhatnagar, further submits that bail petitioner taking undue advantage of innocence of the victim-prosecutrix not only sexually assaulted her against her wishes but also extorted money from her and as such, prayer having been made on his behalf for grant of bail, deserves outright rejection.

14. Having heard learned counsel for the parties and perused material available on this record, this Court finds that victim-prosecutrix was known to the bail petitioner for the last more than two years and during this period they had developed intimate relationship. Interestingly, as per the statement given by the victim-prosecutrix to the police under Section 161 Cr.PC., she was subjected to the sexual intercourse against her wishes on 22.4.2021 and 30.4.2021, at Win Sum Hill hotel and in a room of the bail petitioner, but FIR at hand came to be lodged on 18.8.2021, i.e. after three and half months of the alleged incident. There is no plausible explanation rendered on record qua the delay in lodging the FIR. Similarly, this court

finds that victim-prosecutrix after lodging of the FIR was asked to get medically examined, but she refused to undergo the same and as such, there is no medical evidence available on record suggestive of the fact that she was subjected to forcible sexual intercourse by the present bail petitioner. In the case at hand, victim-prosecutrix alleged that on two occasions, she became pregnant and present bail petitioner compelled her to abort the child, but investigation reveals that victim-prosecutrix was admitted on account of pain in the abdomen at Navjeewan Hospital, but there is no record of abortion. Moreover, entry in Navjeewan Hospital, is in the name of her friend Priya Kamboj. Record of investigation reveals that father of the petitioner has already deposited sum of Rs. 99,877/- in the Muthoot Finance Ltd., the Mall Solan, on 22.6.2021 and thereafter, returned the Jewleary allegedly taken by the bail petitioner from the victim-prosecutrix. It has been also stated in the status report that father of the petitioner also returned Rs. 25,000/- in cash allegedly taken by the bail petitioner from the victim-prosecutrix. Though case at hand, is to be decided by the court below in the totality of evidence collected on record by the investigating agency, but having taken note of the aforesaid glaring aspects of the matter, there appears to be no reason for this court to let the bail petitioner incarcerate in jail for an indefinite period, during trial, especially, when investigation is complete and nothing remains to be recovered from him. In the case at hand, victim-prosecutrix is 28 years old and as such, it is difficult to conclude at this stage that bail petitioner taking undue advantage of her innocence and of her being from lower caste, sexually exploited her and as such, it would be not fair in case liberty of the petitioner is curtailed for indefinite period. Material available on record clearly reveals that victim-prosecutrix of her own volition and without there being any external pressure was in the constant touch of the bail petitioner and during this period, they became close to each other, but since bail petitioner refused to marry her, case at hand came to be registered against him. Hon'ble Apex

Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand also, guilt, if any, of the accused is yet to be proved in accordance with law, by leading cogent and convincing material on record. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

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

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

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial***

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

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

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

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

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

(xxv) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(xxvi) nature and gravity of the accusation;
(xxvii) severity of the punishment in the event of conviction;
(xxviii) danger of the accused absconding or fleeing, if released on bail;
(xxix) character, behaviour, means, position and standing of the accused;
(xxx)likelihood of the offence being repeated;
(xxxi) reasonable apprehension of the witnesses being influenced; and

(xxxii) danger, of course, of justice being thwarted by grant of bail.

19. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

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

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

need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> *"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.*
>
> *3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.*
>
> *4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not*

appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

21. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

(r) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any

reason to do so, seek exemption from appearance by filing appropriate application;

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

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

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

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

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

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

Between:

DEV PARAKASH,
S/O SH. TEK CHAND,
R/O VILLAGE KOTLA,
P.O. THACHI
TEHSIL DHAMMI,
DISTRICT SHIMLA, H.P.
AGED 42 YEARS.

