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INDEX

Nominal Table
I L R 2022 (V) HP 1

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SUBJECT INDEX

'C'

Code of Civil Procedure, 1908- Order VIII Rule 11- Section 151- **Electricity Act, 2003**- Section 56(2)- Rejection of plaint- Held- A suit for recovery of an amount which is recoverable under the provisions of Section 56 of Electricity Act, 2003 has to be filed within a period of two years from the date when such sum become first due- Suit is hit by the provisions of Section 56(2) of the Electricity Act having been filed beyond the period prescribed therein- Application allowed- Plaint rejected. (Para 12, 14) Title: H.P. State Electricity Board vs. M/s Sri Rama Steel Ltd. & others Page-1

Code of Civil Procedure, 1908- Order 22 Rule 3- Impleading L.Rs of deceased plaintiff- Application allowed by the Ld. Trial Court- Held- Term legal representative is much wider in scope than the legal heir, especially in the context of provisions of Order 22 of the CPC- . Legal representative includes even a person entitled to intermeddle with the estate of the deceased- Petition dismissed. (Para 7, 8) Title: Mohinder Kumar vs. Godwin Bindra Page-253

Code of Civil Procedure, 1908- Order 26 Rule 9- Suit for permanent prohibitory injunction- Held- Ld. Trial Court while exercising power under Order 26 Rule 9 CPC ought to have appointed Local Commissioner to ascertain the factual position on the spot- There were three different tatimas prepared by the revenue authority depicting different picture in all tatimas, court should have exercised power vested in it under Order 26 Rule 9 CPC to appoint Local Commissioner, who after visiting the spot may have given the correct report to the court enabling it to do the substantial justice- Appeal allowed- Matter remanded back to Trial Court with the direction to decide afresh. (Para 12) Title: Brahma Nand vs. Bhrigu Nand Page-776

Code of Civil Procedure, 1908- Order 37 Rule 3- Where triable issues arise from the fair and reasonable defence, disclosed by defendant, ordinarily the leave should be granted- Different stands taken by the defendant in his application for leave to defend and in his deposition before Court casts serious doubt on the veracity of his defence- Defendant has withheld the best evidence, adverse inference was liable to be drawn- Appeal allowed- Suit of the plaintiff decreed. (Para 16, 27, 28) Title: Arvind Chaudhary vs. Harish Chander

Page-713

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Injunction- Ingredients- Held- Apart from prima facie case, balance of convenience and irreparable loss, conduct of the party seeking injunction, is also of utmost importance- Petition dismissed. (Para 12) Title: Bhajna Nand vs. Bharat Ram Page-262

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Supervisory jurisdiction- Interim injunction- Held- Impugned order of Ld. Additional District Judge is barred as facts available on record and cannot be said to be suffering from vice of perversity- Petition dismissed. (Para 14, 16) Title: Duni Chand vs. Gian Chand & another Page-256

Code of Civil Procedure, 1908- Sections 96 and 100- Ld. Lower Appellate Court considered the evidence of both the civil suits while passing the impugned judgment and decree- Held- The procedure adopted by learned District Judge has definitely caused prejudice to the appellants herein- Appeal allowed. (Para 15) Title: Usha Devi & others vs. Savitri Devi & others Page-807

Code of Civil Procedure, 1908- Section 100- Order 41 Rule 27- Regular second appeal- Additional evidence- Production of documents at appellate stage- Due diligence- Held- Parties cannot lead evidence at appellate stage as a matter of right- Evidently copies of documents were produced before the Trial Court and thereafter evidence was closed and no effort was made to prove these documents in accordance with law- Ld. Lower Appellate Court should have restrained itself from deciding the application for additional evidence before considering the merits of appeal- Appeal allowed. (Para 14, 18, 19) Title: Mohan Singh & others vs. Tulsi Ram & others Page-763

Code of Civil Procedure, 1908- Section 100- Plea of adverse possession- Held- The pre-requisite of plea of adverse possession is holding of possession by a person other than owner with hostile animus towards the owner- One who lives in the house of his in-laws as “Ghar Jawain” to look after them and survive on their assets cannot assert hostile animus towards his father-in-law- Appeal allowed. (Para 23) Title: Roshni Devi vs. Dolima Devi & others Page-786

Code of Civil Procedure, 1908- Section 100- Section 26- Order 7 Rule 1 & 2- Suit for damages- Suit dismissed- Held- Plaintiffs have based their claim on

tortious liability which arises from breach of duty imposed by law- The legal requirement to succeed in such claim would be to prove breach of legal duty by defendants- They owed a duty towards plaintiffs that no loss was caused to their property on account of digging of well- Defendants were under obligation to take all due care to prevent such loss- As a necessary corollary the plaintiffs were required to prove the negligence or lack of due care in the conduct of defendants and sufferance of consequent loss by plaintiffs- Plaintiffs failed to prove that the damage to their house was caused due to digging of well- No fault can be found with the findings of Ld. Trial Court- Appeal dismissed. (Para 11, 22, 24) Title: Suresh Kumar & others vs. Durga Singh Page-705

Code of Civil Procedure, 1908- Section 100- **Specific Relief Act, 1963**- Sections 38 & 39- **Transfer of Property Act, 1882**- Section 106- Suit for possession and permanent prohibitory injunction- Suit decreed- Held- Plaintiff owner in possession and there is nothing on record to prove ownership of defendant on suit land- Concurrent findings of facts and law recorded by both the courts below requires no interference. (Para 18, 20, 21) Title: Ashok Kumar & others vs. Suhru Ram Page-797

Code of Civil Procedure, 1908- Section 100- Suit for declaration- Suit as well as first appeal dismissed- Held- Concurrent findings of fact to the effect that the plaintiff failed to demonstrate that he along with proforma defendants was in exclusive possession of the suit land as its owner- Appeal dismissed. (Para 11) Title: Gian Chand & others vs. Ram Pal & others Page-697

Code of Civil Procedure, 1908- Section 100- Suit for recovery decreed by Ld. Trial Court and upheld by Ld. First Appellate Court- Held- Concurrent findings returned by both the Ld. Courts below to the effect that it stands established on record that an amount of Rs. 3.00 lac was borrowed by the deceased brother of the defendant-appellant from the plaintiff- Being pure and simple findings of fact no interference is required- Appeal dismissed. (Para 12, 13) Title: Matu Ram vs. Lekh Raj Page-689

Code of Civil Procedure, 1908- Section 100- Regular second appeal- Suit for injunction- Suit dismissed by Ld. Trial Court so also the first appeal by Ld. First Appellate Court- Held- For claiming decree of injunction, plaintiffs were required to prove firstly the existence of their right and secondly, the obstruction- The material on record suggest existence of both- Appeal allowed. (Para 17) Title: Rajul Bhargava & another vs. Vijay Kumar Kohli & another

Page-824

Code of Civil Procedure, 1908- Sections 100 & 11**- Himachal Pradesh Public Moneys (Recovery of Dues) Act, 1973**- Civil suit for permanent prohibitory injunction and declaration that right of appellant to recover loan amount had become time barred- Suit was dismissed however appeal was allowed- Appellant Corporation was permitted to withdraw the suit for recovery and thereafter resorted to recovery proceedings under the Himachal Pradesh Public Moneys (Recovery of Dues) Act- These recovery proceedings were questioned by the plaintiff in the civil suit- Held- The findings of the Ld. First Appellate Court about preclusion of the appellant Corporation's loan recovery claim in light of its withdrawing the civil suit, the abandonment of the appellant Corporation's loan claim, there being no fresh cause of action for initiating recovery proceedings under the Act and the recovery proceedings under the Act having been instituted beyond the period of limitation etc. are not proper and need to be relooked - Matter remanded to the learned First Appellate Court. (Para 4) Title: H.P. Finance Corporation vs. Narender Narain Sharma & another Page-812

Code of Civil Procedure, 1908- Section 115- **Limitation Act, 1963**- Section 5- Delay in filing the appeal- Application for condonation of delay allowed- Held- No reason assigned for delay in filing the appeal- Order passed by Divisional Commissioner is not speaking and cryptic- Petition allowed- Order of Divisional Commissioner set aside. (Para 8, 10) Title: Uma Sharma vs. State of H.P. Page-244

Code of Criminal Procedure, 1973- Appeal- Indian Penal Code, 1860- Section 379**- Indian Forest Act, 1927**- Sections 41 and 42- Petitioner has assailed the judgment of Ld. Sessions Judge whereby the judgment and sentence passed by Ld. Trial Court for the commission of offence under Section 379 IPC and Sections 41 and 42 of Indian Forest Act was affirmed- Held- Non-examination of the Investigating Officer- The prosecution carries a heavy burden to prove the guilt of accused beyond all reasonable doubts- It is the duty of the prosecution and especially of the I.O. of the case to satisfy the conscience of the Court by negating the chances of suspicion arising in the facts of the case- In the instant case, prosecution had failed to discharge the requisite burden- Material contradictions in the statement of witnesses- No effort made to associate independent witness- Appeal allowed. (Para 12, 15,

18, 19) Title: Barkat Ali vs. State of H.P. Page-387

Code of Criminal Procedure, 1973- Criminal revision- **Drugs and Cosmetics Act, 1940**- Section 25- Ld. Trial Court rejected prayer to send the seized second sample lying in the custody of Court, for its analysis to Central Drugs Lab, Kolkata- Held- The report of Government Analyst becomes conclusive evidence of the facts stated therein, unless the person, from whom the sample was taken or the person whose particulars were disclosed under Section 18-A of the Act, within 28 days of the receipt of a copy of the report notifies in writing the Inspector or the Court before which any proceeding in respect of the sample is pending that he intends to adduce evidence in controversion of the report- Petition allowed. (Para 8) Title: M/s Hetero Labs Ltd. vs. Union of India Page-395

Code of Criminal Procedure, 1973- Criminal revision- Ld. Trial Court did not allow the prayer of complainant seeking one more opportunity for producing evidence- Held- Complainant remained casual and negligent towards prosecuting his complaint- Complainant obtained adjournments without showing any plausible reason- Complainant cannot be allowed any premium for his negligent- No fault in the impugned order- Revision dismissed. (Para 6) Title: Prakash Chand Sharma vs. Smt. Krishna Page-405

Code of Criminal Procedure, 1973- Section 311- Application under Section 311 Cr.P.C. to produce witness in defence was dismissed- Held- there was prima-facie substance in the plea of accused for the purpose of leading additional evidence in defence- Therefore, in the facts and circumstances of the case, the plea of accused was liable to be allowed- It would have not caused prejudice to the complainant as the complainant would have got a chance to cross-examine the witnesses produced by the accused- Petition allowed. (Para 10) Title: Babu Ram vs. Amit Sharma Page-337

Code of Criminal Procedure, 1973- Section 374**- Indian Penal Code, 1860-** Sections 279, 337, 338 and 304A- Rash and negligent driving- Ld. Trial Court acquitted the accused- Held- It is more than settled that while deciding the appeal against acquittal the Appellate Court should not ordinarily import its opinion or view on re-appreciation of the evidence unless the view taken by learned Trial Court is perverse- Findings of Ld. Trial Court not perverse- Appeal dismissed. (Para 15, 17) Title: State of H.P. vs. Hem Chand Page-280

Code of Criminal Procedure, 1973- Section 378- **Prevention of Corruption Act, 1988-** Sections 7 and 13(2)- Appeal against acquittal- Held- Prosecution failed to prove the demand of bribe- No illegality or infirmity can be said to have been committed by the Ld. Court below while acquitting the accused- Appeal dismissed. (Para 7, 12, 13) Title: State of H.P. vs. Ashwani Kumar Page-323

Code of Criminal Procedure, 1973- Section 378**- Protection of Children from Sexual Offences Act, 2012 –** Section 4- **Indian Penal Code, 1860-** Sections 363, 366 and 376 – Acquittal- Held:

A. Since the ingredients of the offences, for which the accused has been charge-sheeted, have not been proved, as such, no case made out to interfere with the impugned judgment- Appeal dismissed. (Para 43)

B. **Protection of Children from Sexual Offences Act, 2012 –** Section 33 – Held- The Protection of Children from Sexual Offences Act has been enacted by the legislature to protect the interest of child victims by including certain safeguards in it- Those safeguards were incorporated in the Act to protect the child victim as well as her family from exposure, as sometimes, the child victim, as well as their parents, do not prefer to go to the police station to report the crime- Reporting such crimes to the police are still considered to be stigmatic in the tradition bound conservative society of our country- That is why, certain duties have been cast upon the Special Courts to ensure that the identity of the child victim shall not be disclosed, at any time, during the course of investigation or trial- Directions issued. (Para 46, 50) Title: State of H.P. Shiv Lal @Champi **(D.B.)** Page-291

Code of Criminal Procedure, 1973- Sections 397 & 401- **Negotiable Instruments Act, 1881**- Section 138- Revision against conviction upheld by Ld. Additional Sessions Judge- Accused has not disputed his signatures on the cheque- Held- Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused, complainant being holder of the cheque is entitled to benefit of presumption as available under Sections 118 and 139 of the Act- No error of law as well as of facts committed by the Courts below- Revision dismissed. (Para 10, 14) Title: Alam Chand vs. Chaman Lal Page-54

Code of Criminal Procedure, 1973- Sections 397 & 401- **Negotiable Instruments Act, 1881**- Section 138- Revision against conviction upheld by

Ld. Additional Sessions Judge- Accused has not disputed his signatures on the cheque- Held- Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused, complainant being holder of the cheque is entitled to benefit of presumption as available under Sections 118 and 139 of the Act- No error of law as well as of facts committed by the Courts below- Revision dismissed. (Para 17, 19, 20) Title: Puran Dutt vs. State of H.P. & another Page-72

Code of Criminal Procedure, 1973- Section 439- **Protection of Children from Sexual Offences Act, 2012**- Section 6- **Indian Penal Code, 1860**- Sections 363, 366A and 376- Bail- Held- Pre-trial incarceration is not the rule- No past criminal history of the petitioner- Charges yet to be framed- Bail granted with conditions. (Para 12) Title: Prem Dutt vs. State of H.P. Page-372

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 506- Sexual assault of the prosecutrix against her wishes on the pretext of marriage- Held- No reason to let the bail petitioner incarcerate in jail for indefinite period during the trial specially when nothing remains to be recovered from him- Normal rule is of bail and not jail- Bail allowed. (Para 8, 12) Title: Ravi Kumar vs. State of H.P. Page-177

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 and 29- Bail- 1.252 Kg. of charas- Held- Bail is not to be withheld as a punishment- Normal rule is of bail and not jail- Bail granted with conditions. (Para 7) Title: Vikram vs. State of H.P. Page-377

Code of Criminal Procedure, 1973- Section 482- Releasing of passport- Passport of petitioners have been deposited with S.H.O. at the concerned Police Station in compliance of condition imposed- Held- Passports ordered to be released on furnishing solvent surety in the sum of Rs.2.00 lac with conditions. (Para 18, 20) Title: Ravi Bala & another vs. State of H.P. & another Page-423

Code of Criminal Procedure, 1973- Section 482- **Drugs and Cosmetics Act, 1940**- Sections 18, 27- Quashing of complaint and proceedings under Drugs and Cosmetics Act, 1940- Proceedings against Respondent No. 4 already quashed- Held- Requirement of Section 34 of the Act not fulfilled- Noticeably,

petitioners herein have been impleaded as accused in the complaint on the basis of same material, as was sought to be used against respondent No.4- In view of this also, different parameters cannot be applied for respondent No.4 and petitioners- No reason to differ with earlier findings- Petition allowed. (Para 15) Title: I. N. Gandhi & others vs. State of H.P. & others Page-409

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 376, 506- **Protection of Children from Sexual Offences Act, 2012**- Section 6- Quashing of F.I.R. on account of subsequent development i.e. marriage between petitioner No. 1 and petitioner No. 2- Held- Since, in the case at hand, petitioner No.2- victim/prosecutrix has already solemnized marriage with petitioner No.1 and she is living a happy married life, it would be in the interest of justice to accept the prayer made on behalf of the petitioner/accused for quashing of the FIR as well as consequent proceedings, which if otherwise allowed to sustain may disturb the happy married life of the petitioner No.1 and victim/prosecutrix- Petition allowed. (Para 19, 20) Title: Vajid Ali & others vs. State of H.P. & others Page-85

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 406, 410, 420, 120-B, 34- Quashing of F.I.R.- Held- Where 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- Evidentiary material on record, if accepted would not reasonably connect the petitioner with crime- Petition allowed. (Para 14, 30, 31) Title: Akshay Kumar Goel vs. State of H.P. & others Page-108

Code of Criminal Procedure, 1973- Section 482- Quashing of F.I.R.- Held- There is no material on record to hold that the alleged damage to the properties of complainants was on account of any rash or negligent act of petitioner and also that petitioner had used the explosive material with the intention or knowledge to cause destruction of the properties of complainants- Criminal prosecution cannot be launched on mere assumptions and presumptions- Petition allowed. (Para 28, 29) Title: Amit Singla vs. State of H.P. & another Page-350

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 306, 34- Quashing of F.I.R.- Held- Contents of FIR and Final Report

filed under Section 173 Cr.P.C, if are taken to be correct, on its face value, do not prima facie constitute the offence against the accused- Neither FIR nor Final Report filed under Section 173 Cr.P.C, disclose offences, if any, punishable under Section 306 IPC against the accused named in the FIR- There is no sufficient evidence available on record to connect the accused named in the FIR for the offences alleged to have been committed by them- Chances of conviction of accused named in the FIR, are very remote and bleak- Petition allowed. (Para 29, 30, 31) Title: Vikram Singh & another vs. State of H.P. Page-153

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Section 279, 304A- Quashing of F.I.R.- Held- Material on record is not sufficient to hold that the death of Ved Prakash was on account of any rash or negligent act of petitioner and also that his death was direct or proximate result of the alleged rash or negligent act of the petitioner- Petition allowed. (Para 24) Title: Amit Singla vs. State of H.P. & another Page-359

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 498A, 323, 506/34- Quashing of F.I.R.- Held- Serious triable issues have arisen and are required to be gone into and considered at the time of trial- F.I.R. cannot be quashed- Petition dismissed. (Para 16) Title: Virender Kumar & others vs. State of H.P. & another Page-416

Code of Criminal Procedure, 1973- Section 482- **Protection of Women from Domestic Violence Act, 2005**- Section 12- Challenge has been laid to order passed by Ld. Judicial Magistrate First Class whereby an application of the petitioner for rejecting the complaint of respondent came to be dismissed- Customary divorce- Parties residing separately since 13.12.2013- Complaint filed on 18.06.2018- Held- Respondent was stopped from filing the complaint under Section 12 of the Act against the petitioner after her having agreed to take divorce by way of mutual consent- Petition allowed. (Para 25, 31, 33) Title: Vijay Kumar vs. Sanjana Kumari Page-134

Constitution of India, 1950 - Article 226- Regularization- Petitioners were engaged as daily wage drivers in the office of Child Development Project Officer- Held- Appointment of petitioners on daily wages was as per the Recruitment and Promotion Rules- Recruitment was against sanctioned posts- Petitioners are entitled to be regularized from the initial date of appointment as per rules- Petition allowed. (Para 8, 10) Title: Babu Ram & others vs. State

of H.P. & others Page-20

Constitution of India, 1950- Article 226- Application for the post of Pharmacist (Allopathy)- Petitioner being eligible for the post entitled to apply as OBC candidate but since portal did not show the option of OBC category she applied against general category- During interview petitioner claimed that she belongs to OBC category, however, Commission rejected her prayer- Held- Once petitioner participated in the written exam as general unreserved category, she is stopped at this stage to claim that respondent Commission ought to have considered her in the category of OBC- Petition dismissed. (Para 5) Title: Pooja Kaushal vs. HP Staff Selection Commission Page-240

Constitution of India, 1950- Article 226- Appointment for the post of Ayurvedic Pharmacist on batch wise basis- Held- Diplomas of petitioners were duly verified- Respondent No. 2 cannot now raise question/doubt over the Diplomas obtained by the petitioners from Bihar State Faculty of Ayurvedic and Unani System prior to 2003, as, it was respondent No. 2, who had registered the petitioners with the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh, after verifying the documents submitted by the petitioners- Petition allowed. (Para 26, 27) Title: Dev Raj & others vs. State of H.P. **(D.B.)** Page-528

Constitution of India, 1950- Article 226- **CCS (CCA) Rules, 1965**- Rule 13- Dismissal of petitioner, a Head Constable from the service pursuant to disciplinary proceedings- Held- No proper procedure appears to have been followed by the Disciplinary Authority before initiating disciplinary proceedings against the petitioner- Disciplinary proceedings vitiated on account of framing of charge-sheet by incompetent officer- Penalty of dismissal cannot be said to be justifiable- Petition allowed- Petitioner is ordered to be reinstated in service. (Para 21, 24, 26, 28) Title: Vinoj Kumar Sharma vs. State of H.P. Page-214

Constitution of India, 1950- Article 226- **Central Civil Services (Classification, Control and Appeal) Rules, 1965**- Petitioner a Mason was not found fit to be retained in Government service as he furnished fake birth certificate and accordingly major penalty of dismissal from service was proposed by the Disciplinary Authority- Held- petitioner was not convicted on a criminal charge by any Court of law therefore, procedure as envisaged under Rule 19 of the CCS (CCA) Rules could not have been adopted for initiating disciplinary proceedings against the petitioner on the ground of conviction-

Petition allowed- Order in terms whereof the petitioner was dismissed is quashed and set aside. (Para 9, 10) Title: Geeta Ram vs. State of H.P. Page- 33

Constitution of India, 1950- Article 226- **Central Civil Services (Classification, Control and Appeal) Rules, 1965**- Rule 14- Petitioner was charge sheeted- On enquiry the petitioner was not found fit to be retained in service- Held- The Disciplinary Authority after receipt of the inquiry report had already made an opinion with regard to the punishment which was to be imposed upon the Government servant and as this vitiated the disciplinary proceedings, therefore, besides the said Show Cause Notice being bad in law, all subsequent actions taken by the Authorities, be it the imposition of penalty or the rejection of appeal against the penalty etc. are non est and void abinitio- Petition allowed. (Para 8) Title: Subhash Chand vs. HRTC & others Page-38

Constitution of India, 1950- Article 226- Considering the service of the petitioner rendered as Panchayat Secretary- Held- Petition is clearly barred by principle of delay and laches- Petition dismissed. (Para 8, 10) Title: Swaroop Singh vs. State of H.P. Page-587

Constitution of India, 1950- Article 226- Departmental Promotion Committee proceedings challenged- Petitioner failed in selection process- Held- Factum with regard to non-communication of adverse entries for the last five years was very much in the knowledge of the petitioner before her having participated in the selection process, made no representation of adverse entries to authorities- No illegality in Departmental Promotion Committee proceedings- Petition dismissed. (Para 9, 10) Title: Sunita Chandel vs. Union of India & others Page-187