....PETITIONER

(BY MR. AJAY KOCHAR
AND MS. AVNI, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(MR. SUDHIR BHATNAGAR, AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL
WITH MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No.1914 of 2021
DECIDED ON:07.10.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Section 376 and 506- Held- Prosecutrix age 40 years was in constant touch of the bail petitioner since 2012- Prosecutrix had knowledge of marriage of bail petitioner with another lady since 2014- She did not complain and kept on enjoying the company of the bail petitioner- There is no reason to keep the petitioner behind bars for an indefinite period specially when investigation is complete- Normal rule is of bail and not jail- Bail allowed. (Paras 5, 6, 7, 8)

Cases referred:

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

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

O R D E R

Sequel to order dated 30.9.2021, whereby the petitioner was ordered to be enlarged on bail in case FIR No. 30/21 dated 12.8.2021, registered at PS Solan, District Solan, Himachal Pradesh, under Sections 376 and 506 of the IPC, respondent-state has filed the status report. ASI Bhagat Ram is also present with the records. Records perused and returned.

24. Close scrutiny of record/status report reveals that on 11.8.2021, victim-prosecutrix (name withheld), aged 40 years, lodged a complaint in the office of SP Solan, alleging therein that she is a widow since 2009 and since then, is residing with her three children at Nohradhar, District Sirmour. She alleged that in the year, 2012, she came in contact with the present bail petitioner, who firstly, proposed her for marriage and thereafter, compelled her to leave the private job. She further alleged that, for two years, bail petitioner sexually assaulted her on the pretext of marriage and also provided her financial assistance. She alleged that after two years, she compelled the bail petitioner to take her to his house and there, it transpired to her that bail petitioner is already married to a lady namely Renu. She alleged that though she wanted to lodge complaint against the bail petitioner at that particular time, but parents of the petitioner dissuaded her not to file any complaint and ensured that they will take care of her in future. She alleged that in the year, 2017, bail petitioner had come on leave from army and while she was living in her room, his wife Renu came to know about their relationship and she reached there with police. She alleged that the parents of the bail petitioner as well as his wife got the matter settled with the assistance of the police. She alleged that since after 2017, neither petitioner came to her nor provided any financial assistance, but on 2.6.2021, he forcibly entered her room and sexually assaulted her against her wishes. In the aforesaid background, FIR detailed herein above, came to be lodged against the present bail petitioner under the aforesaid provisions of law.

25. Ms. Avni, learned counsel for the petitioner submits that pursuant to order dated 30.9.2021, bail petitioner has made himself available for investigation and as of today, nothing remains to be recovered from him and as such, he is entitled to be enlarged on bail. She further submits that bare perusal of the statement given by the victim-prosecutrix to the police itself reveals that she of her own volition and without there being any external pressure, was in constant touch with the bail petitioner. She further submits that on 2.6.2021, petitioner was not on leave but was in his unit at Faridkot as has been certified by the Battery Commander and as such, allegation of rape allegedly committed by the bail petitioner upon the victim-prosecutrix on 2.6.2021, is totally false. Lastly, Ms. Avni, contends that since investigation in the case is complete, no fruitful purpose would be served by putting the bail petitioner behind the bars, who is an army personnel.

26. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting factum with regard to completion of investigation, submits that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of the offence alleged to have been committed by him, he does not deserve any leniency. Mr. Bhatnagar, while referring to the status report, contends that there is an overwhelming evidence adduced on record by the investigating agency suggestive of the fact that bail petitioner despite being married with lady namely Renu, took undue advantage of innocence of the victim-prosecutrix and sexually assaulted her against her wishes.

27. Having heard learned counsel for the parties and perused material available on this record, this Court finds that as per own statement of the victim-prosecutrix, she was in the constant touch of the bail petitioner since the year, 2012. Factum with regard to the earlier marriage of the bail petitioner with lady namely Renu had come to the knowledge of the victim-prosecutrix in the year, 2014, but yet she did not find it proper to lodge

complaint against the bail petitioner with the police, rather she kept on enjoying the company of the bail petitioner, who allegedly, besides providing her financial assistance, also sexually assaulted her repeatedly on the pretext of marriage. It is not understood that once factum with regard to earlier marriage of the bail petitioner with lady namely Renu had come to her knowledge in the year, 2014, what made her to remain in the company of the bail petitioner thereafter that too till the year, 2017, when allegedly, wife of the bail petitioner forcibly entered the room of the victim-prosecutrix. As per own version of the victim-prosecutrix, bail petitioner did not come back to her after 2012, till 2.6.2021, when he forcibly entered into the room of the victim-prosecutrix and forcibly sexually assaulted her against her wishes. In case victim-prosecutrix was never aggrieved of the illegal acts, if any, of the bail petitioner, it is not understood that what prevented her to lodge complaint against the bail petitioner in the year, 2017 itself.

28. Victim-prosecutrix in her statement given to the police has stated that after year 2017, petitioner never contacted her and had made her clear that he will not live with her but allegedly, on 2.6.2021, he forcibly entered the room of the victim-prosecutrix and sexually assaulted her against her wishes. Aforesaid allegation qua the rape, if any, committed by the bail petitioner has been seriously disputed by the bail petitioner by stating that on 2.6.2021, he was not on the leave but was at Faridkot in his Unit, which fact has been otherwise substantiated by the Battery Commander.

29. Having carefully perused material available on record and taking note of the fact that victim-prosecutrix is 40 years old, this court finds it difficult to accept the contention of learned Additional Advocate General at this stage that bail petitioner taking undue advantage of the innocence of the victim-prosecutrix sexually assaulted her against her wishes on the pretext of marriage. Though aforesaid aspects of the matter are to be considered and decided by the court below on the basis of totality of evidence collected on

record by the investigating agency, but having taken note of the aforesaid glaring aspects of the matter, there appears to be no reason for this court to send the petitioner behind bars for an indefinite period, during trial, especially, when investigation is complete and nothing remains to be recovered from him. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time, guilt of his/her is not proved in accordance with law. In the case at hand also, guilt, if any, of the accused is yet to be proved in accordance with law, by leading cogent and convincing material available on record.

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

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

> *" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that*

some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive or preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an

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

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

(xxxiii) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
(xxxiv) nature and gravity of the accusation;
(xxxv) severity of the punishment in the event of conviction;
(xxxvi) danger of the accused absconding or fleeing, if released on bail;
(xxxvii) character, behaviour, means, position and standing of the accused;
(xxxviii) likelihood of the offence being repeated;
(xxxix) reasonable apprehension of the witnesses being influenced; and
(xl) danger, of course, of justice being thwarted by grant of bail.

12. Reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

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

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

> ***"2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are***

instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the

investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons.

14. Consequently, in view of the above, order dated 30.9.2021, passed by this Court, is made absolute, subject to the following conditions:

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

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

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

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

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

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

Copy **dasti.**

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

Between:-

STATE OF HIMACHAL PRADESH

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

.....REVISIONIST

AND

MAHINDER SINGH (SINCE DEAD)
SON OF SHRI MANSHA RAM,
RESIDENT OF VILLAGE POONA,

TEHSIL AND DISTRICT UNA, H.P.

...ACCUSED/RESPONDENT

CRIMINAL REVISION
NO.203 OF 2019
DECIDED ON: 30.09.2021

Prevention of Corruption Act, 1988- Sections 7, 13(2)- Criminal Revision- State has assailed in this revision the order of Ld. Special Judge, vide which order to release case property was passed, in this revision- Case property was seized during investigation claiming it to be disproportionate assets accumulated by the respondent beyond his known sources of income- Held- The trial has been closed as abated without adjudication of the allegation of the prosecution- There is no judicial verdict qua seized property being disproportionate as such present petition also deserves to be closed as abated. (Para 4, 5, 6)