Constitution of India, 1950- Article 226- Departmental Promotion Committee- Petitioner an ASI faced trial under Section 13(2) of the Prevention of Corruption Act, but after honourable acquittal respondent No. 2 ordered for fresh inquiry of the petitioner his name was recommended to Departmental Promotion Committee for promotion to the post of S.I.- petitioner assailed the order in writ and the order was quashed and set aside with the direction to accord necessary approval to promote the petitioner to the post of S.I.- Petitioner was promoted but with effect from 22.05.2010 instead of 17.07.2008 when it was due- Held- Adverse entry relating to specific incidents should ordinarily not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been

awarded on the basis of such an incident - Petition allowed and remarks column in the Annual Confidential Report pertaining to the year 2005-06 are expunged. (Para 25, 26) Title: Bhupinder Pal vs. State of H.P. Page-193

Constitution of India, 1950- Article 226- **H.P. Department of Personnel JOA(IT) Class III (Non-Gazetted) Ministerial Service Common Recruitment and Promotion Rules, 2017**- Rule 2(b)- Rejection of the candidature of the petitioner for the post of JOA- Held- Petitioner is not having the requisite qualification, as such, he is not entitled for the relief as claimed- Petition dismissed. (Para 23) Title: Rajender Singh vs State of H.P. & others **(D.B.)** Page-434

Constitution of India, 1950- Article 226- Issue writ of Certiorari thereby quashing and setting aside the Annexure P-4 vide which permission to Respondent No.3 has been given- Held- It is more than settled that even though the Government enjoys great freedom while entering into contracts with the private parties, but even that freedom is circumscribed by the rule of fairness, transparency and objectivity- Fairness in State action is the soul of good-governance- Therefore, every action of the State where it infringes the constitutional mandate or is opposed to basic rule of law or suffers from an infirmity of patent arbitrariness, judicial intervention is inevitable-"Expressio unius est exclusio alterius"- Petition allowed. (Para 13, 14, 18, 22) Title: Ramesh Verma & others vs. State of H.P. & others **(D.B.)** Page-489

Constitution of India, 1950- Article 226- Post of drivers on contract basis in Jal Shakti Vibhag- Department cancelled the selection process being not in terms of Recruitment and Promotion Rules- Petitioners successfully participated in the recruitment process but not issued with appointment letter- Held- For the fault of the respondents, the petitioners who successfully completed the recruitment process cannot be made to suffer- Petition allowed with the direction to the respondents to offer appointment to successfully selected petitioners as Drivers on contract basis. (Para 4, 5) Title: Ashwani Kumar & others vs. State of H.P. Page-48

Constitution of India, 1950- Article 226- Promotion- Juniors were promoted to the post of Assistant Accounts Officer, whereas, petitioner was ignored- Petitioner had never laid any challenge to the grading awarded to him- That being so, the petitioner cannot be said to have any merit in his claim, especially when the post of Assistant Accounts Officer was a selection post-

Petition dismissed. (Para 9, 10) Title: Brijesh Kumar vs. State of H.P. Page-602

Constitution of India, 1950- Article 226- Quashing of memorandum and permitting petitioner to work as PET on PTA basis- Held- Appointment of petitioner was purely temporary with the condition that he would not claim any sort of regular job- Claim of the petitioner has no basis – Petition dismissed. (Para 9 to 11) Title: Vinod Kumar vs. State of H.P & others Page-540

Constitution of India, 1950- Article 226- Quashing of promotions of private respondents 3 to 6 as A.E. (Civil)- Held- Without altering the seniority list of the surveyors, the respondents could not have altered the seniority list of J.Es and that too without complying with the provisions of the principles of natural justice- Without redrawing the final seniority list of surveyors, the seniority position of the J.Es could not have been altered- Directions issued. [Para 4(iii), (iv)] Title: Rajinder Singh vs. State of H.P. & others Page-548

Constitution of India, 1950- Article 226- Quashing of promotions of private respondents 3 to 6 as A.E. (Civil)- Held- Without altering the seniority list of the surveyors, the respondents could not have altered the seniority list of J.Es and that too without complying with the provisions of the principles of natural justice- Without redrawing the final seniority list of surveyors, the seniority position of the J.Es could not have been altered- Directions issued. [Para 4(iii), (iv)] Title: Rakesh Soni vs. State of H.P. & others Page-563

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules – Pay Scale of Senior Clerks granted to petitioners was withdrawn and they were designated as Junior Assistant- Held- It is clear that the vested, accrued and fundamental rights of the petitioners have been infringed and the impugned action of respondents is in clear violation of Articles 14 and 16 of the Constitution of India- Petition allowed. (Para 24, 25) Title: Lekh Raj & others vs. State of H.P. Page-508

Constitution of India, 1950- Article 226- Regularization as per regularization policy of the Government of H.P.- Held- The case of petitioner herein is squarely covered by the judgment, passed by this Court in CWPOA No. 6748 of 2019- The reasons detailed therein shall apply mutatis-mutandis to the present case- Petition allowed- Termination of petitioner is set aside. (Para 9,

10) Title: Sher Singh vs. State of H.P. Page-607

Constitution of India, 1950- Article 226- Regularization of service- Held- Petitioner has failed to substantiate his allegation of nepotism, against private respondents, by placing on record any tangible material- Petition dismissed. (Para 16, 17) Title: Parvesh Sharma vs. H.P. University & others Page-593

Constitution of India, 1950- Article 226- Regularization policy- Regularization on completion of six years of contract employment- Held- Service of the petitioner to be regularized from the due date in terms of regularization policy- Petition allowed. (Para 8) Title: Kailash Chand vs. State of H.P. Page-578

Constitution of India, 1950- Article 226- **Right to Education Act, 2009**- Sections 23, 29, 35- Petitioners have qualified B.Ed. and have sought a direction to the respondents to fill-up the posts of "Shastri Teachers" as per NCTE norms- Held- It is the NCTE alone that has been notified an "academic authority" for the purpose of sub-section (1) of Section 23 as well as sub-section (1) of Section 29 of the RTE Act and, therefore, in terms of sub-section (1) of Section 23, it is the NCTE alone which has authority to prescribe minimum eligibility qualification for appointment as a teacher- But, then such qualifications have to be laid down by the NCTE by following the procedure as laid down under the NCTE Act, more particularly, Sections 3, 12 and 12A thereof and in case the procedure is not followed, then the instructions cannot be issued by the NCTE so as to bind the State Government- Petition dismissed. (Para 62, 63) Title: Satish Kumar vs. State of H.P. & others **(D.B.)** Page-441

Constitution of India, 1950- Article 226- Writ of mandamus directing the respondents to grant the work charge status on completion of eight years of regular daily wage service and regularization- Held- Once the respondents had regularized the services of various other employees initially employed under the projects, the petitioners could not be singled out to be discriminated- Right of equality being one of the fundamental traits of the Constitution, the same cannot be denied at the whims and fencies of the authorities- Petition allowed. (Para 19, 20, 21) Title: Sant Ram & another vs. State of H.P. Page-612

Constitution of India, 1950- Article 226- Writ of mandamus for direction to Department to consider the case of the petitioner under Central Civil Service

Rules, 1972 and to start deduction towards general provident funds- Held- Work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits- Service of the petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits- Petition allowed. (Para 10, 11, 13) Title: Mitter Dev vs. State of H.P. Page-582

'D'

Drugs and Cosmetics Act, 1940- Section 18, 27- Petitioner sought the quashing of the proceedings pending before the Ld. Additional Chief Judicial Magistrate being not maintainable- Held- Petitioner No. 1 cannot derive benefit under Section 34 of the Drugs and Cosmetics Act, 1940 as the said provision only protects the Directors of the Company or partners of the firm from prosecution- Petition disposed of. (Para 4) Title: M/s Unison Pharmaceuticals vs. State of H.P. & others Page-340

'H'

H.P. Urban Rent Control Act, 1987- Section 24(5)- Eviction petition allowed on the ground of bonafide requirement for rebuilding and reconstruction – Held- Approval of the plan of reconstruction by the statutory authority is not a condition precedent for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of the Rent Act- Petition dismissed. (Para 22) Title: Suman Dawar & another vs. Surinder Singh Khera Page-674

H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision against the order of Ld. Appellate Authority reversing the order of eviction of Ld. Rent Controller- Arrears of rent- Relationship of landlord and tenant- Held- As per definition of the tenant as prescribed under Section 2(j) of the Act, person, who was jointly residing with the tenant at the time of his death, shall also be termed as "tenant" subject to the order of succession and conditions specified on Explanation-1 and II, respectively- Revision petition allowed- Judgment of Ld. Appellate Authority is quashed and set aside and order passed by Ld. Rent Controller is restored. (Para 11, 12, 13) Title: Shakuntala Khanna vs. Anil Bakshi Page-63

Hindu Marriage Act, 1955- Section 13- Divorce petition- Cruelty- Held-

Appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and his children- Appellant is guilty of not fulfilling his matrimonial obligations towards the respondent and children- Appellant has filed petition to suppress his own wrongs- Petition dismissed. (Para 24, 26) Title: Ram Pal vs. Ram Devi Page-628

Hindu Marriage Act, 1955- Section 13- Divorce petition- Cruelty- Held- Appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and his children- Appellant is guilty of not fulfilling his matrimonial obligations towards the respondent and children- Appellant has filed petition to suppress his own wrongs- Petition dismissed. (Para 24, 26) Title: Ramesh Chand vs. Leela Devi Page-638

Hindu Marriage Act, 1955- Section 29(2)- Customary divorce- Held- Plaintiff has miserably failed to plead and prove the existence of any such custom or its continuance- Appeal dismissed. (Para 16, 17) Title: Bahadur Singh vs. Smt. Bala Dassi & another Page-724

'I'

Indian Succession Act, 1925- Section 63- Will- Suspicious circumstance- Will proved as per the requirement of law- - Marginal witnesses have admitted their signatures on the Will and their testimonies were not shattered on the issue of execution of Will- even if the names of marginal witnesses were not typed, could not have been taken as a suspicious circumstance to discredit the entire execution of the Will- Appeal allowed. (Para 28) Title: Uttam Ram @ Uttam Singh & others vs. Smt. Purnu & others Page-741

'L'

Letters Patent Appeal- Appellant's petition assailing imposition of penalty of forfeiture of two years' service for the purpose of future increments dismissed by the learned Single Judge- Letters patent appeal – Held- Appellant has not proved any prejudice caused to him by the alleged non supply of inquiry report- Penalty cannot be said to be disproportionate to the charges framed against him- Appeal dismissed. [Para 4(i), 4(ii)] Title: Shesh Ram vs. State of H.P. **(D.B.)** Page-666

Limitation Act, 1961- Article 18- Suit for recovery- Held- Defendants were

not having any obligation towards the plaintiff except to make payments for the services provided- The facts of instant case do not qualify the requirements of Article 1 of the Limitation Act- Suit of plaintiff would fall under the Article 18 which provided for a limitation of three years when the work was done- Appeal allowed. (Para 16 to 18) Title: Municipal Corporation & another vs. Naresh Kumar Sood Page-731

'M'

Motor Accident Claims Tribunal- Motor Vehicle Act, 1988- Section 166- Appellant was fastened with the liability to pay the awarded amount of compensation- Claimant was engaged as a labourer for loading and unloading construction material in the vehicle- Due to rash and negligent driving of the driver accident occurred and the claimant suffered injuries- Compensation of Rs. 3,94,000/- along with interest 7.5% per annum awarded- Held- Claimant was none but the third party and thus the insurer was liable to indemnify the insured- Appeal allowed. (Para 15) Title: Rajesh Kumar vs. Ram Chander & others Page-11

Motor Vehicle Act, 1988- Section 173- Death case- Total compensation of Rs.1,82,650/- awarded- Held- Income of the deceased is assessed as Rs.10,000/- per month- Compensation enhanced to Rs. 7,78,450/- along with interest @ 7.5% per annum- Appeal partly allowed. (Para 35, 38, 40, 47) Title: Gulab Singh & others vs. Arvind Kumar & others Page-648

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Appeal against conviction- 900 gm of charas- Representative samples- Held- There is nothing in the prosecution evidence that proper procedure was followed while drawing samples- There is not even any semblance of any procedure having been adopted for drawing a representative sample- This creates a serious doubt on the very legitimacy of the case of prosecution- To have credence, the sample had to be representative sample, of entire 900 Grams of substance, failing which it can be a case of recovery of only 25 gms. of charas or at the most 50 grams by including weight of second sample, having entirely different legal consequences- Sentence modified. (Para 15) Title: Pappudeen vs. State of H.P. Page-305

'P'

Prisons Act, 1894- Sections 45, 52- Petitioner sought the quashing of proceedings pending against the petitioner under Section 52 of the Prisons Act, 1894 before the Ld. Chief Judicial Magistrate- Held- Petitioner cannot take benefit of the fact that he was punished under Section 46(1) of the Act- Superintendent of Jail in the impugned complaint has recorded that the infliction of any punishment by him under Prisons Act will not serve any purpose and require the trial before the Chief Judicial Magistrate under Section 52 of the Act- This prima-facie satisfies the requirement of Section 52 of the Act- Thus, the petitioner cannot be allowed to take any benefit of the factum of warning issued to him as recorded in the daily diary report dated 01.08.2019- Petition dismissed. (Para 10, 12) Title: Parahlad Kumar vs. State of H.P. Page-344

'S'

Specific Relief Act, 1963- Section 37- Suit for permanent prohibitory and mandatory injunction – Ld. Trial Court dismissed the suit of the plaintiff, however, in first appeal plaintiff succeeded partly- Held- As per the report of Local Commissioner no encroachment was found in the suit land- Findings of Ld. Courts below cannot be faulted- Appeal dismissed. (Para 12 to 14) Title: Brij Kishore Chouhan vs. Kanta Devi & others Page-753

Specific Relief Act, 1963- Section 37- Suit for permanent prohibitory injunction- Held- Plaintiff has failed to prove infringement or encroachment on the suit land by defendants- Suit rightly dismissed- Appeal dismissed. (Para 13 to 15) Title: Chet Ram vs. State of H.P. Page-759

'W'

Workmen's Compensation Act, 1923- Section 4- Ld. Commissioner calculated the compensation by taking the income as Rs.8,000/- per month- Held- Ld. Commissioner erred in calculating the compensation as the Act provided capping of monthly wage of an employee at Rs.4,000/- a person becomes entitled to compensation on the date on which cause of action accrued- Appeal disposed of accordingly. (Para 11 to 14) Title: Bajaj Allianz General Insurance Co. Ltd. vs. Shakuntla Devi & others Page-660

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'B'

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'G

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'J'

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'W'

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'Z'

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****

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

Between:-
HIMACHAL PRADESH STATE ELECTRICITY BOARD, THROUGH ADDITIONAL SUPERINTENDING ENGINEER, ELECTRICAL DIVISION, BADDI, DISTRICT SOLAN, H.P.

.....PLAINTIFF/-NON-APPLICANT

(BY SHRI TARA SINGH CHAUHAN, ADVOCATE)

AND

1. M/S SRI RAMA STEEL LTD. UNIT-II, VILLAGE BATED, TEHSIL BADDI, THROUGH ITS MANAGING DIRECTOR, SHRI OM PARKASH AGGARWAL.

2. SH. OM PARKASH AGGARWAL, S/O SH. ASHA RAM AGGARWAL, MANAGING DIRECTOR OF M/S SRI RAMA STEEL LTD. UNIT-II, R/O HOUSE NO. 117, SECTOR 8, PANCHKULA (HARYANA).

3. SH. PARDEEP KUMAR AGGARWAL, S/O SH. OM PARKASH AGGARWAL, DIRECTOR OF M/S SRI RAMA STEEL LTD. UNIT-II, R/O HOUSE NO. 117, SECTOR 8, PANCHKULA (HARYANA).

4. SMT. SHEELA WATI AGGARWAL, W/O SH. OM PARKASH AGGARWAL, DIRECTOR OF M/S SRI RAMA STEEL LTD. UNIT-II, R/O HOUSE NO. 117, SECTOR 8, PANCHKLA (HARYANA).

5. SH. ROSHAN LAL GOEL, S/O SH. LAHORI MAL, DIRECTOR OF M/S SRI RAMA STEEL LTD. UNIT-II, R/O 141, VIKAS VIHAR, AMBALA CITY.

.....DEFENDANTS/APPLICANTS

(BY SHRI ANKUSH DASS SOOD, SENIOR ADVOCATE,
WITH SHRI MANIK SETHI, ADVOCATE)

OMP No. 193 of 2022 &
CIVIL SUIT No. 31 of 2016

Decided on: 14.09.2022

Code of Civil Procedure, 1908- Order VIII Rule 11- Section 151- **Electricity Act, 2003**- Section 56(2)- Rejection of plaint- Held- A suit for recovery of an amount which is recoverable under the provisions of Section 56 of Electricity Act, 2003 has to be filed within a period of two years from the date when such sum become first due- Suit is hit by the provisions of Section 56(2) of the Electricity Act having been filed beyond the period prescribed therein- Application allowed- Plaint rejected. (Para 12, 14)

This application alongwith Civil Suit coming on for orders this day, Hon'ble Mr. Ajay Mohan Goel, passed the following:-

O R D E R

OMP No. 193 of 2022

By way of this application filed under Order VII, Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, the applicants/defendants pray for rejection of the plaint on the ground that the reliefs prayed for in the suit are barred by the provisions of Order VII, Rule 11(d) of the Code of Civil Procedure, as from the statement made in the plaint, the suit *ex facie* is barred by law.

2. Learned Senior Counsel for the applicants/defendants has submitted that the suit stands filed by the plaintiff-Himachal Pradesh State Electricity Board, which is a 'licensee', as defined under the provisions of The Electricity Act, 2003. The applicants/defendants are the consumers. Learned Senior Counsel has further submitted that a perusal of the plaint would demonstrate that the suit filed by the non-applicant/plaintiff is for recovery of Rs.1,94,99,188/- alongwith interest *pendente lite* and future @ 12% per annum. The suit has been filed on the cause that defendant No. 1 had obtained an electricity connection from the plaintiff with connected load of 11500 KW and contract demand of 12778 KVA and hence, it became liable for the payment of tariff applicable under Schedule LS (Large Supply), as an

agreement was executed between the plaintiff and defendant No. 1, in terms whereof, defendant No. 1 agreed to pay all the demands of the plaintiff, as permissible in law. Learned Senior Counsel further submitted that a perusal of the plaint demonstrates that the plaintiff issued bill dated 05.02.2013 for the month of January, 2013 against account of defendant No. 1 in the sum of Rs.2,54,40,343/- and defendant No. 1 defaulted in the payment of abovesaid bill intentionally and deliberately. Due to non-payment of the said bill, plaintiff temporarily disconnected the electricity connection of defendant No. 1 on 07.03.2013 and as defendant No. 1 failed to make good the outstanding bills, the connection was permanently disconnected on 12.09.2013. Learned Senior Counsel while drawing the attention of the Court to Para-8 of the plaint submitted that it is pleaded therein that defendant No. 1 firstly defaulted in payment of bill dated 05.02.2013 issued by the plaintiff in the month of January, 2013 and thereafter continued to default in paying all subsequent bills raised till permanent disconnection was effected. Learned Senior Counsel submitted that it is further stated in Para-8 of the plaint that after deducting the amount of Rs.2,21,28,000/-, appropriated by the plaintiff from security deposit of defendant No. 1, a sum of Rs.1,52,33,741/- remained payable as on 12.09.2013. By referring to the averments made in Para-13 of the plaint, learned Senior Counsel submitted that it is averred therein that cause of action for filing the suit arose firstly on 05.02.2013, when the demand was raised by issuance of bill in the month of January 2013 and thereafter on the dates of issuance of periodical bills and cause of action also arose on 07.03.2013, when electricity connection of defendant No. 1 was temporarily disconnected. Learned Senior Counsel further submitted that it is further pleaded in this particular para that the cause of action also arose on 12.09.2013 when the said connection was permanently disconnected and the cause of action still continues, as the defendants failed to pay the suit amount of the plaintiff.

3. By referring to the averments made in the plaint, learned Senior Counsel has argued that as the averments in the plaint are to the effect that defendant firstly defaulted in payment of bill dated 05.02.2013, which was issued by the plaintiff in the month of January, 2013 and further as the plaintiff has stated that the electricity connection of defendant No. 1 was: (a) temporarily disconnected on 07.03.2013; and (b) permanently disconnected on 12.09.2013, the suit of the plaintiff for recovery is specifically barred by the provisions of Section 56(2) of the Electricity Act, 2003, in terms whereof, notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer under Section 56 of the Act shall be recoverable after the period of two years from the date when such sum became ***"first due"*** unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity.

4. Learned Senior Counsel submitted that in the plaint, as the sum was firstly shown to be due in the month of January, 2013 and the electricity connection was shown to be permanently disconnected on 12.09.2013, therefore, the suit for recovery which was filed on 13th April, 2016, i.e., beyond the period of two years as from the date when the same first became due in terms of the averments made in the plaint, as also as from the date when the electricity connection of defendant No. 1 was permanently disconnected, same was hit by the provisions of Order VII, Rule 11(d) of the Code of Civil Procedure, which provides that the plaint shall be liable to be rejected where the suit appears from the statement in the plaint to be barred by any law and herein, suit was barred by the provisions of Section 56(2) of the Electricity Act, 2003.

5. Learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court *in Hardesh Ores (P) Ltd. Vs. Hede and Company* (2007) 5 Supreme Court Cases 614, in which, the Hon'ble Supreme Court in Para-25

thereof has been pleased to hold that language of Order VII, Rule 11 of the Code of Civil Procedure is quite clear and unambiguous and the plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to barred by any law. Learned Senior Counsel also relied upon the judgment of the Hon'ble Supreme Court in *Shakti Bhog Food Industries Limited Vs. Central Bank of India and another* (2020) 17 Supreme Court Cases 260, in which, the Hon'ble Supreme Court has reiterated the principle that the Court has ample power under Order VII, Rule 11 of the Code of Civil Procedure to reject the plaint, if from the averments in the plaint, it is evident that the suit is barred by any law, including the law of limitation.

6. The application is resisted by the non-applicant/plaintiff on the ground that a perusal of the averments, as are contained in the Civil Suit, clearly demonstrate that the suit is within limitation and further, it is not hit by the provisions of Order VII, Rule 11(d) of the Code of Civil Procedure.

7. Mr. Tara Singh Chauhan, learned counsel for the non-applicant/plaintiff submitted that in the present case, a huge amount of Rs.1,94,99,188/- is recoverable from the applicants/defendants. Learned counsel argued that default firstly occurred in the month of February, 2013, when the bill which was raised by the Electricity Board was not honoured by defendant No. 1. He submitted that in lieu thereof, the electricity connection of defendant No. 1 was temporarily disconnected on 07.03.2013 and as despite periodical bills being raised, the amount was not made good by defendant No. 1, accordingly, the electricity connection was permanently disconnected on 12.09.2013. Learned counsel submitted that it was clearly stated in Para-13 of the plaint that the cause of action is still continuing, as the defendants have failed to pay the amount, as is due to the plaintiff, till date. Learned counsel relied upon the judgment of the Hon'ble Supreme Court in *Bihar State Electricity Board Vs. Iceberg Industries Limited and others* (2020) 20 Supreme Court Cases 745, in which, in Para-21 thereof, the Hon'ble Supreme Court,

after referring to the provisions of Section 56 of the Electricity Act, has been pleased to observe that under the provisions of Section 56, disconnection of supply is special power given to the supplier in addition to the normal mode of recovery by instituting a suit. By relying upon the said judgment, learned counsel submitted that as the plaintiff has opted for the normal mode of recovery by instituting the suit, therefore, limitation, if any, has to be construed in terms of the statutory provisions of the Limitation Act, and hence the suit is within limitation.

8. I have heard learned counsel for the parties and have also carefully gone through the averments made in the application filed under Order VII, Rule 11 of the Code of Civil Procedure as well as the plaint.

9. Order VII, Rule 11 of the Code of Civil Procedure provides that the plaint*, inter alia,* shall be rejected in case where: (a) it does not disclose cause of action; (b) the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so; and (d) the suit appears from the statement in the plaint to be barred by any law. Besides this, in terms of the said statutory provisions, a plaint is liable to be rejected even where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Rule 9.

10. The contention of the applicants is that the present suit, in terms of the averments made therein, is liable to be rejected, as the suit is barred in terms of the statutory provisions of Section 56(2) of the Electricity Act, as the same has not been filed within the period prescribed therein. This is refuted by the non-applicant.

11. At this stage, it is relevant to refer to the provisions of the Electricity Act, 2003. The Preamble of the Act demonstrates that the said Act was brought into force to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto. The Act is divided into XVIII Parts and Section 56 is part of Part VI, which deals with Distribution of Electricity. Section 56 of the Act reads as under:-

> ***"56. Disconnection of supply in default of payment-***
>
> *(1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:*

PROVIDED that the supply of electricity shall not be cut off if such person deposits, under protest, -

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months,

whichever is less, pending disposal of any dispute between him and the licensee.

(2) Notwithstanding anything contained in any other law for the time being in fore, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

Thus, a perusal of sub-section (1) of Section 56 of the Electricity Act demonstrates that the same provides that where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee etc. in respect of supply of electricity to him, the licensee, after giving not less than 15 clear days' notice in writing to such person, without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee. Sub-section (2) of the Act provides that notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer under Section 56 shall be recoverable after the period of two years from the date when such sum became **"first due"** unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity. The very fact that

this sub-section begins with a *non obstante* clause and it provides that notwithstanding anything contained in any other law for the time being in force, the provision of Limitation Act will not come to the rescue of the plaintiff because the period within which recovery can be effected from a consumer by a licensee stands specifically spelled out in sub-section(2) and this is by by passing any other provision which may be contained in any other law governing limitation.

12. Incidentally, the Electricity Act, 2003 is a Special Act. This Court is of the considered view that a perusal of the provisions of sub-section (2) of Section 56 of the Electricity Act leave no room for doubt that a suit for recovery of an amount which is recoverable under the provisions of Section 56 of the Electricity Act, 2003 has to be instituted within a period of two years from the date when such sum became first due. In the present case, as already mentioned hereinabove, in terms of the averments made in the plaint, the amount became first due when demand was issued on 05.02.2013, which was dis-honoured by the plaintiff. It is not in dispute that the suit has not been filed within the period of two years as from the date when the amount became first due. Now, the Court will refer to the provisions of sub-section (2) of Section 56. The subsequent part of this sub-section further provides that the sum which is due under Section 56 of the Electricity Act, 2003, can be recovered after two years as from the date when such sum became first due, provided: (a) such sum has been shown continuously as recoverable as arrear of charges for electricity supplied ; and (b) the licensee shall not cut off the supply of the electricity. A perusal of the plaint demonstrates that these conditions as are spelled out in sub-section (2) of Section 56 of the Electricity Act, 2003 are not pleaded therein. This Court has no hesitation in holding that these two eventualities, i.e., “(a) such sum has been shown continuously as recoverable as arrear of charges for electricity supplied; and (b) licensee shall not cut off the supply of the electricity” are not independent conditions and

both are inter-dependent, meaning thereby that recovery after two years is permissible only where the licensee has shown the sum due as recoverable as arrears of charges for electricity supplied and further the licensee has not cut off the supply of electricity.

13. Reverting to the averments made in the plaint, it has been specifically pleaded in Para-13 of the plaint that the electricity connection of defendant No. 1 was temporarily disconnected on 07.03.2013 and permanently disconnected on 12.09.2013. Besides this, there is an averment made in Para-13 that the cause of action for filing the suit has arisen to the plaintiff firstly on 05.02.2013 when the bill was raised for the month of January, 2013 and thereafter on the dates of issuance of periodical bills, as mentioned hereinabove, but there is no such detail mentioned thereof in the entire plaint.

14. Therefore, from what has been narrated hereinabove, this Court is of the considered view that as the averments made in the plaint, *prima facie*, demonstrate that the suit is hit by the provisions of Section 56(2) of the Electricity Act, having been filed beyond the period prescribed therein and further taking into consideration the law laid down by the Hon'ble Supreme Court that the plaint can be rejected on the ground of limitation only, where the suit appears from the statement in the plaint to barred by any law, the present application deserves to be allowed and the plaint is liable to be rejected, as being hit by the provisions of Section 56(2) of the Electricity Act, 2003.

15. Before parting, the Court would like to refer to the judgment relied upon by learned counsel for the non-applicant/plaintiff in *Bihar State Electricity Board's case (supra)*, in which, all that the Hon'ble Supreme Court has been pleased to observe is that disconnection of supply of electricity is a special power given to the supplier under the provisions of Section 56 of the Electricity Act, 2003 and this is in addition to the normal mode of recovery in

instituting a suit. With regard to the said proposition of law, there is no quarrel, because Section 56 does provide the special power to the licensee to disconnect the supply of electricity in case of default by a consumer, in terms as they stand spelled out in Section 56(1) of the Act, i.e., after giving clear notice of fifteen days. However, fact of the matter still remains that as far as recovery of amount due is concerned, for the same, the period by instituting a suit for recovery is two years, as is spelled out in Section 56(2) of the Electricity Act. This judgment being relied upon by learned counsel for the plaintiff/non-applicant has no applicability in the background of the issue which is involved in the adjudication of the present application.

16. In view of the discussions made hereinabove, the application is allowed and the plaint is rejected, being hit by the provisions of Section 56(2) of the Electricity Act, 2003.

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

Between:-

SH. RAJESH KUMAR, S/O SH. SANT RAM, R/O VILLAGE HAMBAR, PO DEOTH, TEHSIL SADAR, DISTT. BILASPUR, H.P.

....APPELLANT.

(BY MR. JAGAT PAUL, ADVOCATE)

AND

1. RAM CHANDER, S/O SH. SANT RAM, R/O VILLAGE HAMBAR, PO DEOTH, TEHSIL SADAR, DISTT. BILASPUR, H.P.

2. SH. BABU RAM, S/O SH. KALA RAM, R/O SAYAR, PO DOBHA, TEHSIL SADAR, DISTT. BILASPUR, HP.

3. THE NEW INDIA ASSURANCE COMPANY LTD., BRANCH OFFICE MAIN MARKET BILASPUR, DISTT. BILASPUR, HP, THROUGH ITS BRANCH MANAGER.

...RESPONDENTS.

(NONE FOR RESPONDENTS NO.1 AND 2.
MR. B.M. CHAUHAN, SENIOR ADVOCATE WITH MR. M.S. KATOCH, ADVOCATE, FOR RESPONDENT NO.3)

FIRST APPEAL FROM ORDER
No. 410 OF 2010
Reserved on: 05.09.2022
Decided on:09.09.2022

Motor Accident Claims Tribunal- Motor Vehicle Act, 1988- Section 166- Appellant was fastened with the liability to pay the awarded amount of compensation- Claimant was engaged as a labourer for loading and unloading construction material in the vehicle- Due to rash and negligent driving of the driver accident occurred and the claimant suffered injuries- Compensation of Rs. 3,94,000/- along with interest 7.5% per annum awarded- Held- Claimant was none but the third party and thus the insurer was liable to indemnify the insured- Appeal allowed. (Para 15)

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

J U D G M E N T

The instant appeal has been preferred by the insured against the Award dated 01.06.2010 passed by the learned Motor Accident Claims Tribunal, Bilaspur, (for short "the Tribunal"), in M.A.C.No.51 of 2007, whereby appellant has been fastened with liability to pay the awarded amount of compensation along with interest to respondent No.1 herein (for short "the claimant").

2. Claimant had filed a claim petition under Section 166 of the Motor Vehicles Act (for short, 'the Act') for grant of compensation against appellant (insured/owner), respondent No.2 (for short "driver") and respondent No.3 (for short "insurer") on the premise that the claimant had suffered injuries and permanent disablement as result of motor vehicle accident involving tractor bearing No. HP-69-0628. The case of the claimant was that

on 02.10.2006, he was engaged as labourer by the owner and driver for loading and unloading the goods i.e. construction material in the trolley attached to the aforesaid tractor. It was further alleged that, while unloading the tractor at village Nand, Tehsil Nalagarh, District Solan, the tractor turned turtle due to rash and negligent driving of driver and resulted in causing injuries and permanent disablement to the claimant.

3. The owner and driver had submitted their joint reply. The rash and negligent driving on the part of driver was denied. It was submitted that at the time of accident the tractor was parked for unloading the mud. Claimant was unloading mud and due to his own negligence, he skidded and fell down and sustained injuries. It was further submitted that the vehicle/tractor was insured with the insurer and the liability, if any, was to be borne by the insurer.

4. The insurer contested the petition by raising preliminary objections, with respect to breach of terms and conditions of the insurance policy. Allegation of collusion between the claimants and the owner was also levelled. As regards violation of terms of policy, it was submitted that the owner did not have valid registration certificate as well as policy of insurance for the tractor in question. It was further submitted that the driver did not possess valid and effective driving licence. The claimant was also termed to be the unauthorized/gratuitous passenger. On merits, the averments made in the claim petition were denied in generality.

5. Learned tribunal had framed the following issues:-

1. *Whether the petitioner had sustained injuries on 2.10.2006, at village Nand, Tehsil Ram Shehar, Police Station and District Solan, H.P. falling within the jurisdiction of Police Station Ram Shehar, District Solan, H.P., due to rash and negligent driving of Tractor No. HP-69-0628 being driven by respondent No.2, as alleged?OPP.*

2. *If issue No.1 supra is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom? OPP*
3. *Whether the respondent No.2 was not having a valid and effective driving licence at the relevant time, as alleged?OPR-3.*
4. *Whether the petitioner was travelling in the offending tractor as gratuitous passenger at the relevant time?OPR-3.*
5. *Whether the offending tractor was being plied without relevant documents in contravention of provisions of Motor Vehicles Act?OPR-3*
6. *Relief.*

Issues No. 1, 2 and 4 were decided in affirmative, whereas issues No.3 and 5 were decided in negative. The claim petition was allowed in favour of the claimant. An Award of Rs. 3,94,000/- along with interest @7.5% per annum from the date of filing of petition till the date of deposit was passed. The liability to pay the awarded amount was fastened on the owner. Hence, the owner is in appeal.

6. I have heard Mr. Jagat Paul, Advocate, for the appellant/owner and Mr. B.M. Chauhan, Senior Advocate, for the insurer and have also gone through the entire record carefully.

7. The owner has assailed the impugned award on the ground that the liability to pay awarded amount has been wrongly fastened against him. As per him, the vehicle/tractor was duly insured with the insurer. The findings returned by the learned Tribunal to the effect that the claimant was not proved to be an employee of the owner at the time of accident have been assailed as perverse and against the material on record.

8. Learned Tribunal attributed the injuries suffered by claimant to rash and negligent driving of driver while driving tractor number HP-69-0628. Such findings were based by placing reliance on the statement of claimant and PW-3 Shri Lakshman Singh.

9. The Tribunal held that there was nothing in the statements of claimant and his witness that the claimant was employee of the owner. Further, the Tribunal was also impressed with that part of the statement of claimant where he stated that he was not being paid salary by his brother. It further held that since no passenger was permissible on tractor, therefore, claimant was a gratuitous passenger and, on such grounds, absolved the insurer from indemnifying the insured/owner.

10. On consideration of entire material placed on record, the issue whether claimant was employee of owner or was gratuitous passenger will take back seat and the most material aspect would be to ascertain and find the mode and manner in which accident took place and thereafter the necessary legal implications thereof.

11. Referring to the pleadings, it was clearly spelt out in the claim petition that the accident had taken place when tractor trolley was being unloaded at village Nand. This fact was not denied by owner and driver. They only stated that it was not on account of rash and negligent driving of the driver, but was due to the negligence of the claimant himself. Insurer on its part had not made any specific averment in this respect. In evidence, claimant examined himself as his own witness (PW2). He specifically stated on oath that on 02.10.2006, when he was opening the bolt applied on the tractor trolley for the purpose of unloading the same, the driver rashly reversed the vehicle, as a result of which, the claimant along with the vehicle rolled down to the extent of about 20-25 feet. In cross-examination by the owner and driver, the mode and manner of accident described by the claimant was not seriously disputed. In cross-examination, it was suggested to him that he was not working as labourer on the tractor and was in fact driving the tractor and since he was not having driving licence he was being wrongly shown as labourer.

12. Similarly, the statement of PW-2 as to the manner of accident, was not disputed by the insurer while cross-examining this witness. Rather it was suggested to him that when the tractor was being unloaded it was parked on the road.

13. PW-3 Shri Laxmi Singh was also examined as an eye witness. He deposed that the driver of the tractor was reversing the tractor for unloading its trolley and the claimant was opening its bolt. The tractor rolled down from the road. Claimant was also pushed as a result thereof and he also rolled down along with the tractor. The cause of accident was attributed to the negligence of driver. Again, from the cross-examination of this witness nothing was elicited so as to discredit him regarding his version of accident.

14. None for the respondents entered the witness box.

15. From the aforesaid evidence, it was clearly established that the claimant had suffered injuries on his person when the tractor was in the process of unloading the trolley and the claimant was engaged for the purpose of unloading. It has been duly proved that the claimant was opening the bolt at the relevant time. The tractor trolley along with the claimant rolled down from the road was also established. How the claimant himself was negligent has not been proved on record. The claimant as PW-2 and Shri Laxmi Singh as PW-3 have stated that the driver was rash and negligent in his act. Even otherwise, the Tribunal has held the accident to have resulted due to rash and negligent driving of the driver and none has challenged such findings. In such circumstances, the fact proved was that the accident had taken place when the tractor was in the process of unloading its trolley and claimant was engaged in the opening of the bolt of the trolley to facilitate unloading. The insurer cannot avoid its liability in such circumstances. The claimant in the given circumstances was none but the third party and thus the insurer was liable to indemnify the insured.

16. Thus, since the accident had not taken place when the tractor was in transit with claimant on board, the plea of gratuitous passenger in respect of claimant is rendered meaningless and rather redundant.

17 Similarly whether claimant was employee of the owner could not be taken as determinative factor for absolving the insurer from its liability under the policy for the reasons that once the claimant qualified for compensation as third party the insurer's liability could not be denied.

18. In alternative, the finding of the Tribunal regarding failure of claimant to prove himself as employee of owner needs examination in light of the material on record as under.

19. In the petition filed by the claimant, it was specifically averred in para-10 that the claimant was travelling in the tractor as labourer for unloading and loading of the mud. Again, in para-23, it was mentioned that on the ill-fated day, the claimant was engaged as labourer by the owner for loading and unloading the goods i.e. sand, grit and mud etc. In reply filed by respondents No.1 and 2, it was admitted that claimant was unloading the tractor trolley. There was no denial on their part to the fact that the claimant was engaged by them. The insurer except alleging that the claimant was travelling as an unauthorized traveler in the tractor and was a gratuitous passenger, had not specifically replied the averments regarding engagement of claimant by the owner and driver for the purpose of loading and unloading the tractor trolley on the date of accident. There also was no specific issue framed on this fact by the learned Tribunal.

20. As PW-2 claimant had stated in his examination-in-chief that he was a labourer. He further stated that he used to earn Rs. 5000/- per month by working as labourer with tractor. It was also the specific deposition of claimant that on 2.10.2006 he was opening the bolt of tractor trolley for the purpose of unloading. In cross-examination on behalf of owner and driver it

was suggested to this witness that he was driver of the tractor and not the labourer. His status as employee was not denied.

21 In cross examination by the insurer, the claimant had stated that owner was his brother and was not paying any salary to him.

22 On analysis of material as extracted above, the finding that claimant was not proved as employee of the owner cannot be sustained for the reason *firstly* that the Tribunal had failed to consider that respondents had nowhere denied the averments made in paragraphs 10 and 23 of the petitions, as noticed above, *secondly* the statement of claimant was not appreciated as a whole and *lastly* it had erred by misunderstanding the meaning of employment in the context of the facts of the case. In private employment like the one in the instant case, it is invariably of casual nature and the payments are often made by the hirer of vehicle and the statements of the witnesses required appreciation in such perspective. Such employments cannot be proved by appointment letters as there would be none. It can be inferred from the facts and circumstances of each case and in the instant case the casual employment of claimant on tractor trolley for unloading was duly proved. There was no reason for claimant to be unloading the tractor trolley without consideration. For such reason also the insurer could not be absolved of its liability especially when extra premium of Rs. 25/- was received by it for covering one employee.

23. Learned counsel for the insurer placed reliance upon judgment passed by the Hon'ble Supreme Court in ***Oriental Insurance Co. Ltd. vs. Brij Mohan & Others, (2007)7 SCC 56,*** however, due to difference in fact situation, the insurer cannot derive any help from such judgment. In the said case, the trolley was not insured and only tractor was insured. It was in such background that the judgment was passed in peculiar facts of the case. Similarly, reliance placed on ***United India Insurance Co. Ltd. vs. Serjerao and others, 2008(1) ACJ 254*** and also on ***New India Assurance Co. Ltd. v.***

Durgi Devi & Others, 2009 ACJ 1851, on behalf of the insurer is misplaced only for the reason that the judgments in the said cases were passed in their own peculiar facts. There is no dispute in the instant case that the trolley was insured.

24. Perusal of Insurance Policy Ex. RA reveals that the insurer had received Rs.25/- as additional premium for an employee. Learned counsel for the insurer further stated that such premium covered only the driver of the tractor. Such contention also deserves to be rejected. The proviso appended to sub section (1) to Section 147 of the Motor Vehicles Act reads as under:-

> *"Provided that a policy shall not be required—*
> *(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—*
> *(a) engaged in driving the vehicle, or*
> *(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or*
> *(c) if it is a goods carriage, being carried in the vehicle, or*
> *(ii) to cover any contractual liability."*

As per the aforesaid provision, the driver was not required to be specially insured by paying extra premium and was covered under the statutory requirement of the aforesaid provision.

25. In view of the above discussion, the appeal deserves to be allowed and the impugned award dated 01.06.2010 passed by the learned Motor Accident Claims Tribunal, Bilaspur, H.P. in M.A.C. No. 51 of 2007, is modified only to the extent that the liability to pay the awarded amount alongwith interest thereon shall be borne by the insurer and not by the owner. The appeal is accordingly disposed of, so also, the pending applications, if any.

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

Between:-

1. BABU RAM, S/O SH. JALAM SINGH, R/O VILLAGE BAGNA, P.O. MASHOBRA, TEHSIL & DISTT. SHIMLA, H.P.

2. BALBIR SINGH, S/O SH. HIRA SINGH, R/O VILLAGE PAN-KUPHER, P.O. TAPROLI, TEHSIL RAJGARH, DISTRICT SIRMAUR, H.P.

3. CHANDER PARKASH, S/O SH. SHANTI PARSAD, R/O VILLAGE FATHEPUR, P.O. MAJARA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

4. DHAN RAJ, S/O SH. GIAN CHAND, R/O VILLAGE SIDHPUR, P.O. MAJRA, TEHSIL DHARAMSHALA, DISTT. KANGRA, H.P.

5. GuRVESH KUMAR, S/O SH. GEETA RAM, R/O VILLAGE LATHER, P.O. BANTHAL, TEHSIL KARSOG, DISTRICT MANDI, H.P.

6. HITENDER, S/O SH. LAKSHMAN SINGH, R/O H.N. 119, WARD NO. -2, P.O., TEHSIL & DISTRICT HAMIRPUR, H.P.

7. MEENA RAM, S/O SH. GOVIND SINGH, R/O VILLAGE NAGRA, P.O. CHURAG, TEHSIL KARSOG, DISTT. MANDI, H.P.

8. MANGAL SINGH, S/O SH. BALBIR SINGH, R/O VILLAGE SHOUN, P.O. JALARI, TEHSIL NADAUN, DISTT. HAMIRPUR, H.P.

9. NARESH KUMAR, S/O SH. RAJENDER, R/O VILLAGE BASA, P.O. NAGROTA SOORIYANA, TEHSIL JWALI, DISTT. KANGRA, H.P.

10. NAND LAL, S/O SH. DAYA RAM, R/O VILLAGE DOCHI, P.O. BIOLIYA, TEHSIL & DISTT. SHIMLA, H.P.

11. NARENDER KUMAR, S/O SH. PARAM DEV, R/O VILLAGE SAMRAHAN, TEHSIL & DISTT. MANDI, H.P.

12. PREM SINGH, S/O SH. MANI RAM, R/O VILLAGE SAIRI, P.O. BANGLO, TEHSIL KARSOG, DISTT. MANDI, H.P.

13. PURUSHOTAM, S/O SH. BEMBARAM, R/O VILLAGE MOHALLA, P.O. SULTANPUR, TEHSIL & DISTRICT CHAMBA, H.P.

14. RAMESH CHAND, S/O SH. AMAR SINGH, R/O VILLAGE CHHORAN, P.O. & TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

15. RANJIT SINGH, S/O SH. TARA CHAND, R/O VILLAGE BARI, P.O. GHUMANU, TEHSIL & DISTRICT MANDI, H.P. (SINCE DECEASED) THROUGH LRs.:

1(A) SMT. MEENA DEVI (WIDOW OF THE DECEASED), 39 YEARS OLD.

1(B) PIYUSH THAKUR (SON) 8 YEARS OLD MINOR.

1(C) ANJALI THAKUR AGED ABOUT 13 YEARS OLD MINOR.

1(D) YAMNI THAKUR, DAUGHTER 19 YEARS OLD (MAJOR NOW).

(RESPONDENTS NO. 15 1(B) AND 15 1(C) ARE REPRESENTED THROUGH THEIR MOTHER NATURAL GUARDIAN SMT. MEENA DEVI, WIFE OF LATE SH. RANJIT SINGH).