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

O R D E R

This petition has been preferred against the order dated 21.01.2019, passed by learned Special Judge, Una, District Una, H.P., in Criminal Miscellaneous Application No.134 of 2018, titled as *Mahinder Singh vs. State of H.P.,* whereby on application filed by respondent Mahinder Singh, during pendency of the trial, in case FIR No.13 of 2009 dated 09.09.2009 registered under Sections 7, 13(2) of Prevention of Corruption Act, 1988 (hereinafter referred to as the 'P.C. Act'), in Police Station State Vigilance and Anti Corruption Bureau Solan, District Solan, H.P., learned Special Judge has ordered to release currency, wrist watch, Gold ornaments, FDRs etc. to respondent Mahinder Singh on furnishing Sapurdari bond amounting to

`10,00,000/- by respondent. These articles were recovered and seized by Vigilance Team in raid of house of Mahinder Singh during investigation by considering these articles to have been accumulated by the respondent as assets disproportionate to his known sources of income.

18. During pendency of trial as well as present petition, respondent-Mahinder Singh, has expired on 29.04.2021.

19. As per instructions received from the office of Superintendent of Police, SV & ACB, SR, Shimla, placed on record by learned Deputy Advocate General, on account of death of the respondent-Mahinder Singh, Criminal case pending against him in case FIR 13 of 2009 referred supra, titled as *State of H.P. vs. Mahinder Singh* has been ordered to be closed as abated by learned Special Judge, Una, H.P., vide order dated 30.07.2021 and another case in FIR No.7 of 2010, registered against the respondent, has also been closed by learned Special Judge, Una, vide separate order dated 30.07.2021. It has further been stated in the instructions that in these cases, there are no specific directions for disposal of the case property.

20. The case property was seized during investigation, claiming it to be disproportionate assets accumulated by the respondent beyond his known sources of income. The said allegation was to be adjudicated during trial and thereafter, on the basis of conclusion of the trial, above referred property was to be disposed of, released or confiscated by the judicial order of the Court.

21. Now trial has been closed as abated without adjudication of the allegation of the prosecution and without determining as to whether property seized by the Investigating Agency was disproportionate assets or not and there is no judicial proceeding pending for adjudicating this issue, nor there is any judicial verdict declaring aforesaid property/articles disproportionate to the income of the deceased respondent. In these circumstances, present petition also deserves to be closed as abated, on account of death of respondent-Mahinder Singh.

22. There is no order passed by trial Court with respect to case property at the time of closing the trials as abated. As the case property cannot be kept in seize or in custody of the Court or police for infinite or indefinite period, therefore, in these circumstances, the property in question shall devolve upon legal heirs of deceased respondent as, undisputedly, they have a right to inherit the property of deceased Mahinder Singh unless barred from claiming it under any law. Thus, petitioner-State has lost right to keep the property in question under seize.

23. In view of above, present petition is disposed of as abated. Pending application(s), if any, also stand disposed of.

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

Between:-

STATE BANK OF INDIA, DULY CONSTITUTED
UNDER STATE BANK OF INDIA ACT, 1955,
HAVING ITS HEAD OFFICE AT MADAME
COMA ROAD, NARIMAN POINT, MUMBAI,
HAVING ITS LOCAL HEAD OFFICE AT
SECTOR 17-A, CHANDIGARH AND HAVING
ITS STRESSED ASSETS RECOVERY BRACH
AT 40 SDA COMMERCIAL COMPLEX,
ZONAL OFFICE BUILDING, KASUMPTI,
SHIMLA THROUGH ITS AUTHORISED OFFICER.

……PETITIONER

(BY SH. ARVIND SHARMA, ADVOCATE)

AND

2. DISTRICT MAGISTRATE,
SIRMAUR AT NAHAN,
DISTRICT SIRMAUR, H.P.

....RESPONDENT

2. SH. RAJINDER SINGH SON OF SH. BANSHI RAM,
RESIDENT OF VILLAGE AND P.O. PANOG,
SUB TEHSIL RONHAT, DISTRICT SIRMAUR, H.P.

...PROFORMA RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL, WITH MR. RAJINDER DOGRA, SR. ADDITIONAL ADVOCATE GENERAL, MR. VINOD THAKUR, MR. SHIV PAL MANHANS, MR. HEMANSHU MISRA, ADDL. ADVOCATE GENERALS AND MR. BHUPINDER THAKUR, DY. ADVOCATE GENERAL, FOR RESPONDENT NO.1.