16. RAJINDER SINGH, S/O SH. AMAR SINGH, R/O VILLAGE DOL, P.O. LAHRU, TEHSIL JAISINGHPUR, DISTRICT KANGRA, H.P.

17. TARA DUTT, S/O SH. CHET RAM, R/O VILLAGE & P.O. BATAL, TEHSIL ARKI, DISTRICT SOLAN, H.P.

18. VIKRAM SINGH, S/O SH. LEKH RAM, R/O VILLAGE KARCHAYALI, P.O. BHUMTI, TEHSIL ARKI, DISTRICT SOLAN, H.P.

19. VINOD KUMAR, S/O SH. BALWANT SINGH, R/O VILLAGE BIANA, P.O. KATHARGRAH, TEHSIL INDORA, DISTRICT KANGRA, H.P.

20. YUDHVIR SINGH, S/O SH. KASHMIR SINGH, R/O VILLAGE BADHERA, TEHSIL HAROLI, DISTRICT UNA, H.P.

21. SUNIL KUMAR, S/O SH. JAGMOHAN THAKUR, R/O VILLAGE KOTLI, P.O. SHAYA CHABNOWN, TEHSIL RAJGARH, DISTRICT SIRMAUR, H.P.

22. BHUPINDER SINGH, S/O LATE SH. SUNDAR SINGH, R/O VILLAGE DWADE-KI-SAIR, P.O. BHALLAN, TEHSIL PACHAD, DISTRICT SIRMAUR, H.P.

...PETITIONERS

(BY SHRI RAJIV JIWAN, SENIOR ADVOCATE, WITH M/S Y.K. THAKUR & HITENDER VERMA, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY, SOCIAL JUSTICE & EMPOWERMENT, H.P. CIVIL SECRETARIAT, SHIMLA EAST, CHHOTA SHIMLA-171002.
2. THE DIRECTOR, SOCIAL JUSTICE & EMPOWERMENT, SDA COMPLEX, SHIMLA-171009.

3. UNION OF INDIA THROUGH MINISTRY OF HUMAN RESOURCES (WOMEN AND CHILD DEVELOPMENT), SHASTRI BHAWAN, NEW DELHI.

4. THE PRINCIPAL SECRETARY (FINANCE), H.P. CIVIL SECRETARIAT, SHIMLA EAST, CHHOTA SHIMLA-171002.

5. THE PRINCIPAL SECRETARY (PERSONNEL), H.P. CIVIL SECRETARIAT, SHIMLA EAST, CHHOTA SHIMLA-171002.

...RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT DHUMAL,

DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR R-1, R-2, R-4 & R-5.

MR. LOKENDER PAUL THAKUR, SENIOR PANEL COUNSEL, FOR R-3).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 513 of 2019
Decided on: 25.08.2022

Constitution of India, 1950- Article 226- Regularization- Petitioners were engaged as daily wage drivers in the office of Child Development Project Officer- Held- Appointment of petitioners on daily wages was as per the Recruitment and Promotion Rules- Recruitment was against sanctioned posts- Petitioners are entitled to be regularized from the initial date of appointment as per rules- Petition allowed. (Para 8, 10)

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

O R D E R

By way of this petition, the petitioners have, *inter alia,* prayed for the following relief:-

> *"(i) That the respondents hereinabove except respondent No. 3, may please be directed by way of writ or order to regularize the petitioners from their initial appointments as per Annexure P-4/A and P-5; and entitled for all consequential benefits, by ordering them (to respondents No. 4 and 5) to allow the Annexure P-5 and P-9 and accept the same approved proposal as sent by the respondents No. 1 and 2 to them, vide Annexure P-9; and as a result thereof set aside the Annexure P-6, 6/A & Annexure P-10 being null and void."*

2. As the controversy involved in the present petition is in a very narrow compass, therefore, the Court is not going in detail with regard to the averments as are contained in the writ petition.

3. Facts necessary for the adjudication of the present petition can be summarized as under:-

The petitioners herein were recruited as Drivers in the office of Child Development Project Officer in the respective Districts under the Integrated Child Development Services Projects on daily wage basis. Services of the petitioners were subsequently regularized as such in the said offices. The dates of their engagement on daily wage basis and subsequent regularizations are as under:-

Sr. No. and name of the applicant	Date of appointment on daily wages as Driver and place of posting	Date of regularization in the Office of
1. Babu Ram	29.12.1999 in the office of CDPO Sunni, Tehsil and District Shimla in ICDS Project	19.09.2008 in the same office
2. Sh. Balbir Singh	04.01.2000 in the office of CDPO at Nahan under ICDS Project	20.09.2008 in the same office
3. Sh. Chader Parkash	01.01.2000 in the office of CDPO, Shillai under ICDS Project.	01.10.2008 in the same office
4. Sh. Dhani Raj	14.12.1999 in the office of CDPO, Shillai under ICDS Project	29.9.2008 in the same office.
5. Sh. Gurvesh Kumar	3.1.2000 in the office of Directorate SJ & E	1.10.2008
6. Hitender	30.11.1999 in the office of CDPO, Sujanpur under ICDS Project	29.9.2008 in the office of DPO, Nadon, District Kangra (H.P.)

7. Sh. Meena Ram	8.8.1998 in the office of CDPO, Karsog under ICDS Project	29.09.2008 in the same office.
8. Sh. Mangal Singh	01.12.1999 in the office of CDPO, Nadon under ICDS Project.	29.9.2008 in the same office.
9. Sh. Naresh Kumar	17.12.1999 in the office of CDPO, Nagrota Soorinya under ICDS Project	25.09.2008 in the same office.
10. Sh. Nand Lal	30.12.1999 in the office of CDPO Rohru under ICDS Project	19.09.2008 in the office of Directorate of SJ & E
11. Sh. Narender Kumar	3.12.1998 in the office of Directorate SJ & E, Shimla. ICDS Project.	19.09.2008 in the same office.
12. Sh. Prem Singh	14.03.2000 in the office of CDPO, Solan, under ICDS Project.	29.09.2008 in the same office.
13. Sh. Purshotam	13.07.1999 in the office of CDPO, Saloni under ICDS Project.	19.09.2008 in the office of DPO Chamba.
14. Sh. Ramesh Chand	19.11.1999 in the office of CDPO, Chontra under ICDS Project.	19.9.2008 in the same office.
15. Sh. Ranjit Singh	17.11.1999 in the office of CDPO, Darang, under ICDS Project.	19.9.2008 in the same office.
16. Sh. Rajinder Singh	30.12.1999 in the office of Directorate SJ & E, Shimla.	1.10.2008 in the O/o CDPO Sujanpur.
17. Sh. Tara Dutt	21.1.1999 in the office of CDPO, Solan under ICDS Project.	20.10.2008 in the same office.
18. Sh. Vikram	29.12.1999 in the office of	19.9.2008 in the same office.

Singh	CDPO, Arki under ICDS Project.	
19. Sh. Vinod Kumar	28.5.1999 in the O/o CDPO Indora.	29.9.2008 in the same office.
20. Sh. Yudhvir Singh	1.12.1999 in the O/o CDPO	30.9.2008 in the same office of CDPO Kangra.
21. Sh. Sunil	28.10.2000 in the office of CDPO, Rampur, Tehsil & Distt. Shimla, H.P.	30.11.2009 in the same office.
22. Sh. Bhupinder	28.10.2000, CDPO Office, Recong-Peo, Distt. Kinnaur, H.P.	25.11.2009

4. The names of the petitioners for appointment were sponsored through the respective Employment Exchanges, on the basis of which, they appeared for interview before the Selection Committee. This is evident from the interview letters which were issued to the petitioners, copies whereof have been placed on record by the petitioners alongwith their affidavits, which are available on record from Page No. 87 onwards of the paper-book. The order of initial engagement of one of the petitioners on daily wage basis is also on record as Annexure P-12, dated 24th December, 1999, perusal whereof demonstrates that the petitioner was offered appointment on daily wage basis on the recommendations of the Selection Committee, which was duly constituted for the said purpose. The background in which these appointments were made can be made out from para-1 of the preliminary submissions in general and para-8 in particular of the reply which has been filed to the writ petition by respondents No. 1, 2, 4 & 5. It is mentioned in the preliminary submissions that the Department of Social Justice and Empowerment was implementing various Schemes for weaker sections of the Society. For effective implementation of the said Schemes, offices at District, Tehsil and Block level have been set up. For the children and women, the

Department was implementing an Integrated Child Development Services Programme, which was a Centrally Sponsored Scheme. Under the said Scheme, at Block level, offices of Child Development Project Officers and at District level, District Cells were set up throughout the State. Under the Scheme, besides other functionaries, the Drivers were also posted to ply vehicles with a view to ensure regular monitoring of the Scheme. Staff under ICDS Programme was provided in accordance with the norms/guidelines formulated by the Government of India. For the State of Himachal Pradesh, the Government of India sanctioned 81 posts of Drivers for ICDS Projects and District Cells. In the year 1998, 29 posts of Drivers were vacant. To fill up these posts, the matter was sent by respondent No. 2 to respondent No. 1 for the purpose of approval. As only 24 vehicles were supplied instead of 29 by the UNICEF to the State, therefore, the revised proposal was sent on 05.12.1998 in this regard. After necessary approval was granted, the State Finance Department conveyed the approval of the State to fill up 24 posts of Drivers in different ICDS Projects/District Cells on daily wage basis in terms of letter dated 30.12.1998 (Annexure P-3). Thereafter, the respondent No. 2 started the process to fill up the posts. For filling up the posts, it was decided that process be completed at District level, where the vacancies existed. The Selection Committee consisting of: (1) Additional District Magistrate-Chairman; (2) District Programme Officer concerned-Member; (3) Child Development Project Officer-Member; and (4) Technical Officer of the Transport of the Transport Department/PWD Department-Member was constituted. The Selection Committee completed the selection process and appointed the petitioners. The case of the petitioners is that the entire staff in the ICDS Scheme was appointed from the initial date of recruitment of theirs on regular basis, except the Drivers. Accordingly, as per them, once their services were regularized, they at least were entitled for regularization from the date of their initial appointment, more so, when their initial appointment was

in accordance with the Recruitment and Promotion Rules. This is the precise line of argument of learned Senior Counsel for the petitioners.

5. Though the State has not disputed the fact that the initial recruitment of the Drivers on daily wage basis was as per the Recruitment and Promotion Rules, but learned Additional Advocate General by placing reliance upon the documents appended with the reply has submitted that the petitioners were not kept in dark and the communications, in terms whereof they were invited for interview, specifically contained therein that the posts were being offered on daily wage basis only. The petitioners participated in the process knowing fully well that the posts were being offered on daily wage basis only. Not only this, after their participating in the process of selection and their names being recommended, even in the appointment letters, it was made clear that the offer of appointment was being made on daily wage basis only and this offer of appointment on daily wage basis was accepted by the petitioners without any protest. Thus, according to the learned Additional Advocate General, filing of the present petition is nothing but an abuse of the process of law, as once services of the petitioners stood regularized, now they have taken a chance by filing the present petition and are seeking their regularization from the initial dates of their appointment. Learned Additional Advocate General submitted that the petition is barred both on account of delays and latches and further the petitioners are otherwise estopped by their own acts and omissions from filing and maintaining the present petition and from seeking the reliefs sought therein.

6. I have heard learned counsel for the parties and have also perused the pleadings as well as the documents appended therewith.

7. It is not in dispute that the appointment of the petitioners on daily wage basis was as per the Recruitment and Promotion Rules. The relevant Recruitment and Promotion Rules which were governing the field at the time when the petitioners were appointed as Drivers on daily wage basis

are appended with the petition as Annexure P-17. The same are dated 09.01.1997. There is no dispute that the petitioners were possessing the requisite qualification as was laid down in the Recruitment and Promotion Rules and their selection was made by the Selection Committee which was so constituted by the employer in terms of Rule-15 thereof. There is not much dispute with regard to the fact that the recruitment of the petitioners, though on daily wage basis, was against duly sanctioned posts and the petitioners were appointed to the posts in question, after their names were sponsored by the Employment Exchanges. Thus, here is a case where the petitioners were initially appointed on daily wage basis by following the procedure laid down in the Recruitment and Promotion Rules and later on, their services have been regularized by the State. This regularization was without any break etc. is also not in dispute.

8. This Court is of the considered view that as the appointment of the petitioners on daily wage basis was by following the procedure prescribed in the Recruitment and Promotion Rules and further as they were appointed on sanctioned posts, therefore, after their services were regularized against the said posts, they are entitled for the relief of regularization from the initial date of appointment in terms of the law laid down by the Hon'ble Constitutional Bench of the Hon'ble Supreme Court in *Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra* (1990) 2 SCC 715), in which, the Hon'ble Supreme Court, *inter alia*, has been pleased to lay down the following principles:-

> *"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.*
>
> *The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.*

> *(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.*
>
> *…… …… …… ….”*

One of the principles which has been laid down by the Hon'ble Supreme Court is that if the initial appointment of an incumbent is not made by following the procedure laid down by the rules, but the appointee continues in the post uninterruptedly till regularization of his service in accordance with the rules, the period of officiating service will be counted.The case of the petitioners is at a better footing than what has been stated by the Hon'ble Supreme Court. In the present case, even the initial appointment of the petitioners was in terms of the procedure laid down by the Recruitment and Promotion Rules, though on daily wage basis. Thereafter, they continued to serve against the posts in question uninterruptedly till regularization of their services in accordance with the Recruitment and Promotion Rules. In these circumstances, the period of daily wage service has to be counted for all intents and purposes and the petitioners have to be treated in regular service of the employer as from the dates of their initial appointment on daily wage basis.

9. At this stage, it is also necessary to refer to another judgment of the Hon'ble Supreme Court in *State of W.B. and others Vs. Aghore Nath Dey and others* (1993) 3 Supreme Court Cases 371. In the said judgment, in paras-20 to 25, the Hon'ble Supreme Court while dealing with conclusions (A) and (B) of the Constitutional Bench's judgment in Direct Recruit's case *(supra)* has held that conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the Rules. In paragraph-25, the Hon'ble Supreme Court has been pleased to hold as under:-

"25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to re-councile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not-being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on

> *account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A).”*

10. Therefore, a careful perusal of the law laid down by the Hon’ble Supreme Court in *Aghore Nath Dey’s case (supra)* demonstrates that while dealing with conclusions (A) and (B) of the Constitutional Bench judgment in *Direct Recruit’s case (supra),* the Hon’ble Supreme Court has reiterated the principle that even in those cases where though initial recruitment made on *ad hoc* basis against existing vacancies as per Rules suffers from any deficiency, but subsequently said deficiency is cured at the time of regularization, the appointee is entitled for regularization from the date of initial appointment. This Court reiterates that in the present case, there was no such deficiency and the petitioners were recruited on daily wage basis by following the procedure prescribed under the Recruitment and Promotion Rules and this was followed by regularization against the posts they were serving.

11. Accordingly, in view of the discussions held hereinabove, the petition is allowed and the petitioners are held entitled for regularization from the dates of their initial appointment. The consequences of the judgment shall be that the petitioners shall get seniority as Drivers from the initial dates of their appointment, with all consequential benefits, including pension rights, if eligible. However, monetary benefits, if any, shall be notional as from the date of their initial recruitment up to the date of actual regularization. Petition

stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:-

SH. GEETA RAM, S/O LATE BHARAT SINGH, R/O VILLAGE DHAR-CHULRIYA, P.O. DADAHU, TEHSIL DADAHU, DISTRICT SIRMOUR, H.P.

...PETITIONER

(BY SHRI NISHANT KHIDTTA, ADVOCATE, VICE MR. V.D. KHIDTTA, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (JAL SHAKTI VIBHAG) TO THE GOVT. OF H.P. SHIMLA-2.

2. ENGINEER-IN-CHIEF (JAL SHAKTI VIBHAG), U.S. CLUB, SHIMLA-1.

3. SUPERINTENDING ENGINEER (JAL SHAKTI CIRCLE), NAHAN, DISTRICT SIRMOUR, H.P.

4. THE EXECUTIVE ENGINEER, JAL SHAKTI DIVISION, NAHAN, DISTRICT SIRMOUR, H.P.

....RESPONDENTS

(M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 1838 of 2022
Decided on: 26.08.2022

Constitution of India, 1950- Article 226- **Central Civil Services (Classification, Control and Appeal) Rules, 1965**- Petitioner a Mason was not found fit to be retained in Government service as he furnished fake birth

certificate and accordingly major penalty of dismissal from service was proposed by the Disciplinary Authority- Held- petitioner was not convicted on a criminal charge by any Court of law therefore, procedure as envisaged under Rule 19 of the CCS (CCA) Rules could not have been adopted for initiating disciplinary proceedings against the petitioner on the ground of conviction- Petition allowed- Order in terms whereof the petitioner was dismissed is quashed and set aside. (Para 9, 10)

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 petitioner has prayed for quashing of office order dated 25.03.2022 (Annexure P-9) and for his reinstatement as Mason on regular basis with all consequential benefits.

2. Brief facts necessary for the adjudication of present petition are that the petitioner was initially engaged as a Mason in the respondent-Department on daily wage basis in the year 1988. After prolonged litigation, his services were ordered to be regularized on completion of ten years service by this Court in terms of judgment dated 30.07.2010, passed in CWP No. 2584 of 2008, titled as *Geeta Ram Vs. State of Himachal Pradesh and others.* Subsequent facts which are not necessary for the adjudication of the present petition are not being referred to. Vide Memorandum dated 17.03.2022 (Annexure P-7), a show causewas issued to the petitioner that as the petitioner stood convicted under Section 420 of the Indian Penal Code as per the inquiry report submitted vide letter dated 16.03.2022 by the Assistant Engineer -Jitender Thakur, who was the Inquiry Officer on a charge regarding submission of a fake birth certificate submitted by the petitioner at the time of his initial appointment in Jal Shakti Vibhag, therefore, the disciplinary authority proposed to award an appropriate penalty under Rule-19 of The Central Civil Services (Classification, Control and Appeal) Rules, 1965 taking into account the gravity of the charges**.** It was further stated in the

Memorandum that as on perusal of the inquiry report, the Disciplinary Authority has provisionally come to the conclusion that the petitioner was not a fit person to be retained in Government service and the gravity of the charge warrants the imposition of a major penalty and the Disciplinary Authority proposed to impose upon the petitioner the penalty of dismissal from service, therefore, time was granted to the petitioner to show cause as to why the same be not done.

3. This Memorandum is replied to by the petitioner in terms of Annexure P-8, in which, while denying the allegations mentioned in the Memorandum, it was further submitted that one Dinesh Kumar had enmity with him on account of a land dispute and Dinesh Kumar had lodged a false complaint against him with the Police. It was mentioned in the reply by the petitioner that he had not been convicted by any Court of law and that a false complaint stood filed against him under Section 420 of the Indian Penal Code by Dinesh Kumar.

4. Thereafter, vide office order dated 25.03.2022 (Annexure P-9), the petitioner was dismissed from service by the Disciplinary Authority in exercise of powers so conferred under the CCS(CCA) Rules, 1965 by holding that as the Disciplinary Authority was not satisfied with the reply that was filed by the petitioner to the Memorandum, therefore, the Disciplinary Authority in exercise of power conferred under Rule 12 of the CCS(CCA) Rules was dismissing the petitioner from service with immediate effect.

5. Feeling aggrieved, the petitioner has approached this Court.

6. Learned counsel for the petitioner has primarily argued that the impugned office order dated 25.03.2022 (Annexure P-9) is *per se void abinitio*, for the reason that invocation of provisions of Rule 19 of the CCS(CCA) Rules in the facts of the case of the petitioner was not called for and this extremely important aspect of the matter has not been gone into by the disciplinary authority while passing the impugned order. Learned counsel has further

argued that the petitioner was not convicted by any Court of law and as the impugned order has been passed on the incorrect notion that the petitioner stood convicted in a criminal case, the petition deserves to be allowed and the impugned order deserves to be quashed and set aside.

7. Learned Additional Advocate General has fairly stated that there appears to be merit in the contention of the petitioner, but he submits that as the impugned order is likely to be set aside on technical grounds, therefore, the same should not be construed as if a clean chit has been given by this Court to the petitioner and in case the Court is pleased to allow the writ petition, then the respondent-Department be given liberty to take appropriate action against the petitioner as per the CCS (CCA) Rules, 1965, if so advised.

8. I have heard learned counsel for the parties and have also gone through the documents appended therewith and the record which has been produced by the learned Additional Advocate General.

9. Rule-19 of the CCS(CCA) Rules, *inter alia*, provides that notwithstanding anything contained in Rules 14 to 18 of the CCS(CCA) Rules, where any penalty is imposed on a Government servant on the ground of conduct, which has led to his conviction on a criminal charge, the Disciplinary Authority may consider the circumstances of the case and make such orders thereon as it deems fit, provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause (i), i.e., the Clause which confers power upon the disciplinary authority to impose penalty on the basis of conviction on a criminal charge. In the present case, it is not in dispute that on the basis of a complaint which has been filed against the petitioner under Section 420 of the Indian Penal Code, till date he has not been convicted by any Court of law. That being the fact situation, the proceedings which were initiated against the petitioner by the Disciplinary Authority by exercising powers conferred under Rule-19 of the CCS(CCA)

Rules by way of issuance of Memorandum dated 17.03.2022 (Annexure P-7) were *per se* bad and the Office Order which was subsequently issued by the Disciplinary Authority on 25.03.2022 (Annexure P-9), in terms whereof, the petitioner has been dismissed from service is also *per se* bad and not sustainable in the eyes of law. The Court again reiterates that office order dated 25.03.2022 is bad in law for the reason that it has been passed by the disciplinary authority without appreciating that as the petitioner was not convicted on a criminal charge by any Court of law, therefore, the procedure, as is envisaged under Rule 19 of the CCS (CCA) Rules could not have been adopted for initiating disciplinary proceedings against the petitioner on the ground of conviction.

10. Accordingly, in view of what has been held hereinabove, this petition is allowed. Annexure P-9 dated 25.03.2022, in terms whereof, the petitioner was dismissed from service, is quashed and set aside. Consequences to ensue. As far as the prayer made by learned Additional Advocate General is concerned, all that this Court can observe is this that as the petition has been allowed on technical ground, the Disciplinary Authority thus has the right to proceed against the petitioner in accordance with law, if so advised, but taking into consideration the fact that the petitioner was to superannuate after five days as from the date when he was dismissed from service, the Court hopes and expects, as prayed for by learned counsel for the petitioner, in the peculiar facts of the case that the Disciplinary Authority shall take a sympathetic view in the matter. This is more so for the reason that the allegations which have been levelled against the petitioner have not yet been proved and further as per the petitioner, the allegations were levelled on account of enmity between him and the complainant. With these observations, the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:-

SHRI SUBHASH CHAND, SON OF SHRI CHUNI LAL, RESIDENT OF VILLAGE & POST OFFICE BANURI, TEHSIL PALAMPUR, DISTT. KANGRA (HP).

...PETITIONER

(BY SHRI CHANDRANARAYANA SINGH, ADVOCATE)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION, THROUGH ITS MANAGING DIRECTOR, H.P., SHIMLA-171003.

2. DIVISIONAL MANAGER, HRTC, DHARAMSHALA DIVISION, DISTRICT KANGRA (HP).

3. REGIONAL MANAGER, HRTC, PALAMPUR, DISTT. KANGRA, HP.

4. SHRI AVTAR SINGH (THE THEN WORKS MANAGER) HAMIRPUR, THROUGH ITS MANAGING DIRECTOR, HRTC, SHIMLA-171003.

5. SHRI O.P. BHARDWAJ (THE THEN AREA MANAGER) (INQUIRY OFFICER) HRTC, SHIMLA THROUGH ITS MANAGING DIRECTOR, HRTC, SHIMLA-171003.

...RESPONDENTS

(SHRI B. N. SHARMA, ADVOCATE, FOR R-1 TO R-3
NONE FOR R-4 & R-5)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.4160 of 2019
Decided on: 12.09.2022

Constitution of India, 1950- Article 226- **Central Civil Services (Classification, Control and Appeal) Rules, 1965**- Rule 14- Petitioner was charge sheeted- On enquiry the petitioner was not found fit to be retained in service- Held- The Disciplinary Authority after receipt of the inquiry report had

already made an opinion with regard to the punishment which was to be imposed upon the Government servant and as this vitiated the disciplinary proceedings, therefore, besides the said Show Cause Notice being bad in law, all subsequent actions taken by the Authorities, be it the imposition of penalty or the rejection of appeal against the penalty etc. are non est and void abinitio-Petition allowed. (Para 8)

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

J U D G M E N T

By way of this writ petition, the petitioner has primarily prayed for the following reliefs:-

> *"(I) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing Memo of Charge Sheet dated 5.8.1997 (Annexure P-1).*
> *(II) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing the order dated 19.1.2001 (Annexure P-3) in toto.*
> *(III) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing Office Order dated 25.5.2001 (Annexure P-5) with further directions to the respondents to reinstate the petitioner in service with all consequential benefits.*
> *(IV) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing Office Order dated 24.4.2012 (Annexure P-9) with further directions to the respondents to reinstate the petitioner in service with all consequential benefits.*
> *(V) That the respondent department be directed to reinstate the petitioner back in service and pay all the due and admissible salary, allowances, increments with upto date pay revisions, scale with 12% interest within a time bound period."*

2. Brief facts necessary for the adjudication of the present petition are that a charge-sheet was served upon the petitioner on 5th August, 1997

vide Annexure P-1, to show cause as to why disciplinary proceedings be not conducted against him on the basis of Article of Charges of misconduct appended with the said charge-sheet. The petitioner submitted his response thereto, but as the Disciplinary Authority was not satisfied with the same, and accordingly disciplinary inquiry was ordered and Inquiry Officer was appointed. Record demonstrates that after the Inquiry Officer forwarded his report to the Disciplinary Authority, the same was forwarded to the petitioner in terms of Annexure P-3, which reads as under:-

> *"SHOW CAUSE NOTICE*
>
> *Whereas Shri Subhash Chand-I driver was charge-sheetedUR 14 of the CCS (CC & A) Rules, 1965 vide Memorandum No. HRTC/BJN/EStt/PF-1369/4232 dated 5.8.97 by the Regional Manager, HRTC, Baijnath.*
>
> *And whereas an Enquiry Officer was appointed to enquire into the charges levelled against the said Shri Subhash Chand-I driver. The Enquiry Officer, has submitted his enquiry report dated 15.4.2000 (Copy of the enquiry report is enclosed). Now, on careful consideration of the whole case (i.e. enquiry report and other record) related to the case, the undersigned agrees with the findings of the Enquiring authority. Therefore, undersigned has provisionally come to the conclusion that Shri Subhash Chand-I driver is not a fit person to retain in the Himachal Road Transport Corporation services. Therefore, the penalty of removal from service proposed against him.*
>
> *Shri Subhash Chand-I driver is hereby given an opportunity of making representation the penalty proposed but only on the basis of evidences adduced during the enquiry. The representation which he may wish to make on the penalty proposed, if any, would be made in writing and submitted, to as to reach the undersigned not later than 15 days from the receipt of this memorandum by Shri Subhash Chand-I driver, HRTC, Palampur.*
>
> *The receipt of this show cause notice should be acknowledged."*

3. The petitioner submitted his response to the Show-Cause Notice, however, in terms of Annexure P-5, the services of the petitioner were terminated by the Disciplinary Authority by imposing penalty of removal from service upon the petitioner. The appeal filed by the petitioner met with the same fate in terms of office order dated 26th September, 2001 (Annexure P-7). Petitioner filed CWP-T No. 9098 of 2008, which was disposed of by this Court vide order dated 08.03.2011 by quashing office order dated 26.09.2001 and directing the Appellate Authority to decide the appeal of the petitioner by passing a speaking order. In compliance to this order, the Appellate Authority again passed order dated 24th April, 2012, maintaining the punishment imposed the petitioner. It is in this background that the writ petition stood filed by the petitioner before this Court.

4. Learned counsel for the petitioner has argued that the proceedings which were undertaken against the petitioner are not sustainable in the eyes of law, for the reason that whereas the premise of the allegations of the employer against the petitioner was that on the fateful day, he was under the influence of liquor and had parked his vehicle in the mid of the road, thereby breaching the traffic rules and that he had also misbehaved with certain persons, yet the petitioner was not subjected to any medical test, from which it could have been ascertained whether the petitioner was under the influence of liquor or not. Learned counsel for the petitioner has also argued that otherwise also, the proceedings which were undertaken by the respondents against the petitioner were vitiated, as the provisions of Rule-15 of the CCS (CCA) Rules were violated by the disciplinary authority at the stage when the inquiry report was forwarded to the petitioner, as said authority had already made up its mind as to what punishment should be imposed upon the petitioner, without even hearing him. Accordingly, as per him, the proceedings which took place thereafter are also bad in law and are liable to be quashed

and set aside. Learned counsel further argued that taking into consideration the fact that the petitioner is now more than 70 years of age, therefore also, this writ petition be allowed in terms of the prayers made in the petition and justice be done to the petitioner.

5. The petition is opposed by the respondent-Corporation, *inter alia,* on the ground that the disciplinary proceedings were conducted against the petitioner by meticulously following the provisions of the CCS (CCA) Rules. The petitioner was duly associated with the entire proceedings. He was given due opportunity to defend himself. Further, the allegations which were levelled against the petitioner were correct and as the petitioner ran away from the spot and was located after 3-4 days as from the date of incident, therefore, it was not possible for the respondents to have had conducted his medical test. Accordingly, it has been prayed that as the present petition is meritless, therefore, the same be dismissed.

6. I have heard learned counsel for the parties and have also gone through the pleadings as well as the documents appended therewith and also the record which has been produced by learned counsel for the respondent-Corporation.

7. A perusal of the record demonstrates that the inquiry report was submitted by the Inquiry Officer Shri O.P. Bhardwaj on 15.04.2000 to the Disciplinary Authority with his findings. It is relevant to take not of the fact that the provisions of Rules15 of the CCS (CCA) Rules underwent a change as from the date when the disciplinary proceedings stood initiated as compared to date when notice in terms of Rule-15 of the CCS (CCA) Rules was issued by the Disciplinary Authority to the employee after receipt of the inquiry report. More particularly, earlier the Rule position with regard to action on the inquiry report was to the effect that where the Disciplinary Authority itself was not the Inquiring Authority and after holding of the inquiry, the report stood submitted to the Disciplinary Authority, then a copy of the report of the

Inquiring Authority was to be forwarded to the delinquent official by the Disciplinary Authority, calling upon the delinquent official to submit, if he so desired, his written representation or submission to the Disciplinary Authority within 15 days, irrespective of whether the report was favourable or not to the delinquent official. After sub-rules (1-A), (1-B) and (2) of Rule-15 of the CCS (CCA) Rules were substituted by Sub-rules (2) and (2-A) by Government notification published in the Gazette of India on 2nd September, 2000, the Rule position was that after receipt of the inquiry report by the Disciplinary Authority, where the Disciplinary Authority itself was not the Inquiring Authority, a copy of the said report together with its own tentative reasons disagreement, if any, with the inquiry report were to be forwarded by the Disciplinary Authority to the Government servant calling upon the Government servant to submit, if he so desired, his written representation or submission to the Disciplinary Authority within fifteen days.

8. Thus, neither Rule-15(1-A), as it stood before amendment nor Rule 15(2), as it stood after amendment, confered any power upon the Disciplinary Authority that at the stage of forwarding a copy of the inquiry report to the Government servant and seeking his response thereto, the Disciplinary Authority either could have had applied its mind on the inquiry report and come to a tentative conclusion as to what punishment was to be imposed upon the Government servant or in the notice forwarding a copy of the inquiry report, any tentative reasoning was to be given by the Disciplinary Authority with regard to what the said Authority intended to do, on the basis of the inquiry report.Yet, a perusal of Annexure P-3, dated 19.01.2001, relevant contents whereof have already been quoted hereinabove, demonstrates that this Show Cause Notice, which was issued by the Disciplinary Authority, was violative of the provisions of Rules 15(1-A) or 15(2), as the case may be, of the CCS (CCA) Rules. As the amendment which was incorporated in Rule-15 does not materially affects the out come of this writ

petition, therefore, this Court is not dwelling on the issue as to whether the proceedings which were initiated in the year 1997 were to be governed by the un-amended CCS (CCA) Rules or the amended CCS (CCA) Rules. Be that as it may, as mentioned hereinabove, the Disciplinary Authority after receipt of the inquiry report had already made an opinion with regard to the punishment which was to be imposed upon the Government servant and as this vitiated the disciplinary proceedings, therefore, besides the said Show Cause Notice being bad in law, all subsequent actions taken by the Authorities, be it the imposition of penalty or the rejection of appeal against the penalty etc. are *non est* and *void abinitio.*

9. At this stage, this Court would like to dwell upon the judgment of the Hon'ble Supreme Court in *Himachal Pradesh State Electricity Board Limited Vs. Mahesh Dhiya (*2017) 1 Supreme Court Cases 768. In the said case also, the Disciplinary Authority, at the time of forwarding inquiry report to the delinquent officer, had already made up its mind with regard to the award of punishment upon the delinquent officer. This act of the Disciplinary Authority was held to be bad by both the learned Single Judge as well as the Hon'ble Division Bench of this Court and when the matter went to the Hon'ble Supreme Court, the same was decided by the Hon'ble Supreme Court as under:-

> *"31. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/reply on the inquiry report which finds a*

> *charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum-Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and before obtaining his comments on the inquiry report. We are, thus, of the view that the order of the High Court setting aside the punishment order as well as the Appellate order has to be maintained."*

Therefore, the pronouncement of law, as has been made by the Hon'ble Supreme Court makes it amply clear that forming of an opinion to punish a delinquent employee by the Disciplinary Authority at the stage of forwarding the inquiry report, amounts to violation the principles of natural justice.

10. Hence, in view of the above discussions, this writ petition is allowed and Show Cause Notice dated 19.01.2001 (Annexure P-3) as alsosubsequent orders dated 25.05.2001 (Annexure P-5) and 24.04.2012 (Annexure P-9) are ordered to be quashed and set aside.

11. It is duty of this Court to point out at this stage that the Hon'ble Supreme Court in *Mahesh Dhiya's case (supra),* while upholding the judgment of learned Single Judge as well as Hon'ble Division Bench of this Court though held that forming of an opinion to punish a delinquent employee by the

Disciplinary Authority at the stage of forwarding the inquiry report, amounts to violation the principles of natural justice, however, the Hon'ble Supreme Court further held that the High Court while quashing the punishment order as well as appellate order ought to have permitted the disciplinary authority to have proceeded with the inquiry from the stage in which fault was noticed, i.e., the stage under Rule 15 of the CCS (CCA) Rules, 1965.

12. At this stage, Mr. C.N. Singh, learned counsel for the petitioner while referring to a subsequent judgment of the Hon'ble Supreme Court in *Allahabad Bank and others Vs. Krishna Narayan Tewari* (2017) 2 Supreme Court Cases 308, has submitted that in this case, after holding the disciplinary proceedings which were initiated by the employer to be bad in law, the High Court did not remand the matter back for inquiry from the stage the same was vitiated. Hon'ble Supreme Court while upholding the judgment of the High Court held as under:-

> *"8. There is no quarrel with the proposition that in cases where the High Court finds the enquiry to be deficient either procedurally or otherwise the proper course always is to remand the matter back to the concerned authority to redo the same afresh. That course could have been followed even in the present case. The matter could be remanded back to the Disciplinary Authority or to the Enquiry Officer for a proper enquiry and a fresh report and order. But that course may not have been the only course open in a given situation. There may be situations where because of a long time lag or such other supervening circumstances the writ court considers it unfair, harsh or otherwise unnecessary to direct a fresh enquiry or fresh order by the competent authority. That is precisely what the High Court has done in the case at hand.*
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> *9. The High Court has taken note of the fact that the respondent had been placed under suspension in the year 2004 and dismissed in the year 2005. The*

dismissal order was challenged in the High Court in the year 2006 but the writ petition remained pending in the High Court for nearly seven years till 2013. During the intervening period the respondent superannuated on 30th November, 2011. Not only that he had suffered a heart attack and a stroke that has rendered him physically disabled and confined to bed. The respondent may by now have turned 65 years of age. Any remand either to the Enquiry Officer for a fresh enquiry or to the Disciplinary Authority for a fresh order or even to the Appellate Authority would thus be very harsh and would practically deny to the respondent any relief whatsoever. Superadded to all this is the fact that the High Court has found, that there was no allegation nor any evidence to show the extent of loss, if any, suffered by the bank on account of the alleged misconduct of the respondent. The discretion vested in the High Court in not remanding the matter back was, therefore, properly exercised.

10. The next question is whether the respondent would be entitled to claim arrears of salary as part of service/retiral benefits in full or part. The High Court has been rather ambivalent in that regard. We say so because while the High Court has directed release of service/retiral benefits, it is not clear whether the same would include salary for the period between the date of removal and the date of superannuation. Taking a liberal view of the matter, we assume that the High Court's direction for release of service benefits would include the release of his salaries also for the period mentioned above. We are, however, of the opinion that while proceedings need not be remanded for a fresh start from the beginning, grant of full salary for the period between the date of dismissal and the date of superannuation would not also be justified."

13. Learned counsel for the petitioner has submitted that the fact situation of the present case is squarely covered by the observations of the

Hon'ble Supreme Court and herein also, as incident in the present case happened a long time back and there are circumstances to the effect that the petitioner has attained the age of superannuation long time back and now he is almost 73 years old, it will be in the interest of justice in case the proceedings are put to a quietus rather than giving an opportunity to the respondents to re-open the matter. The Court is of the considered view that there is merit in the submission of learned counsel for the petitioner.As in the present case, the proceeding were initiated as far back as in the year 1997, the punishment was imposed upon the petitioner as far back as in the year 2001 and his initial appeal was dismissed firstly as far back as in the year 2001 and further there is no dispute that the petitioner has also crossed the age of superannuation and now he is more than 73 years of age, this Court is of the considered view that the ends of justice would be met in case the disciplinary proceedings are put to a quietus, with further direction to the respondents that as the disciplinary proceedings which were initiated against the petitioner have been set at naught by this Court, all consequential benefits, including monetary benefits be conferred upon the petitioner. Ordered accordingly.The respondents are directed to confer all consequential benefits, including monetary benefits upon the petitioner. Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:-

1. ASHWANI KUMAR (AGED 26 YEARS), SON OF SHYAM CHAND, R/O VPO MOHAL, TEHSIL BHUNTER, DISTRICT KULLU, H.P.

2. ANIL KUMAR, AGE 34 YEARS, SON OF SH. HANS RAJ, R/O VILLAGE SEHAL, P.O. PAIRI, TEHSIL BALH, DISTRICT MANDI, H.P.

3. ABHISHEK THAKUR, AGE 26 YEARS, SON OF SH. VIJAY PAL, R/O VPO TALWARA, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

4. ROHIT DHIMAN, AGE 23 YEARS, SON OF SH. ARUN KUMAR, R/ O VPO SPAIL, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

5. TILAK RAJ, AGE 35 YEARS, SON OF BALDEV SINGH, R/O VILLAGE GLASSAN, P.O. MATHI, TEHSIL KARSOG, DISTRICT MANDI, H.P.

6. NIRMAL SINGH, AGE 30 YEAR, SON OF SH. DOLE RAM, R/O VPO SHIKARI, TEHSIL THUNAG, DISTRICT MANDI, H.P.

7. BHIM SEN, AGE 35 YEARS, SON OF SH. DOLA RAM, R/O VILLAGE BAGAN, P.O. MANGLOR, TEHSIL BANJAR, DISTRICT KULLU, H.P.

8. RAJ KUMAR, AGE 34 YEARS, SON OF SH. RATTAN LAL, R/O VILLAGE GLASSAIN, P.O. DABLA, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

9. NEERAJ KUMAR, AGE 35 YEARS, SON OF SH. DHIAN SINGH, R/O VILLAGE THANA, TEHSIL BARSAR, DISTRICT HAMIRPUR, H.P.

10. CHAMAN LAL, AGE 40 YEARS, SON OF SH. DHARAM CHAND, R/O VILLAGE THALEHAR, P.O. MARATHU, TEHSIL SADAR, DISTRICT MANDI, H.P.

11. DEVENDER SINGH, AGE 32 YEARS, SON OF SH. DHARAM SINGH, R/O VILLAGE SEHAL, P.O. PAIRI, TEHSIL BALH, DISTRICT MANDI, H.P.

12. HEMANT KUMAR, AGE 29 YEARS, SON OF SH. NARESH KUMAR, R/O VILLAGE LEHTHACH, P.O. SHIKARI, TEHSIL THUNAG, DISTRICT MANDI, H.P.

13. SANJAY KUMAR, AGE 28 YEARS, SON OF SH. PREM CHAND, R/O VILLAGE JULAH, P.O. DEVDHAR, TEHSIL CHACHYOT, DISTRICT MANDI, H.P.

14. HARISH KUMAR, AGE 31 YEARS, S/O SH. SUNDER SINGH, R/O VILLAGE SOYRA, P.O. AND TEHSIL BELH, DISTRICT MANDI, H.P.

15. YASHWANT SINGH, AGE 39 YEARS, SON OF SH. PAUSU RAM, JHAMACH, P.O. THANA SHIVA, TEHSIL THUNAG, DISTRICT MANDI, HP.

16. MANGLA NAND, AGE 33 YEARS, SON OF SH. BRIJ LAL, VILLAGE AVERI, P.O. MAGLI, TEHSIL NIRMAND, DISTRICT KULLU, H.P.

17. BHARAT KUMAR, AGE 28 YEARS, SON OF SH. BHADAR, VPO JUGAHAN, TEHSIL SUNDER NAGAR, DISTRICT MANDI, H.P.

18. KUSHAL SINGH, AGE 30 YEARS, SON OF SH. HARDEV SINGH, RESIDENT OF VILLAGE SUNAS, POST OFFICE BAGSHAID, TEHSIL THUNAG, DISTRICT MANDI, H.P.

19. AJAY KUMAR SHARMA, AGE 33 YEARS, SON OF SH. PARAS RAM, RESIDENT OF VILLAGE KUNNA, POST OFFICE BALERA, TEHSIL DALHOUSIE, DISTRICT CHAMBA, H.P.

20. ANKIT SHARMA, AGE 22 YEARS, SON OF DHARMENDER SHARMA, RESIDENT OF VILLAGE AND POST OFFICE SURLA, TEHSIL NAHAN, DISTRICT SIRMOUR, H.P.

...PETITIONERS

(BY SHRI TARA SINGH CHAUHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY, JAL SHAKTI VIBHAG, TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. ENGINEER IN CHIEF, JAL SHAKTI BHAWAN, TUTI KANDI, SHIMLA, H.P.

3. CHAIRMAN-CUM-EXECUTIVE ENGINEER, JAL SHAKTI DIVISION BAGGI, DISTRICT MANDI, H.P.

....RESPONDENTS

(M/S DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATES, WITH MR. AMIT DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 8356 of 2021
Decided on: 01.09.2022

Constitution of India, 1950- Article 226- Post of drivers on contract basis in Jal Shakti Vibhag- Department cancelled the selection process being not in terms of Recruitment and Promotion Rules- Petitioners successfully participated in the recruitment process but not issued with appointment letter- Held- For the fault of the respondents, the petitioners who successfully completed the recruitment process cannot be made to suffer- Petition allowed with the direction to the respondents to offer appointment to successfully selected petitioners as Drivers on contract basis. (Para 4, 5)

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

J U D G M E N T

Heard.

2. With the consent of the parties, the petition is being disposed of as under:-

The case of the petitioners is that respondent No. 1 invited applications from eligible candidates for the posts of Drivers on contract basis in terms of Annexure P-1. The Advertisement pertained to Jal Shakti Vibhag and total number of posts advertised in different categories were 44. The petitioners being eligible, applied for the posts in issue and participated in the process of recruitment. The petitioners, in terms of communication Annexure P-2, which relates to one of the petitioners, were invited to appear for the driving test and thereafter, in terms of Annexure P-3, they were declared selected for appointment against the posts of Drivers. Their grievance is that

despite the fact that Annexure P-3 was issued on 15th July, 2021, till date the appointment letters have not been issued to them. A representation was also made by the petitioners, which was followed by filing CWP No. 6497 of 2021 before this Court, which writ petition was disposed by the Hon'ble Division Bench of this Court by calling upon the petitioners to submit a comprehensive representation, with further direction to the respondents to take a decision thereupon within a time bound period. In response thereto, vide Annexure P-8, the respondentsrejected the representation of the petitioners on the ground that as the selection process undertaken for recruitment to the posts of Drivers on contract basis was not in terms of the prevailing Recruitment and Promotion Rules,therefore, the process has been cancelled as per law. It is in this background that the petitioners have filed this writ petition praying for quashing of Annexure P-8 and further for issuance of a direction to the respondents to issue appointment letters to the petitioners pursuant to Annexure P-3.

3. The petition has been opposed by the respondents on the ground that the recruitment process was initiated for filling up 44 posts of Drivers on contract basis by respondent No. 3 in the year 2021, but by erroneously applying the Recruitment and Promotion Rules of 2010 instead of 2017 Rules, which came into force w.e.f. 03.11.2017. On these basis, the respondents submitted that though it is not in dispute that the petitioners successfully participated in the process of recruitment, however, as the recruitment was held under the Rules which were no more inforce, the process has been cancelled.

4. Having heard the respective contentions of the parties and having carefully gone through the pleadings as well as the documents on record, this Court is of the considered view that mistake, if any, in the course of applying relevant Recruitment and Promotion Rules in assessing the eligibility of the candidates in terms of Annexure P-1 is that of the

respondents. For this fault of the respondents, the petitioners who successfully completed the recruitment process cannot be made to suffer. Incidentally, the Court standsinformed and it has not been denied by the State that one person, who also participated in the process of recruitment, similar to the one to which the petitioners were subjected, was offered appointment, though on daily wage basis. As already observed by this Court hereinabove, mistake committed, if any, in the course of applying the relevant Recruitment and Promotion Rules for the purpose of recruitment was at the end of the respondents. For this mistake of their's, the petitioners cannot be made to suffer. The petitioners *bonafidely* participated in the process which was undertaken by the respondents and here it is not a case where either immediately after issuance of the Advertisement or in the course of process of recruitment, the process was rescinded on the ground that the same stood initiated under the wrong Rules. On the contrary, the process was not only taken to its logical conclusion, but even the names of successful candidates were notified and the only thing that was required to be done, was the issuance of appointment letters to the successful candidates like the petitioners. In the course of arguments, it has not been argued on behalf of the respondent-State that in terms of the subsequent Rules which have come into force, the petitioners were otherwise not eligible for being appointed as Drivers. The Court is making this observation for the reason that this argument was not made in the Court. In view of the above discussions, this Court is of the considered opinion that denial of appointment letters to the petitioners after they were successful in the recruitment process undertaken by the respondent-Department for appointment against the posts of Drivers on contract basis is not sustainable in law.As the process was undertaken by the respondent-Department being fully conscious of the fact that the same was being undertaken in terms of 2010 Rules, though 2017 Rules had already come into force, therefore, the only inference which the Court can draw is that

same was a conscious decision taken by the Department and offer of appointment to successful candidates like the petitioners now cannot be allowed to be denied on the pretext that the process was held by mistake under the old Rules.