(NONE FOR PROFORMA RESPONDENT.)

CIVIL WRIT PETITION
No. 2028 OF 2021

DECIDED ON: 07.10.2021

Constitution of India, 1950- Article 226- **SARFAESI Act, 2002**- Section 14- Order of District Magistrate vide which application under Section 14 of SARFAESI Act was dismissed has been assailed- Loan amount of proforma respondent was declared NPA when he failed to liquidate the liability- Held- There was no reason for the District Magistrate to have construed the secured asset to be an agricultural land- District Magistrate exceeded his jurisdiction vested in him under Section 14 of the SARFAESI Act- Petition allowed- Order of District Magistrate is quashed and set aside.

Cases referred:

ITC Limited vs. Blue Coast Hotels Limited and others (2018) 15 SCC 99;

This petition coming on for admission after notice, this day,

Hon'ble Mr. Justice Satyen Vaidya, *passed the following:*

ORDER

By way of instant petition, petitioner has assailed order dated 30.09.2020 passed by the District Magistrate, Sirmaur at Nahan, H.P. whereby the application of petitioner-Bank under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') has been dismissed.

2. The loan account of proforma respondent Rajinder Singh was declared NPA on 06.06.2017. Demand made by petitioner-Bank in accordance with the provisions of the SARFAESI Act, proforma respondent failed to liquidate his liability. The outstanding dues as on 31.05.2019 against the account of proforma respondent was Rs.26,66,670/-. The loan was obtained by proforma respondent from petitioner-Bank for construction of house in the sum of Rs.24,00,000/-.

3. In order to secure the aforesaid loan, proforma respondent mortgaged immovable property comprised in Khata Khatauni No. 6/10 to 14, Khasra No. 87/1, measuring 0-2 bighas which form 2/565 share in total land measuring 28-5 bighas, situated at Mohal Gondapir, Tehsil Paonta Sahib, District Sirmaur, H.P.

4. The loan having remained unpaid, petitioner-Bank approached respondent No.1 District Magistrate, Sirmaur under Section 14 of the SARFAESI Act for assistance in taking possession of secured asset. The District Magistrate, Sirmaur dismissed the application of petitioner-Bank vide impugned order.

5. Heard.

6. The District Magistrate, Sirmaur has dismissed the application of petitioner-Bank under Section 14 of the SARFAESI Act on two grounds, first being that the mortgaged land was agricultural and was exempted under Section 31 (i) of the SARFAESI Act and secondly, that since the mortgaged land formed only a share in a joint holding, petitioner-Bank could not be handed over the possession thereof.

7. Section 14 of the SARFAESI Act mandates the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction the secured asset or other document relating thereto may be situated or found, to take possession thereof on the request of the secured creditor and forward such asset and document to such secured creditor provided the secured creditor complies with the conditions provided under such Section. Perusal of the conditions of Section 14 of the SARFAESI Act, does not contemplate any such inquiry as has been done by the District Magistrate in the instant case.

8. The application of secured creditor has been rejected by the District Magistrate on the ground that the secured asset was an agricultural land and as such was exempted under Section 31 (i) of the SARFAESI Act. It was not in dispute before the District Magistrate that proforma respondent had obtained a loan from petitioner-Bank for construction of a house on the secured asset and the house had in fact been constructed. This being so, there was no reason for the District Magistrate to have construed the secured asset to be an agricultural land. It was the case of none of the parties that the construction raised on secured asset was in the nature of being subservient to agriculture. The District Magistrate is also the Collector of the District and, as such, was aware that the nature of agricultural land if changed to non-agricultural purpose, would not remain the same notwithstanding the period taken for updation of revenue records. The District Magistrate, in the context of the object of SARFAESI Act, was not justified in denying the prayer of petitioner-Bank in light of the observations made hereinabove.