5. Accordingly, this petition succeeds. Annexure P-8, dated 30.11.2021 is quashed and set aside and respondents are directed to offer appointment to the successfully selected petitioners as Drivers on contract basis, forthwith and not later than 30 days from today, with all consequential benefits. Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:

ALAM CHAND S/O SH. RAGHUBIR SINGH, R/O VILLAGE KUTAHCHI, P.O GOHAR, TEHSIL CHACHYOT, DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. MOHAR SINGH ADVOCATE)

AND

CHAMAN LAL S/O SH.SHIV RAM, R/O VILLAGE AND PO MOVISERI, TEHSIL CHACHYOT, DISTRICT MANDI, H.P.

....RESPONDENT

(BY MR. SANDEEP SHARMA, ADVOCATE)

CRIMINAL REVISION
No. 183 of 2021
Decided on: 15.06.2022

Code of Criminal Procedure, 1973- Sections 397 & 401- **Negotiable Instruments Act, 1881**- Section 138- Revision against conviction upheld by Ld. Additional Sessions Judge- Accused has not disputed his signatures on the cheque- Held- Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused, complainant being holder of the cheque is

entitled to benefit of presumption as available under Sections 118 and 139 of the Act- No error of law as well as of facts committed by the Courts below- Revision dismissed. (Para 10, 14)

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

Instant Criminal Revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, lays challenge to judgment dated 28.2.2020, passed by learned Additional Sessions Judge-I, Mandi, District Mandi, H.P., in Criminal Appeal No.208 of 2017, affirming the judgment of conviction and order of sentence dated 31.01.2017/4.2.2017, passed by learned Judicial Magistrate 1st Class, Chachiot at Gohar, District Mandi, H.P. in criminal case No.197-I/2014/120-III/2014, 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 a period of three months and pay compensation to the tune of `4,80,000/- to the complainant.

2. Precisely, the facts of the case as emerge from the record are that respondent/complainant ***(for short 'complainant')*** filed a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the competent court of law, alleging therein that accused with a view to discharge his legal liability issued a cheque bearing No.456713 (Ex. CW1/B) dated 13.06.2014, amounting to `4,00,000/- in his favour drawn at Punjab National Bank Chail-Chowk Branch, District Mandi, H.P. However, fact remains that

aforesaid cheque on its presentation was dishonoured on account of insufficient funds in the account of the accused, as is evident from return memo Ex. CW1/D, dated 20.8.2014. Though, complainant served accused with legal notice (Ex.CW1/F), calling upon him to make the payment good within the stipulated time, but same was not received by the accused and as such, same was returned to the complainant as undelivered Ex.CW1/G and Ex.CW1/H.

3. Complainant with a view to prove his case examined himself as CW-1 as well as another person namely, Gurdev Singh, whereas though opportunity was given to the accused to lead evidence, but he failed to avail the same. Accused in his statement recorded under Section 313 Cr.P.C. denied the case of the complainant in toto and claimed himself to be innocent.

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 Additional Sessions Judge-I, Mandi, District Mandi, H.P., which also came to be dismissed vide judgment dated 28.02.2020, 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. Vide order dated 24.08.2021, this Court suspended the substantive sentence imposed by the court below subject to petitioner-accused depositing 50% of the compensation amount awarded by court below, but fact

remains that despite repeated opportunities, no amount ever came to be deposited in the Registry of this Court. On 18.05.2022, this Court while allowing the application bearing Cr.MP No.2256 of 2021, having been filed by the petitioner-accused, seeking therein extension of time to comply with order dated 24.08.2021 extended time till today, but made it clear that in case amount is not deposited on or before the next date of hearing, interim protection granted by this Court vide order dated 24.08.2021 shall come to an end.

7. Today, during the proceedings of the case, learned counsel representing the petitioner-accused states that despite repeated communications, petitioner-accused is not coming forward to impart instructions and as such, this Court may proceed to decide the petition on its own merit.

8. Having heard learned counsel representing the parties and perused the grounds taken in the petition vis-à-vis reasoning assigned by the learned courts below while holding petitioner-accused guilty of having committed an offence punishable under Section 138 of the Act, this Court sees no force in the submission of learned counsel for the petitioner that judgment of conviction and order of sentence passed by learned court below is not based upon the proper appreciation of evidence as well as law, rather evidence led on record by the complainant clearly reveals that he has successfully proved on record that petitioner-accused with a view to discharge his lawful liability issued cheque Ex.CW1/B, amounting to `4,00,000/- in his favour, but same was dishonoured on account of insufficient funds in the account of the accused, as is evident from return memo Ex.CW1/D. Though, accused in his statement recorded under Section 313 Cr.P.C claimed that he did not issue any cheque, but he nowhere disputed his signature on the cheque. Needless to say, there is presumption in favour of the holder of the cheque that same is issued in favour of the bearer for discharge of lawful liability. Sections 118 and

139 of the Act, raises presumption in favour of the holder of the cheque. No doubt, aforesaid presumption is rebuttable, but for that purpose, accused is required to raise probable defence.

9. Interestingly, in the case at hand, though accused claimed that at no point of time he issued cheque, but failed to explain that in case cheque was not issued by him how it came in the hands of the complainant. There is nothing on record that report, if any, qua loss/misplacement of cheque book of accused ever came to be lodged with the police. Similarly, there is no mention that cheque book of accused was stolen by the complainant.

10. Leaving everything aside, accused has nowhere disputed his signature on the cheque, meaning thereby he had issued signed cheque in favour of the complainant, especially when accused has not been able to dispute his liability to pay sum of `4,00,000/- to the complainant. Interestingly, accused in the case at hand though attempted to carve out a case that complainant had no capacity to advance loan to the tune of `4,00,000/-, but he was unable to substantiate his aforesaid plea. No doubt, in the case at hand record reveals that complainant was unable to produce on record income tax return showing withdrawal of `4,00,000/- , if any, by him from the bank for further paying the same to the accused, but he categorically stated that amount advanced by him to the accused was uncounted cash amount and was not shown in the income tax return. Mere fact that complainant failed to produce the income tax return or other documents showing that he had sufficient means to advance loan is not sufficient to rebut the presumption attached to the cheque. Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused,complainant being holder of the cheque is entitled to benefit of presumption as available under Sections 118 and 139 of the Act.

11. Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque, as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and can be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant.

12. 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.

13. Having carefully scanned the entire evidence available on record, this Court is convinced and satisfied that complainant has successfully proved on record by leading cogent and convincing evidence that cheque in question Ex.CW1/B was issued by accused in his favour. Return memo Ex.CW1/D, dated 20.8.2014 clearly reveals that cheque was dishonoured on account of insufficient funds in the account of the accused. He also proved that notice Ex.CW1/F was issued on 22.08.2014, whereby the demand was made to refund `4,00,000/-The notice was issued by way of post and postal receipt is Ex.CW1/F. On the other hand, accused despite opportunity failed to produce any positive evidence to rebut the evidence available in favour of the complainant that cheque signed by the accused was issued in his favour by the accused for discharge of his liability. Though, in the case at hand accused disputed the service of notice but record reveals that notices were issued on both the addresses of the accused and postman concerned had visited time and again to find out him. As a matter of the fact the accused is a Govt. employee and the notice was also sent on his address of employment but the endorsements on the letters clearly proves that the accused intentionally avoided the service of notice. It is not the requirement of law to state in the complaint that the notice was served on a particular date as notice is deemed to have been served with the addressee or he is deemed to have the knowledge

of the notice unless and until contrary is proved at the stage of evidence. Hence, it cannot be concluded that courts below have committed any illegality and infirmity while holding accused guilty of having committed offence punishable under Section 138 of the Act. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> 5. ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***
> 6.

14. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as of 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.

15. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of

judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but learned counsel representing the accused has failed to point out any material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

16. Having scanned the entire evidence be it ocular or documentary led on record, this Court finds it difficult to agree with the submission of learned counsel for the petitioner-accused that judgments passed by learned courts below are not based upon the proper appreciation of facts as well as evidence led on record, rather this court finds 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.

17. Consequently, the present revision petition is dismissed being devoid of any merit and judgments passed by learned courts below are upheld. 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. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Between:

SHAKUNTALA KHANNA W/OF LATE SH. BAL KRISHAN KHANNA, R/O THE NEST, NEAR KAMLA NEHRU HOSPITAL, SHIMLA, H.P.

....PETITIONER

(BY MR. DALIP K. SHARMA, ADVOCATE).

AND

ANIL BAKSHI S/O LATE SH. R.S. BAKSHI,
R/O THE NEST NEAR KAMLA NEHRU
HOSPITAL, SHIMLA, H.P.

....RESPONDENT

(MR. MAHESH SHARMA, ADVOCATE).

CIVIL REVISION
No.192 OF 2018
Reserved on: 22.08.2022
Decided on: 31.08.2022

H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision against the order of Ld. Appellate Authority reversing the order of eviction of Ld. Rent Controller- Arrears of rent- Relationship of landlord and tenant- Held- As per definition of the tenant as prescribed under Section 2(j) of the Act, person, who was jointly residing with the tenant at the time of his death, shall also be termed as "tenant" subject to the order of succession and conditions specified on Explanation-1 and II, respectively- Revision petition allowed- Judgment of Ld. Appellate Authority is quashed and set aside and order passed by Ld. Rent Controller is restored. (Para 11, 12, 13).

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

O R D E R

By way of instant Revision petition filed under Section 24(5) of the Himachal Pradesh Rent Control Act 1987, challenge has been laid to judgment dated 8.06.2018, passed by Appellate Authority-II, Shimla, H.P., in Rent Appeal No.3-S/13(b) of 2018, reversing order dated 22.12.2017, passed by learned Rent Controller, Court No.1, Shimla, District Shimla, H.P., in Rent Petition No.17-2 of 2013, titled as **Smt. Shakuntala Khanna vs. Sh. Anil Bakshi,** whereby learned Rent Controller while allowing the petition, having been filed by the petitioner-landlady, ordered for eviction of the

respondent/tenant from the demised premises on the ground of arrears of rent w.e.f. April 2011, amounting to Rs.4, 47, 743/- alongwith interest calculated till 30.12.2017.

2. Precisely, the facts of the case, as emerge from the record are that the petitioner-landlady filed petition under Section 14 of the H.P. Urban Rent Controller Act, 1987 ***(for short 'Act')***, seeking eviction of the respondent-tenant from the demised premises in the Court of learned Rent Controller, Court No.1, Shimla, H.P., alleging therein that she being owner of the premises known as the Nest, near Kamla Nehru Hospital, Shimla had inducted respondent as tenant in one residential set consisting of two rooms, one kitchen, one bath cum toilet in the first floor of the building***(hereinafter referred to as the "demised premises")*** on monthly rent of Rs.5000/-. Petitioner-landlady alleged that the premises were let out to the brother of the respondent about ten years back and after the death of his brother, the respondent started residing in the demised premises. Petitioner-landlady alleged that the respondent is in arrears of rent w.e.f. April, 2011 and as such, she is entitled to recover this amount from the respondent with interest. Besides above, respondent is also creating nuisance in premises due to which other neighbourer and occupier of the building are facing hardship.

3. Aforesaid prayer made on behalf of the petitioner-landlady came to be resisted on behalf of the respondent-tenant on the ground that the petitioner is neither landlord nor owner of the premises in occupation. He submitted that Sh. Suresh Bakshi was tenant in the demised premises and after his death, his family has been residing in the demised premises. He denied that the respondent-tenant is in arrears of rent w.e.f. April, 2011. He also denied that rent of the demised premises is Rs. 5000/-per month. He submitted that rent of the demised premises including house tax is Rs. 1716/- per month. He also denied the allegation that respondent has carried out any

damage to the premises in occupation. He also submitted that he has paid rent of the demised premises till May, 2013.

4. On the basis of the aforesaid pleadings adduced on record by the respective parties, learned Rent Controller framed the following issues:-

1. Whether the respondent is in arrears of rent since April,2011 as alleged? OPP.

2. Whether the present petition is not maintainable, as alleged? OPR.

3. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR.

4. Whether the present petition lacks necessary and material particulars, as alleged, if so its effect? OPR.

5. Whether the petitioner is estopped to file the present petition, as alleged? OPR.

6. Whether the petitioner has not approached the Tribunal with clean hands, as alleged, if so its effect? OPR.

7. Whether the petitioner is not landlord of the respondent, as alleged? OPR.

8. Relief:-

5. Subsequently, learned Rent Controller on the basis of the evidence led on record by the respective parties, ordered for eviction of the respondent-tenant from the demised premises on the grounds of arrears of rent w.e.f. April, 2011, amounting to Rs.4, 47, 743/- alongwith interest calculated till 30.12.2017. While passing aforesaid order, Rent Controller specifically directed the respondent-tenant to deposit arrears of rent within a

period of 30 days from the date of the order. Learned Rent Controller specifically ordered that in case arrears of rent are deposited within a period of 30 days from the date of the order, respondent-tenant shall not be evicted on this ground from the demised premises.

6. Being aggrieved and dissatisfied with the aforesaid order of eviction passed by Rent Controller, respondent-tenant preferred an appeal before the Appellate Authority-II, Shimla, H.P., which came to be allowed vide order dated 8.06.2018. Learned Appellate Court while allowing the appeal filed by the respondent-tenant, returned the findings that petitioner-landlady has not been able to establish relationship as of landlord and tenant and as such, order of eviction passed by Rent Controller is not sustainable in the eye of law. In the aforesaid background, petitioner-landlady has approached this Court in the instant proceedings, praying therein to restore the order of eviction passed by learned Rent Controller after setting aside the judgment dated 8.06.2018 passed by learned Appellate Authority-II, Shimla, H.P.

7. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning recorded by learned Appellate authority while passing the impugned judgment and setting aside the order of eviction passed by learned Rent Controller, this Court finds considerable force in the submissions made by learned counsel for the petitioner-landlady that learned Appellate authority has failed to appreciate the facts as well as law in its right perspective, as a consequence of which, findings to the detriment of the petitioner-landlady have come to fore. Learned Appellate authority has set aside the findings returned by learned trial Court on the ground that petitioner has been not able to establish relationship of landlord and tenant between her and respondent and as such, petition filed by her under Section 14 of the Act, for eviction of the respondent-tenant from the demised premise is otherwise not maintainable under Himachal Pradesh Urban Rent Control Act. However, aforesaid finding returned by learned

Appellate Authority is not substantiated by the record as well as provisions contained in the Act.

8. True, it is that in the case at hand petitioner filed eviction petition specifically claiming therein that she had inducted Sh. Suresh Bakshi, brother of the respondent as tenant, but after his death his other brother i.e. Anil Bakshi, respondent in the case at hand started residing in the same. Though, it has been claimed on behalf of the respondent that after the death of Suresh Bakshi, family of deceased brother was residing in the demised premises, but if the reply to the main petition is perused in its entirety, it has been not denied by the respondent that he was not residing in the demised premises after the death of Sh. Suresh Bakshi, rather he himself claimed before the court below that he alongwith other family members of deceased Suresh Bakshi was residing in the demised premises after the death of Suresh Bakshi. If it is so, petitioner-landlady was well within her right to institute proceedings under Section 14 of the Act, seeking therein eviction of the respondent from the demised premises.

9. At this stage, it would be apt to take note of Section 2(j) of the Himachal Pradesh Urban Rent Control Act, 1987 hereinbelow:-

> "(j) "tenant" means any person by whom or on whose account rent is payable for a residential or non-residential building or rented land and includes a tenant continuing in possession after termination of the tenancy, a deserted wife of a tenant who has been or is entitled to be in occupation of the matrimonial home or tenanted premises of husband, a divorced wife of a tenant who has a decree of divorce in which the right of residence in the matrimonial home or tenanted premises has been incorporated as one of the conditions of the decree of divorce and in the event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing with him at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and Explanation-II to this clause, but does not

include a person placed in occupation of a building or rented land by its tenant, except with the written consent of the landlord, or a person to whom the collection of rent or fees in a public market, cart stand or slaughter house or of rents for shops has been farmed out or leased by a Municipal Corporation or a Municipal Council or a Nagar Panchayat or a Cantonment Board;

Explanation-I.- The order of succession in the event of death of the person continuing in possession after the termination of his tenancy shall be as follows:—

(a) firstly, his surviving spouse;

(b) secondly, his son or daughter, or both, if there is no surviving spouse, or if the surviving spouse did not ordinarily live with the deceased persons as a member of his family upto the date of his death;

(c) thirdly, his parent(s), if there is no surviving spouse, son or daughter of the deceased person, or if such surviving spouse, son, daughter or any of them, did not ordinarily live in the premises as a member of the family of the deceased person upto the date of his death; and

(d) fourthly, his daughter-in-law, being the widow of his pre-deceased son, if there is no surviving spouse, son, daughter or parent(s) of the deceased person or if such surviving spouse, son, daughter or parent(s), or any of them, did not ordinarily live in the premises as a member of the family of the deceased person upto the date of his death:

Explanation-II.- The right of every successor, referred to in Explanation-I, to continue in possession after the termination of the tenancy, shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs; and.]

10. Section 2(j) of the Act, clearly provides that any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after termination of the tenancy and in the event of the death of such person such of his heirs as are mentioned in schedule –I of the Act and who were ordinarily residing with him at the time of

his death, subject to the order of succession and conditions specified in explanation-1 and explanation-II shall be termed/considered as a tenant.

11. No doubt, in the case at hand, respondent-tenant claimed in the reply that at the time of death of original tenant Sh. Suresh Bakshi, his family was residing with him and as such, petitioner-landlady ought to have filed eviction proceedings against her. Since, at no point of time eviction proceedings instituted at the behest of the petitioner-landlady came to be opposed on behalf of wife of the deceased Suresh Bakshi or other LRs of him, it can be safely presumed/ inferred that actually after the death of Suresh Bakshi, present respondent Anil Bakshi was residing in the demised premises. Otherwise also, respondent-tenant is estopped from taking aforesaid defence on account of his having admitted in the reply to the eviction petition that he had been paying rent qua the demised premises at the rate of Rs.1716 per month including municipal taxes. As has been taken note hereinabove, though petitioner-landlady claimed that rent of the demised premises was Rs.5000/- per month, but such plea of her has been specifically refuted by the respondent by stating that monthly rent of demised premises including municipal taxes was Rs. 1716/-. He also denied that the petitioner is entitled to the statutory increase in the rent. On one hand, respondent pleaded that petitioner-landlady is not landlord, but on the other hand, he pleaded that he has paid the rent of the demised premises up till May, 2013, if it is so, where was the occasion for him to pay rent to the petitioner-landlady. Payment of rent by respondent to the petitioner-landlady at the rate of Rs.1716/-, clearly establish factum with regard to respondent-tenant having occupied premises after the death of his brother Suresh Bakshi. As per definition of the tenant as prescribed under Section 2(j) of the Act, person, who was jointly residing with the tenant at the time of his death, shall also be termed as “tenant” subject to the order of succession and conditions specified on Explanation-1 and II, respectively. No doubt, at first instance LRs

of the original tenant Suresh Bakshi are/were to be considered as tenant, but since at no point of time they claimed themselves to be tenant and nowhere filed application, if any, in these proceedings claiming themselves to be tenant of the premises coupled with the fact that respondent-tenant while refuting the claim of the petitioner-landlady that rent of the demised premises was Rs.5000/-, specifically stated in the reply that he has paid rent up till May, 2013 at the rate of Rs.1716/- per month including municipal taxes, he cannot be permitted at this stage to claim that there is no relationship of landlord and tenant interse petitioner and him. Otherwise also, definition of Section 2(d) of the Act that *"landlord" means any person for the time being entitled to receive rent in respect of any building or any other person deriving title under a landlord*. It stands duly proved that earlier Sh. Bal Krishan Khanna was landlord of the respondent and after his death the petitioner Shakuntala Khanna is landlord of the demised premises and she had derived the title from her deceased husband Bal Krishan Khanna. The petitioner has taken the plea that respondent is in arrears of rent since April, 2011.

12. Though, respondent has specifically took the plea with regard to non-joinder of necessary party on the ground that his brother Suresh Bakshi was inducted as a tenant and after his death, he as well as his family members started residing in the demised premises and as such, petition is bad for non-joinder of family members of Suresh Bakshi. However, record reveals that the respondent has miserably failed to lead evidence that family of Suresh Bakshi after his death is continuously residing in the demised premises with the respondent. The respondent has not led any evidence in order to prove that family members of Suresh Bakshi are still residing in the demised premises and they are necessary party without whom no effective and executable order can be passed.

13. Consequently, in view of the detailed discussion made hereinabove, this Court finds merit in the present petition and accordingly

same is allowed, as a consequence of which, judgment dated 8.06.2018, passed by learned Appointing authority is quashed and set-aside and order passed by learned Rent Controller is restored. Pending applications, if any, also stand disposed of. Interim order, if any, is vacated.

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

Between:

PURAN DUTT , SON OF SH. TULSI RAM, RESIDENT OF VILLAGE GAJYO, P.O. SHARGAON, TEHSIL RAJGARH, DISTRICT SIRMOUR, H.P.

....PETITIONER

(BY MR. NARESH K. TOMAR, ADVOCATE)

AND

1. STATE OF H.P.
2. SEWA RAM CHAUHAN, SON OF SH. SURAT SINGH, RESIDENT OF VILLAGE AND POST OFFICE SHARGAON, TEHSIL RAJGARH, DISTRICT SIRMAUR, H.P.

....RESPONDENTS

(MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERAL FOR R-1)

(MR. SUDHIR THAKUR, SENIOR ADVOCATE WITH MR. KARUN NEGI, ADVOCATE FOR R-2)

CRIMINAL REVISION
No. 280 of 2018
Decided on: 30.05.2022

Code of Criminal Procedure, 1973- Sections 397 & 401- **Negotiable Instruments Act, 1881**- Section 138- Revision against conviction upheld by Ld. Additional Sessions Judge- Accused has not disputed his signatures on the cheque- Held- Once signature on the cheque are not disputed and accused has not been able to prove that cheque under signature either was stolen by the complainant or was misused, complainant being holder of the cheque is entitled to benefit of presumption as available under Sections 118 and 139 of

the Act- No error of law as well as of facts committed by the Courts below- Revision dismissed. (Para 17, 19, 20)

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

Instant Criminal Revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment, dated 3.4.2018 passed by learned Sessions Judge Sirmaur District at Nahan, H.P., in Criminal Appeal No. 86-Cr.A/10 of 2017, affirming the judgment of conviction and order of sentence dated 12.8.2017/12.10.2017, passed by learned Judicial Magistrate Ist Class, Rajgarh, District Sirmaur, H.P. in criminal complaint No.73/3 of 2015, 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 a period of one year and pay compensation to the tune of `9,00,000/- to the complainant and in default of payment of compensation to further undergo simple imprisonment for 30 days.

18. Precisely, the facts of the case as emerge from the record are that respondent No.2/complainant ***(for short 'complainant')*** filed a complaint under Section 138 of the Negotiable Instruments Act (***for short 'Act')*** in the competent court of law, alleging therein that on 24.10.2014, respondent/complainant lent sum of `8,00,000/- to the accused on his request, enabling him to pay money to those persons, who had filed 3 or 4 complaints against him under Section 138 of the Act. With a view to

discharge his liability, accused issued post dated cheque Ext. CW2/B, amounting to `8,00,000/- in favour of the complainant drawn on H.P. State Co-operative Bank Limited, Habban, but fact remains that aforesaid cheque on its presentation came to be dishonoured vide memo dated 25-2-2015 Ex.CW1/C on account of insufficient funds in the account of the accused. Complainant after receipt of memo from the bank concerned, served accused with legal notice Ex.CW2/D, calling upon him to make the payment good within the stipulated time, but since accused failed to make the payment within the time stipulated in the notice, complainant was compelled to institute the complaint under Section 138 of the Act in the competent court of law.

19. 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.

20. 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, Sirmaur at Nahan, which also came to be dismissed vide judgment dated 3.4.2018, 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.

21. Vide order dated 6.8.2018, this Court suspended the substantive sentence imposed by the court below subject to petitioner-accused depositing `2,00,000/- in the Registry of this Court and furnishing personal bond in the sum of `1,00,000/- with one in the like amount to the satisfaction of trial Court within a period of four weeks. However, fact remains that

aforesaid order never came to be complied with despite repeated opportunities. To enable the petitioner-accused to deposit the amount of compensation, case at hand came to be adjourned on 10 dates. Finally, on 8.4.2021 learned counsel for the petitioner informed this Court that sum of `2,00,000/- stands paid directly to respondent No.2/complainant by way of demand draft and parties are in process of settling the dispute amicably *interse* them and as such, this Court adjourned the matter and stayed the warrants of execution issued by the executing court below. After passing of order dated 8.4.2021, case at hand came to be repeatedly adjourned on 10 dates, enabling the petitioner-accused to make the payment of compensation. However, as of today, sum of `4,00,000/-, out of total amount of ` 8,00,000/- awarded by the court below stands paid to the respondent No.2/complainant. On 8.4.2022, this court having taken note of the fact that the petitioner-accused is ready and willing to make the entire payment of compensation awarded by the court below, adjourned the matter for today's' date with the direction to the petitioner-accused to deposit the remaining amount within a period of six weeks, but neither aforesaid balance amount has been paid nor petitioner has come present in Court 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.

22. Having heard learned counsel representing the parties and perused the material available on record, this Court finds it difficult to agree with the submission of learned counsel for the petitioner-accused that judgments passed by learned courts below are not based upon the proper appreciation of facts as well as evidence led on record, rather this court finds 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.

23. Interestingly in the case at hand, there is no denial, if any, on the part of the petitioner-accused with regard to issuance of cheque as well as

signature thereupon, as a consequence of which, there is presumption in favour of the complainant as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and could be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant. However, in the case at hand petitioner has not been able to raise probable defence and as such, no illegality can be said to have been committed by the courts below while holding petitioner-accused guilty of having committed the offence punishable under Section 138 of the Act.

24. Interestingly, accused in his statement recorded under section 313 Cr.P.C stated that he was well known to the complainant, but he denied that he had requested complainant to advance loan of `8,00,000/- to him. He also denied that complainant has advanced loan of `8,00,000/- to him on 24.10.2014 and he has executed the receipt regarding receipt(Ex.CW2/C) of such amount. Though, accused in his statement recorded under section 313 Cr.P.C denied factum with regard to issuance of post dated cheque bearing dated 25.2.2015 for `8,00,000/- , but he feigned his ignorance that cheque when presented for collection on 25.2.2015 and 22.4.2015 was dishonoured by the drawee bank for “exceeds arrangement. Interestingly, in the case at hand efforts came to be made on behalf of the accused to setup a case that cheque book containing 15 cheques was misplaced and to prove this fact he also examined police official, who admitted that report with regard to missing of cheque book was registered, but rapat (Ex.DW2/A) placed on record, nowhere contains details with regard to cheque allegedly misplaced by the accused. Interestingly, aforesaid defence setup by the accused while making statement under section 313 Cr.P.C, is totally contrary to the suggestion put to the complainant during his cross-examination, wherein it came to be put to

the complainant that he had obtained cheques for insurance purpose. The aforesaid suggestion put to the complainant in his cross-examination itself establishes factum with regard to issuance of cheque by the accused.

25. Apart from above, accused has taken a defence that he had issued letter i.e. mark D-1 to the Manager of the bank concerned, requesting therein to stop the payment, but such fact never came to be proved in accordance with law by the accused, rather return memo Ex.CW1/F dated 22.4.2014 clearly reveals that cheque in question came to be dishonoured on account of insufficient funds in the account of the accused.

26. In the case at hand, complainant while examining himself as CW-2 has fully corroborated the allegations as contained in the complaint by stating that accused is well known to him and he is an agriculturist and is also doing the business of flowers and his income is about `18 to ` 20 lacs per annum. He stated that accused was in dire need of money as many cases/complaints regarding dishonour of the cheques were pending against him in the Court. He deposed that on 19.10.2014 accused approached him and demanded ` 8 lacs as loan. However, he paid sum of `8 lac on 24.10.2014 to the accused. He further deposed that accused assured to return the said amount within four months and also issued a post dated cheque, Ext. CW2/B ,amounting to `8 lacs in his favour drawn at H.P. State Co-operative Bank, Habban. He deposed that cheque was filled in and signed by the accused and the accused has also executed a receipt, Ext. CW2/C regarding such payment. He also deposed that he deposited the cheque on 25-2-2015 for encashment with the drawee bank, but the same was returned as unpaid by the drawee bank on account of "exceeds arrangement" vide memo, Ext. CW1/C dated 25-2-2015 and thereafter he contacted the accused and told him about dishonouring of the cheque, who asked him not to take any legal action on account of dishonouring of the cheque and assured that cheque would be encashed after a period of 1½ months and on such assurance of the

accused, he again presented the cheque for collection on 22-4-2015 with the drawee bank, but the same was again dishonoured by the drawee bank vide memo Ext. CW1/F dated 22-4-2015 on account of "exceeds arrangement". He has further stated that on receipt of information from the bank regarding dishonouring of the cheque for the second time, he got legal notice, Ext. CW2/D issued to the accused through his Counsel on 27-4-2015 under registered cover, Ext. CW2/F vide postal receipt, Ext. CW2/E intimating therein factum to accused with regard to dishonouring of the cheque and also demanded payment of the cheque amount from the accused, which notice, the accused intentionally refused to receive and he also also failed to make payment of the cheque amount to him.

27. Cross-examination conducted upon this witness nowhere suggests that defence was able to extract something contrary to what this witness stated in his examination-in-chief. Interestingly, during his cross-examination, this witness clarified that accused has executed receipt, Ext. CW2/C on the same date on which cheque in question was handed over to him by the accused. He specifically stated that cheque, Ext. CW2/B was signed by the accused in his presence. It is denied by him that receipt, Ext. CW2/C is a forged document. He has further stated that he has financially helped about 15 or 20 persons so far and he has advanced loan to such persons who are in a position to return the same, regarding which, he also used to obtain receipts from such persons. He has denied that the accused has not taken any loan from him. It is also denied by him that he used to do the work of insurance and he has obtained the cheque in question from the accused on account of insurance, which has been subsequently misused by him.

28. Complainant also examined Arun Kumar (CW1), Manager of H.P. State Co-operative Bank Habban, who admitted the factum with regard to deposition of cheque in the bank on 25-2-2015 for encashment, but the

same was dishonoured on account of “exceeds arrangement” vide memo, Ext. CW1/C and was returned to the complainant vide letter, Ext. CW1/D. He deposed that on 22-4-2015 the cheque, Ext. CW1/A was again deposited in the bank for collection by the complainant, but it was again dishonoured on account of “exceeds arrangement” vide memo, Ext. CW1/F and was returned to the complainant vide letter, Ext. CW1/G. In his cross-examination, nothing contrary could be elicited from him. He admitted that letter, copy of which is mark D-1 dated 23-4-2013 bears the signatures of the then branch Manager Sh. D.D.Sharma in red circle 'A'. He admitted that the cheques No. 5409966 and 5409967 were reported to have been lost and prayer was made to stop the payment of such cheques. However, he clarified that in case any information is received from the customer regarding loss of cheque or any instruction is received from the customer regarding stop payment, then entry is made in the computer and while dishonouring the cheque, in such cases, the reason assigned is payment stopped by the drawer. However, in the case at hand, as has been taken note hereinabove, there is no such endorsement in the cheque returning memo, Ext. CW1/C and Ext. CW1/F.

29. The complainant has also examined Jai Raj Sharma (CW2), the official of the Baghat Urban Co-operative Bank Solan to prove that he is having account in the said bank and certified copy of the statement of account is Ext. CW2/A. As per the statement of the account, complainant withdrawn a sum of `10 lacs from his account on 10.10.2014. In his cross-examination, this witness stated that the complainant is having FOD limit of `30 lacs. He has also stated that after withdrawal of `10 lacs from his account by the complainant, he has deposited a sum of `10 lacs in his account on 14-10-2014.

30. Complainant also examined Shashank (CW4), official of PNB, Mall road, Solan to prove statement of his account, Ext. CW4/A. Perusal of

statement of the account of the complainant Ex.CW4/A clearly establishes that complainant was financially sound and he has sufficient funds in his account with PNB, Solan.

31. Krishan Dutt, CW5, who is a Criminal Ahlmed in the Court of ld. JMIC, Rajgarh deposed that there were seven cases under Section 138 of the Act pending against the accused in the Court, out of which, four have been decided and three cases are pending adjudication in the Court, thereby corroborating/supporting the plea of the complainant that the accused was in dire need of money as some cases on account of dishonouring of cheques were pending against him in the Court.

32. Leaving everything aside, it has come in the statement of the accused recorded under Section 313 Cr.P.C., that there are four complaints under Section 138 of the Act pending adjudication against him, whereas three complaints have already been decided. To the contrary, complainant by leading cogent and convincing evidence proved on record that cheque Ex. CW2/B was issued by the accused for discharge of his lawful liability. While inviting attention of this court to the cross-examination conducted upon the complainant, learned counsel for the accused argued that once complainant admitted factum with regard to issuance of cheque by the accused on three occasions qua one liability, cheque Ex.CW2/B could not have been considered to be issued for discharge of lawful liability by the court below. However, this Court is not impressed by the submission of learned counsel for the petitioner because there is no probable defence ever came to be raised on behalf of the accused that he did not issue this cheque for discharge of his lawful liability and this cheque did not contain his signatures. Apart from above, accused never set up a defence that sum of `8 lac was ever paid by him to the complainant.

33. Since, issuance of cheque as well as signature thereupon has been not denied by the accused, there is presumption in favour of the holder of the cheque as provided under Section 118 and 139 of the Act that cheque in question was issued in favour of complainant by accused for discharge of his lawful liability. No doubt, aforesaid presumption is rebuttable and could be rebutted by the accused by raising probable defence. Probable defence can be raised either by leading positive evidence or by referring to the documents/evidence led on record by the complainant.

34. 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:-

7. ***"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.

8. ***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.***

9. ***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.***

35. Having carefully scanned the entire evidence available on record, this Court is convinced and satisfied that complainant successfully proved on record by leading cogent and convincing evidence that cheque in question Ex.CW2/B was issued by accused towards discharge of his lawful liability and he has further successfully proved that cheque issued by the accused on its presentation to the bank concerned was returned on account of insufficient funds. Hence, it cannot be concluded that courts below have committed any illegality and infirmity while holding accused guilty of having committed offence punishable under Section 138 of the Act. 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:-

> 10. ***"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."***
> 11.

36. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as of 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.

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

38. Consequently, the present revision petition is dismissed being devoid of any merit and judgments passed by learned courts below are upheld. 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. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Between:

1. VAJID ALI, S/O SH. FAKEER AHMED, R/O VILLAGE KALBASAWASHING, POST OFFICE KATKALSIA, TEHSIL CHHACHHRAULI, DISTRICT YAMUNANAGAR, HARIYANA, AGE 26 YEARS.

2. MOSHINA (MINOR) AGE 17 THROUGH HER FATHER SH. FURKAN AGE 45 YEARS, SON OF LATE SH. KAHALEEL AHMED, R.O VILLAGE AND POST OFFICE MISSERWALA, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

3. SH. FURKAN AGE 45 YEARS, SON OF LATE SH. KAHALEEL AHMED, R.O VILLAGE AND POST OFFICE MISSERWALA, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

....PETITIONERS

(BY SUNIL THAKUR & MR. MUKESH SHARMA, ADVOCATES)

AND

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

2. SUPERINTENDENT OF POLICE, DISTRICT SIRMAUR, HIMACHAL PRADESH.

3. SHO, POLICE STATION MAJRA, DISTRICT SIRMAUR, HIMACHAL PRADESH.

....RESPONDENTS

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CR.P.C
NO.300 of 2022

Decided on: 22.06.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 376, 506- **Protection of Children from Sexual Offences Act, 2012**- Section 6- Quashing of F.I.R. on account of subsequent development i.e. marriage between petitioner No. 1 and petitioner No. 2- Held- Since, in the case at hand, petitioner No.2- victim/prosecutrix has already solemnized marriage with petitioner No.1 and she is living a happy married life, it would be in the interest of justice to accept the prayer made on behalf of the petitioner/accused for quashing of the FIR as well as consequent proceedings, which if otherwise allowed to sustain may disturb the happy married life of the petitioner No.1 and victim/prosecutrix- Petition allowed. (Para 19, 20)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497;

Gian Singh v.State of Punjab and anr. (2012) 10 SCC 303;

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

State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376;

State of Madhya Pradesh vs. Laxmi Narayan (2019) 5 SCC 688;

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

O R D E R

On the oral request of learned counsel representing the petitioners, the father of the petitioner No.2 (victim/prosecutrix) is impleaded as petitioner No.3 in the array of the parties. Registry is directed to carry out necessary correction in the memo of the parties.

2. By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioners for quashing of FIR No. FIR No. 127 of 2021, dated 29.08.2021 under Sections 376, 506 of IPC and Section 6 of POCSO Act, registered at police Station, Majra, District Sirmaur, H.P., as well as consequent proceedings, if any, pending adjudication in the competent court of law on account of subsequent

development i.e. marriage interse petitioner No.1 and petitioner No.2 (hereinafter referred to as the victim/prosecutrix).

3. Precisely, the facts of the case as emerge from the record are that FIR sought to be quashed in the instant proceedings came to be lodged at the behest of petitioner No.2-victim/prosecutrix, who alleged that last year while she had gone to her maternal uncle's house at Kot, Tehsil Chhachhrauli, she came into the contact of petitioner No.1. She alleged that petitioner No.1 told her that he is an employee of police department and wants to solemnize marriage with her. She alleged that petitioner No.1 firstly on the pretext of marriage sexually assaulted her against her wishes and thereafter clicked her obscene photographs. She alleged that on 26.08.2021, petitioner No.1 told her that in case she comes out of her house, he would return her obscene photographs, but thereafter sexually assaulted her in a Kayarda Hotel. Though, after completion of the investigation, police presented the challan in the competent court of law, but before same could be taken to its logical end, petitioner No.1/accused and petitioner No.2 i.e. victim/prosecutrix solemnized marriage as per Muslim rights and ceremonies and as such, have filed present petition jointly, praying therein for quashment of FIR as well as consequent proceedings, if any, pending in the competent Court of law.

4. Pursuant to the notice issued in the instant proceedings, respondent-State has filed reply, wherein prayer having been made on behalf of the petitioners has been opposed on the ground that petitioner No.1 has committed heinous crime of rape that too with minor and as such, prayer made on his behalf for quashment of FIR is not maintainable in terms of the law laid down by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** wherein it has been categorically ruled that High Court while exercising power under

Section 482 Cr.P.C may not quash proceedings in the cases involving mental depravity, murder, rape, dacoity etc.

5. Pursuant to order dated 26.5.2022, petitioners have come present. Petitioner No.2/victim/prosecutrix, who has come alongwith her father Fukran, states on oath that she of her own volition and without there being any external pressure has entered into the compromise, whereby she as well as petitioner No.1 have solemnized marriage. She states that FIR sought to be quashed in the instant proceedings, is result of misunderstanding. She states that she herself wanted to solemnize marriage with petitioner No.1 but since at one point of time petitioner No.1 refused to solemnize marriage with her, she was compelled to lodge the FIR sought to be quashed. She states that since petitioner No.1 has already solemnized marriage with her and she is living happy married life, she shall have no objection in case prayer made in the instant petition for quashment of FIR as well as consequent proceeding in the competent court of law is accepted. Her statement is taken on record.

6. Petitioner No.3,Furkan, father of petitioner No.2-victim/prosecutrix, states on oath that petitioner No.1 and his daughter have solemnized marriage as per Muslim customs and rights at Qutub Masjid, as is evident from marriage certificate ***(Nikhanama)*** placed on record (Annexure P-2). He states that since his daughter has already solemnized marriage with petitioner No.1 and is living happy married life, he shall have no objection in case prayer made in the instant petition is accepted and FIR lodged against petitioner No.1 is quashed and set-aside. His statement is taken on record.

7. After having heard aforesaid statements made by petitioner No.2 and her father Furkan, Mr. Sunny Dhatwalia, Assistant Advocate General states that though victim/prosecutrix has solemnized marriage with petitioner No.1, but keeping in view the gravity of the offence alleged to have been committed by petitioner No.1, coupled with the fact that there is complete bar to accept the compromise in cases of rape, prayer made on behalf of the

petitioner may not be accepted. In support of his submission, learned Assistant Advocate General has placed reliance upon the judgment passed by Hon'ble Apex Court in ***Narinder Singh case(supra).***

8. True, it is that as per the law laid down by Hon'ble Apex Court in Narinder Singh case(supra), compromise, if any, arrived interse parties in a criminal case involving offence punishable under Section 302 and 376 of IPC, is not to be accepted, but if aforesaid judgment is read in its entirety, High Court while exercising power under Section 482 Cr.P.C can permit the parties to enter into the compromise in the peculiar facts and circumstances of the case. No doubt, in the case at hand petitioner No.1 allegedly sexually assaulted petitioner No.2 against her wishes on the pretext of marriage, but now since petitioner No.1 and victim/prosecutrix i.e. petitioner No.2 have already solemnized marriage, as is evident from "Nikahnama" placed on record and they are living happy married life, it may be too harsh and impractical to not accept the prayer made on behalf of petitioners No.1 and 2 jointly for quashing of FIR as well as consequent proceedings. Moreover, as has been taken note hereinabove, father of the victim/prosecutrix has also stated on oath before this Court that since both petitioner No.1 and his daughter (petitioner No.2) have solemnized marriage and they are living happy married life, he shall have no objection in case the prayer made in the petition is allowed.

9. Learned Assistant Advocate General states that since victim/ prosecutrix (petitioner No.2) is 17 years of age, marriage without the consent of father cannot be said to be valid or otherwise also consent of father is necessary in case, the girl is less than 15 years of age and the marriage without consent of father is void.

10. Learned counsel representing the petitioners while inviting attention of this Court to Article 195 of Mahomedan Law from the book "Principles of Mahomedan law, argued that every Mahomedan of sound mind,

who has attained puberty, can enter into a contract of marriage. He argued that puberty is presumed in the absence of evidence on completion of the age of fifteen years. Since, in the case at hand, petitioner No.2/-victim/prosecutrix at the time of marriage was 17 years old, marriage solemnized interse petitioner No.1 and petitioner No.-2victim/prosecutrix cannot be said to be void. In support of his aforesaid submission, learned counsel for the petitioner has placed reliance upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case tilted **Mohd. Samim** vs. **State of Haryana and others**, Criminal Writ Petition No.523 of 2018, decided on 26.09.2018, wherein it has been held as under:-

> "The arguments raised by learned State counsel as well as counsel for respondent No.4 are not applicable to the present case as both the parties belong to Muslim religion/community. The factum of marriage has not been denied by learned counsel for the petitioner as well as counsel for respondent No.4. The Delhi High Court in the case of *Rukshana vs. Govt. of NCT of Delhi 2007(3) R.C.R. (Criminal) 542,* while relying on the judgment of Md. Idris's case (supra) while reflecting on the Mohammedan Law in somewhere similar situation, as the present one, has held that the Criminal Writ Petition No.532 of 2018 (O&M) -8-Sessions Judge was right in directing that she was at liberty to live with her husband. The observations made by the Delhi High Court is reproduced as under:-

11.

> "7. Learned counsel for the petitioner submitted that as per Mohammedan Law, a girl who had attained the age of puberty could marry without consent of her parents and had right to reside with her husband even when she was less than 18 years of age and thus otherwise a minor girl. In support of this, he referred to the judgment of Patna High Court in the case of Md.Idris v. State of Bihar and others 1980 Crl. L.J.
>
> 764. That was a case where girl in question was 15 years of age and had married respondent No. 4

without the consent of her parents. Complaint was filed that respondent No. 4 had enticed away the girl in question (respondent No. 5) and minor daughter of the petitioner in that case with a view to marry her forcibly. On this complaint, respondent No. 5/girl was produced before a Magistrate before whom she stated that she had gone with respondent No. 4 with her own accord and without enticement and married him with her own volition. The medical evidence showed that she was above 15 years but below 18 years, the Magistrate ordered the custody of respondent No. 5 to the petitioner as she minor.

However, in the revision, the Sessions Judge ordered the custody of the girl to her husband/respondent No. 4 whom she claimed to have married. Challenging this order, father filed writ petition before the Patna High Court. The High Court dismissing the writ petition held that though respondent No. 5 on relevant date may he minor under the Indian Criminal Writ Petition No.532 of 2018 (O&M) -9-

Majority Act or within the meaning of Section 361 I.P.C., still under Mohammedan Law she could have married without consent of her natural guardian as she had attained the age of puberty. In such a situation, Sessions Judge was right in directing that she was at liberty to live with her husband. The following observations from this judgment would be worth quoting:

"Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mohammedan Law a girl, who has attained the age of puberty, can marry without

> the consent of her parents. In this connection reference can be made to Article 251 or Mulla's Principles of Mohammedan Law which says that every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, in absence of evidence on completion of the age of 15 years. Even in Tyabji's Muslim Law under Article 27 it is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Article 268 of Mulla's Principles of Mohammedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man or the woman as his wife. Article 90 of Tyabji's Muslim Law also says that a marriage is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mohammedan Law a girl, who has reached the age of puberty, i.e., in Criminal Writ Petition No.532 of 2018 (O&M) -10- normal course at the age of 15 years, can marry without the consent of her guardian."