9. In **ITC Limited vs. Blue Coast Hotels Limited and others (2018) 15 SCC 99**, the Hon'ble Supreme Court while dealing with the fact situation involved in the instant case has held as under:

> **"Inclusion of agricultural land as security interest in the notice of recovery**

35. One of the contentions raised on behalf of the debtor questioned the correctness of the finding of the High Court on the ground that the inclusion of agricultural land as security interest could not have been validly included in the notice for recovery of the secured loan. The correctness of the finding of the High Court depends on the effect of Section 31 (i) of the Act, which reads as follows:-

> "31. Provisions of this Act not to apply in certain cases- The provision of this Act shall not apply to-
>
> (a) – (h) xx xx xx
>
> (i) any security interest created in agricultural land."

36. The purpose of enacting Section 31(i) and the meaning of the term "agricultural land" assume significance. This provision, like many others is intended to protect agricultural land held for agricultural purposes by agriculturists from the extraordinary provisions of this Act, which provides for enforcement of security interest without intervention of the Court. The plain intention of the provision is to exempt agricultural land from the provisions of the Act. In other words, the creditor cannot enforce any security interest created in his favour without intervention of the Court or Tribunal, if such security interest is in respect of agricultural land. The exemption thus protects agriculturists from losing their source of livelihood and income i.e. the agricultural land, under the drastic provision of the Act. It is also intended to deter the creation of security interest over agricultural land as defined in Section 2 (zf). Thus, security interest cannot be created in respect of property specified in Section 31.

37. In the present case, security interest was created in respect of several parcels of land, which were meant to be a part of single unit i.e. the five star hotel in Goa. Some parcels of land now claimed as agricultural land were apparently purchased by the debtor from agriculturists and are entered as agricultural lands in the revenue records. The debtor applied to the revenue

authorities for the conversion of these lands to non-agricultural lands which is pending till date due to policy decision.

38. It is undisputed that these lands were mortgaged in favour of the creditor under a deed dated 26.02.2010. Obviously, since no security interest can be created in respect of agricultural lands and yet it was so created, goes to show that the parties did not treat the land as agricultural land and that the debtor offered the land as security on this basis. The undisputed position is that the total land on which the Goa Hotel was located admeasures 182225 sq. mtrs. Of these, 2335 sq. mtrs. are used for growing vegetables, fruits, shrubs and trees for captive consumption of the hotel. There is no substantial evidence about the growing of vegetables but what seems to be on the land are some trees bearing curry leaves and coconut. This amounts to about 12.8 % of the total area.

39. The Corporate Loan Agreement that deals with the mortgage in question in the relevant clause reads as follows:-

> 'The Borrower shall create mortgage on Exclusive basis on the 'Park Hyatt Goa Resort and Spa' Hotel Property admeasuring 1, 82, 225 Sq Mtrs with a built up area of 25182 Sq. Mtrs situated at 263 C, Arossim, Canasaulim Goa."

The mortgage is thus intended to cover the entire property of the Goa Hotel. Prima facie, apart from the fact that the parties themselves understood that the lands in question are not agricultural, it also appears that having regard to the use to which they are put and the purpose of such use, they are indeed not agricultural."

10. As regards the other ground on which the District Magistrate dismissed the application, suffice it to say that the District Magistrate has again exceeded his jurisdiction vested in him under Section 14 of the SARFAESI Act. The possession of secured debtor i.e. proforma respondent on

the secured asset was not in dispute. None of the co-sharer had come forward to raise any objection in this regard. Debtor had constructed a house on the secured asset and his possession was not in dispute. In this view of the matter, what was required was to hand over the possession of secured asset on as is where is basis to the secured creditor i.e. petitioner-Bank for achievement of purpose of Section 14 of the SARFAESI Act.

11. In light of the above discussion, the petition is allowed, the order dated 08.10.2020 passed by the District Magistrate, Sirmaur at Nahan, H.P. is quashed and set-aside. Respondent No.1 is directed to decide the application of the petitioner-Bank filed under Section 14 of the SARFAESI Act strictly in accordance with law and the observations made hereinabove.

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