11. Reliance is also placed upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case titled **Gulam Deen and another vs. State of Punjab and others** passed in CRWP No.5744 of 2022, decided on 13.06.2022, wherein it has been held as under:-

> "Learned counsel for the petitioners would contend that this is the first marriage of both the petitioners. He has relied upon the decisions by this Court in 'Kammu vs. State of Haryana & Ors.' [2010(4) RCR (Civil) 716]; 'Yunus Khan vs. State of Haryana & Ors.' [2014(3) RCR (Criminal) 518] and 'Mohd. Samim vs. State of Haryana & Ors.' [2019(1) 1 RCR (Criminal) 685] to contend that in Muslim law puberty and majority are one and the same and that there is a presumption that a person attains majority at the age of 15 years. It is further contented that a Muslim boy or

Muslim girl who has attained puberty is at liberty to marry any one he or she likes and the guardian has no right to interfere.

Learned counsel for the petitioners contends that the life and liberty of the petitioners is in grave danger at the hands of respondent Nos.5 to 7. It is further contended that the petitioners have also moved a representation dated 09.06.2022 (Annexure P-4) to the Senior Superintendent of Police, Pathankot (respondent No.2). However, no action has been taken thereon. Learned counsel for the petitioners submits that he limits his prayer in the present petition and would be satisfied at this stage if directions are issued for deciding the said representation (Annexure P-4) in a time-bound manner in accordance with law.

This Court has taken note of the judgments cited on behalf of the petitioners and also the fact that the girl in the instant case i.e. petitioner No.2 is aged more than 16 years. In the case of ***Yunus Khan(supra***) it has been noted that the marriage of a Muslim girl is governed by the personal law of the Muslims. Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla' has also been reproduced in the said decision which Article reads as under :

> "**195. Capacity for marriage** - (1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.
>
> (2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.
>
> (3) A marriage of a Mahomedan who is sound mind and has attained puberty, is void, if it is brought about without his consent.
>
> Explanation - Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years."

The law, as laid down in various judgments cited above, is clear that the marriage of a Muslim girl is governed by the Muslim Personal Law. As per Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla', the

> petitioner No.2 being over 16 years of age was competent to enter into a contract of marriage with a person of her choice. Petitioner No.1 is stated to be more than 21 years of age. Thus, both the petitioners are of marriageable age as envisaged by Muslim Personal Law. In any event, the issue in hand is not with regard to the validity of the marriage but to address the apprehension raised by the petitioners of danger to their life and liberty at the hands of the private respondents and to provide them protection as envisaged under Article 21 of the Constitution of India. Article 21 of the Constitution of India provides for protection of life and personal liberty and further lays down that no person shall be deprived of his or her life and personal liberty except as per the procedure established by law. The Court cannot shut its eyes to the fact that the apprehension of the petitioners needs to be addressed. Merely because the petitioners have got married against the wishes of their family members, they cannot possibly be deprived of the fundamental rights as envisaged in the Constitution of India."

12. Having taken note of aforesaid law laid down by the Hon'ble Punjab and Haryana High Court and Articles 195 and 251 of Mahomedan Law, which have been reproduced hereinabove, this Court finds sufficient force in the submission of learned counsel for the petitioner that petitioner No.2 being Muslim girl can perform marriage after her having attained puberty, which otherwise in the absence of evidence is presumed to have been attained at the age of 15 years. In the case at hand, it is not in dispute that petitioner No.2- victim/prosecutrix is 17 years of age and as such, marriage solemnized by her with petitioner No.1 cannot be said to be void.

13. This Court, after having carefully perused the compromise, which has been duly effected between the parties, sees substantial force in the prayer having been made by the learned counsel for the petitioners that offences in the instant case can be ordered to be compounded.

14. Since the petition has been filed under Section 482 Cr.P.C, this Court deems it fit to consider the present petition in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be as under:-

> 29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether

incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in

> acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

15. The Hon'ble Apex Court in case ***Gian Singh v.State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

> *"7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.*
>
> *The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)*
>
> > *61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different*

from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and se serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or

> *continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)*
>
> *8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."*

16. Recently Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others versus State of Gujarat and Another***, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in ***Narinder Singh's*** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

> "13. The same principle was followed in **Central Bureau of Investigation v. Maninder Singh** (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice

Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to the power under Section 482:

> "…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in **State of Tamil Nadu v R Vasanthi Stanley** (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

> "… Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether

> pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score…"
>
> "…A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system…"

15.The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether

the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has bee inherent n settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transac mental tions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and

the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

17. The Hon'ble Apex Court in (2019) 5 SCC 688, titled as ***State of Madhya Pradesh vs. Laxmi Narayan*** , has held as under:-

" 15 . Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1 That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3 Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption

Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4 Offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5 While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and

> do not have a serious impart on society, on the ground that there is a settlement/ compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

18. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove, Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C. must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases. Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in ***State of Tamil Nadu*** *supra*, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal

proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

19. Since, in the case at hand, petitioner No.2- victim/prosecutrix has already solemnized marriage with petitioner No.1 and she is living happy married life, it would be in the interest of justice to accept the prayer made on behalf of the petitioner/accused for quashing of the FIR as well as consequent proceedings, which if otherwise allowed to sustain may disturb the happy married life of the petitioner No.1 and victim/prosecutrix. No doubt, while accepting prayer for quashing of the FIR in heinous crime like rape, etc. interest of society at large is to be kept in mind rather than the interest of an individual, however in the facts and circumstances of the case, as detailed hereinabove, interest of victim/prosecutrix appears to be of paramount importance, if is not protected and petitioner No.1/accused is left to be prosecuted for his having committed the offence punishable under Sections 376, 506 of IPC and Section 6 of POCSO Act, ultimate loser would be petitioner No.2 (victim/prosecutrix and as such, no fruitful purpose would be served in continuing with the criminal proceedings.

20. Consequently, in view of the averments contained in the petition as well as the submissions having been made by the learned counsel for the parties that the matter has been compromised, and keeping in mind the well settled proposition of law as well as the compromise being genuine, this Court has no inhibition in accepting the compromise and quashing the FIR as well as consequent proceedings pending in the competent Court of law.

21. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, FIR No. 127 of 2021, dated 29.08.2021 under Sections 376, 506 of IPC and Section 6 of POCSO Act, registered at police Station, Majra, District Sirmaur, H.P., as well as consequent proceedings, if any, pending adjudication in the competent court

of law, are quashed and set-aside and the petitioner-accused is acquitted for the charges framed against him.

22. The present petition is allowed in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Between:

SH. AKSHAY KUMAR GOEL, S/O SHRI VINOD GOEL, R/O ASHOK BHAWAN OPP. D.C. OFFICE THE MALL SOLAN, HIMACHAL PRADESH.

....PETITIONER

(BY MR. GEORGE, ADVOCATE)

AND

4. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH SECRETARIAT SHIMLA 171002.

5. SENIOR SUPERINTENDENT OF POLICE UNA, DISTRICT UNA, HIMACHAL PRADESH.

6. SH. UMA SHANKAR KUMAR BRANCH MANAGER VIJAY BANK UNA, DISTRICT UNA, HIMACHAL PRADESH.

....RESPONDENTS

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

(MR. DEEPAK BHASIN, ADVOCATE FOR R -3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 Cr.P.C
No.347 of 2020
Decided on:13.06.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 406, 410, 420, 120-B, 34- Quashing of F.I.R.- Held- Where 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- Evidentiary material on record, if accepted would not reasonably connect the petitioner with crime- Petition allowed. (Para 14, 30, 31)

Cases referred:

Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Department of Home and Anr, AIR 2019 SC 210;

Central Bureau of Investigation, SPE, SIU (X), New Delhi vs. Duncans Agro Industries Ltd, Calcutta (1996) 5 SCC 591;

Joseph Salvaraj A vs. State of Gujarat and others AIR 2011 SC 2258;

Mahadeo Prasad vs. State of West Bengal AIR 1954 S.C.724;

Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608;

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 Gujarat vs. Jaswantlal Nathalal, (1968) 2SCR 408;

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 admission after notice this day, the Court passed the following:

O R D E R

By way of instant petition filed under Section 482 Cr.P.C., read with Section 227 of the Constitution of India, prayer has been made on behalf of the petitioner for quashing of FIR No.129, dated 12.04.2019, registered at police Station, Una Sadar, District Una, H.P., under Sections 406, 410, 420,

120-B and 34 of IPC as well as consequent proceedings pending before the competent court of law.

2. For having bird's eye view, facts leading to the registration of FIR sought to be quashed in the instant proceedings are that the Branch Manager, Vijaya Bank, Una, District Una, H.P., sanctioned the loan amount of `10,00,000/-on dated 12.01.2015 to the petitioner, who in turn, executed an agreement/ deed of hypothecations dated 12.01.2015 and hypothecated the machinery in favour of the bank. Since the petitioner allegedly committed default in repayment of loan and had committed serious irregularities in the operation of the accounts, bank, as detailed hereinabove, firstly called upon the petitioner to make the payment regularly, but subsequently debt of the petitioner was classified as "NPA" on 30.9.2018. On 7.6.2018, notice for the recovery of loan was issued by the bank to the petitioner, but despite that he made the default in payment. Thereafter, demand-cum re-possession seizure notice was issued to the petitioner and to the surety on 01.10.2018. The authorization letter for re-possession/ seizure of machinery was issued to seizure agent on 30.10.2018, but by that time allegedly petitioner had absconded with the hypothecated machinery and it was not found at the place of business. The letter by recovery agent addressed to the Regional Manager for (Recovery) Vijaya bank dated 29.11.2018, is annexed with as **Annexure R-2** with the reply filed by Superintendent of Police Una, wherein he reported that borrower has disposed off the machinery, therefore FIR for fraud may be lodged against the borrower. In the aforesaid backdrop, respondent No.3, Uma Shankar Kumar, Branch Manager, Vijaya Bank, Una lodged complaint in the police station, but it appears that no action was taken by the police on the complaint of the bank and as such, it was compelled to file complaint under Section 156(3) Cr.P.C in the Court of Judicial Magistrate 1st Class, Court No.III, Una, praying therein to order for registration of the case against the petitioner under Sections 406, 410, 420, 120-B and 34 of IPC. In the aforesaid

background, FIR sought to be quashed in the instant proceedings came to be lodged against the petitioner, who as per the reply filed by respondent No.1 stands declared proclaimed offender in the case vide order dated 29.01.2021 passed by court below.

3. Precisely, the grounds, as has been raised in the petition and further canvassed by Mr. George, learned counsel representing the petitioner for quashing of FIR, are that once petitioner has already repaid the entire amount of loan alongwith up-to -date interest, he cannot be prosecuted for his being allegedly committed the offence of criminal breach of trust punishable under Section 406 of IPC. Learned counsel for the petitioner while inviting attention of this Court to Sections 405 and 406 IPC, argued that if any person entrusted with any property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law, such person can be said to have committed the offence of criminal breach of trust punishable under section 406 of IPC. Learned counsel for the petitioner further argued that at no point of time machinery alleged to have been sold by the petitioner was entrusted to him by the complainant, rather same as per own case of the complainant was hypothecated by petitioner with the bank. Learned counsel for the petitioner further argued that though machinery or other property kept as collateral security in lieu of loan was hypothecated with the bank, but always remained in the ownership of the petitioner and as such, there is no question, if any, of entrustment of property by the bank to the petitioner. If it is so, no case much less under Section 405 of IPC, is made out against the petitioner. While referring to Section 420 of IPC, learned counsel for the petitioner argued that there is no material on record to suggest that petitioner committed cheating and dishonestly induced respondent-bank to deliver its property to any person, or any part of a valuable security, which is capable of being converted into a valuable security. He argued that to attract

Section 482 Cr.P.C, there has to be dishonest intention from very beginning, which is sine qua non to hold the accused guilty for the commission of said offence. He argued that as per own case of respondent-bank, petitioner was regular in making repayment of loan for some time, but subsequently on account of irregular payments, his account was classified as "NPA' on 30.9.2018. He argued that had petitioner had an intention to cheat the bank from very beginning, he would have not paid single installment after availing loan facility from the respondent bank, rather he kept on paying installments regularly, but subsequently on account of some financial crunch became irregular in payment but that does not mean that he had an intention from very beginning to cheat and misappropriate the loan amount. Learned counsel for the petitioner further argued that since no case much less substantial is made out against the petitioner under Sections 405 and 406 of IPC for the reasons stated hereinabove, no fruitful purpose would be served by keeping the FIR sought to be quashed alive. He argued that to the contrary, petitioner, who is innocent and has not committed any offence as is being alleged against him, would be put to great hardship. He argued that moreover entire loan amount now stands repaid and as such, otherwise also, no case is made out against the petitioner and as such, prayer made in the instant petition deserves to be allowed. In support of his aforesaid contention, learned counsel for the petitioner has placed reliance upon the following judgments passed by Hon'ble Apex Court:-

i). ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335.***

ii) Anand Kumar Mohatta and another vs. State (Government of NCT of Delhi) Department of Home and Anr, AIR 2019 SC 210 and

iii) Judgment dated 3.1.2019 passed by Hon'ble Apex Court in case titled Satishchandra Ratanlal Shah

versus State of Gujarat and another in Criminal Appeal No.9 of 2019 (arising out of SLP(CRL). No.5223 of 2018).

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General and Mr. Deepak Bhasin, learned counsel representing respondents No.1 to 3, refuted the aforesaid submissions made by learned counsel representing the petitioner, by stating that since machinery alleged to have been sold by petitioner was under hypothecation, he had no authority to sell the same and as such, no fault, if any, can be said to have been committed by the police while registering criminal case under Section 406 and 420 IPC. Above named counsel representing the respondents further argued that loan account of the petitioner was classified as "NPA" on 30.9.2018 and when he sold machinery hypothecated in favour of the bank, sum of ` 5, 14, 982/- with interest was payable by him and as such, it cannot be said that he has not committed any offence punishable under Sections 406 and 420 of IPC. Learned counsel for the respondents further argued that hypothecation means that till the time entire loan amount is repaid, property hypothecated in favour of the bank would be considered as property of the bank and as such, it cannot be contended/submitted that during hypothecation person in whose favour loan is advanced can claim him/herself to be owner of the property under hypothecation. They further argued that till the time entire loan amount is not repaid property moveable or immoveable hypothecated in favour of the bank would be deemed to have been entrusted to the loanee by the bank and he cannot dispose of the same till the time property is released from the hypothecation. Lastly above named counsel representing respondents argued that whether petitioner had an intention from very beginning to cheat is a question which need to be determined/answered on the basis of the totality of evidence led on record by the respective parties during trial and as such, it

would be too premature at this stage to conclude that petitioner has not committed any offence punishable under Section 420 of IPC.

5. Learned counsel for the respondents further argued that High Court while exercising power under Section 482 Cr.P.C cannot adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented, rather limited question for determination in these proceedings can be whether on the face of FIR, the allegations constitute as a cognizable offence, if yes, then power under section 482 cannot be exercised to quash the FIR. They further argued that since prima-facie FIR discloses cognizable offence alleged to have been committed by the petitioner, this Court may not exercise power under Section 482 Cr.P.C.

6. I have heard learned counsel representing the parties and perused the record of the case.

7. Close scrutiny of the FIR sought to be quashed in the instant proceedings as well as reply to the petition filed by the respondents, reveal that petitioner vide application dated 12.01.2015 applied to Vijaya bank, Una for term loan to the extent of Rs.10 lac, which was sanctioned in his favour on 12.01.2015 itself. Petitioner submitted certain documents required by the bank and thereafter loan amount was released in favour of the petitioner. From January 2015 to middle of the year 2018 petitioner continued to repay the loan amount through installments along with interest, but thereafter became irregular in payment. Since despite repeated notices, petitioner failed to repay the remaining amount, his loan account was classified as “NPA” on 30.09.2018 and recovery notice of loan was issued on 7.6.2018. Since despite notice of recovery, petitioner failed to make the payment, bank issued authorization letter to its agent for re-possession and seizure of machinery, who in turn, reported vide communication dated 29.11.2018 that petitioner has absconded with the machinery and as such, in this backdrop FIR sought

to be quashed in the instant proceedings came to be lodged against the petitioner.

8. Though, as per the reply filed by the respondents, sum of `5,14,982/- with up-to- date interest was payable at the time of lodging of the FIR, but during proceedings of the case, it was informed that as of now entire loan amount stands recovered, which fact has been duly acknowledged by learned counsel representing the respondent-bank.

9. Precisely, the case of the prosecution against the petitioner is that he fraudulently without any authority sold the machinery hypothecated in favour of the bank. As per prosecution, till the time property was hypothecated, it was deemed to have been entrusted to the petitioner by the bank, which advanced loan to the tune of `10,00,000/-. Apart from above, another allegation against the petitioner is that he intentionally with a view to commit fraud upon the bank sold the hypothecated property, which was property of the bank till the time entire loan amount was not repaid.

10. Before considering the prayer made in the instant petition for quashing of FIR, this Court deems it necessary to discuss/elaborate the scope of this Court to quash the FIR as well as criminal proceedings while exercising power under Section 482 Cr.P.C.

11. 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.P.C., 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.

12. Subsequently, 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.

13. 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.PC, 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)
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> > 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."

14. 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.

15. Sh. Sudhir Bhatnagar, learned Additional Advocate General, contended that since investigating agency after having completed investigation has already filed challan under Section 173 Cr.PC., in the competent court of law, prayer made on behalf of the petitioners for quashing FIR cannot be accepted at this stage. However, this Court is not inclined to accept the aforesaid submission made by the learned Additional Advocate General for the reason that High Court while exercising jurisdiction under Section 482 Cr.PC can even proceed to quash charge, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situations is allowed to continue, person arraigned as an accused would be unnecessarily put to ordeals of protracted trial on the basis of flippant and vague evidence.

16. Recently, the Hon'ble Apex Court in case tilted **Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Department of Home and Anr, *AIR 2019 SC 210***, has held that abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation and as such, the abuse of law or miscarriage of justice can be rectified by the court while exercising power under Section 482 Cr.PC. The relevant paras of the judgment are as under:

> ***16. Even otherwise it must be remembered that the*** provision invoked by the accused before the High Court is Section 482 Cr. P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -
>
> "482. Saving of inherent power of the High Court.- Nothing in this Code shall be deemed to

> limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

> 17. There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court (G. Sagar Suri and Anr. V. State of U.P. and Others, (2000) 2 SCC 636 (para 7), Umesh Kumar v. State of Andhra Pradesh and Anr. (2013) 10 SCC 591 (para 20). Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

17. Recently, the Hon'ble Apex Court in case titled **Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, *(2019) 9 SCC 608,*** has elaborated the scope of exercise of power under Section 482 Cr.PC, the relevant para whereof reads as under:-

> "7. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use

of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and re-iterated by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.

> "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:
>
> (i) to give effect to an order under the Code;
> (ii) to prevent abuse of the process of the court, and
> (iii) to otherwise secure the ends of justice.
>
> 24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

8. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present

case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335

> "102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).
>
> .....
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra, 2018 SCCOnLine SC3100 ("Dhruvaram Sonar") :

> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers.

> If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

18. Now being guided by the aforesaid proposition of law laid down by the Hon'ble Apex Court, this Court would make an endeavor to examine and consider the prayer made in the instant petition vis-à-vis factual matrix of the case. Precisely question, which needs to be decided in the instant case, is whether property/machinery hypothecated in favour of the bank can be presumed/ termed to be entrusted in favour of the petitioner by the bank by advancing him loan to buy that property.

19. Before exploring answer to aforesaid question, it would be apt to take note of Section 405 of IPC, which reads as under:-

> *"***405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".**

20. Bare reading of aforesaid provisions of law clearly reveals that the person, who in any manner entrusted with property, or with any dominion over property, if dishonestly misappropriate or converts to its own use that property, or dishonestly uses or disposes of that property would deem to have been committed criminal breach of trust as prescribed under Section 405 of IPC. If allegation of criminal breach of trust is proved, person against whom such allegation is proved, shall be punished with imprisonment of either

description for a term which may extend to three years, or with fine, or with both in terms of the provisions contained in section 406 of IPC.

21. Though, learned Additional Advocate General argued that entrustment of physical possession of the property is not essential for the offence defined under Section 405 of IPC because the expression "whoever being in any manner entrusted with property or with any dominion over property" clearly negatives the contention that since physical possession was not exclusively transferred to the bank, there cannot be a case of entrustment but after having carefully read section 405 of IPC, this Court finds it difficult to accept the aforesaid contention of learned Additional Advocate General. The term 'entrusted' found in section 405 IPC governs not only the words "with the property" immediately following it but also the words" or with any dominion over the property" occurring thereafter, meaning thereby before there can be any entrustment, the entrustment carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. A mere transaction of sale cannot amount to an entrustment. Reliance in this regard is placed upon the judgment rendered by Hon'ble Apex Court in **State of Gujarat vs. Jaswantlal Nathalal**, (1968) 2SCR 408,wherein it has been held as under:-

> The term "entrusted" found in S. 405 IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter-see Velji Raghvaji Patel v. State of Maharashtra [1965] 2 S.C.R. 429.Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust (see Jaswantrai Manilal Akhaney v. State of Bombay(1965 SCR 483). The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that properly is handed over to another, continues to be its owner. Further the

person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust.

22. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in case titled **Central Bureau of Investigation,_SPE, SIU (X), New Delhi** vs. **Duncans Agro Industries Ltd, Calcutta** (1996) 5 Supreme Court Cases 591, wherein it has been held as under:-

> "26. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the respective counsel for the parties, it appears to us that for the purpose of quashing the complaint, it is necessary to consider whether the allegations in the complaint prima facie make out an offence or not. It is not necessary to scrutinize the allegations for the purpose of deciding whether such allegations are likely to be upheld in the trial. Any action by way of quashing the complaint is a action to be taken at the threshold before evidences are led in support of the complaint. For quashing the complaint by way of action at the threshold. It is, therefore, necessary to consider whether no the face of the allegations, a criminal offence is constituted or not. In recent decisions of this Court, the case of Bhajan Lal (supra), since relied on by Mr. Tulsi, the guiding principles in quashing a criminal case have been indicated.
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> 27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective party as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in wide sense in Section 405 I.P.C. Such expression includes all case in which goods are entrusted, that is, voluntarily handed

over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted appearing in Section 405 I.P.C. is not necessarily a term of law. It has wide and different implication in different context. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'Trust' in Section 405 I.P.C. is a comprehensive expression and has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailer and bailee, master and servant, pledger and pledger. When some goods are hypothecated by a person to another person. the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in other person and the offender must hold such property in trust for such other person or for his benefit. In a case of pledge, the pledged article belongs to some other person or for his benefit. In a case of Pledge, the pledged article belongs to some other person but the same is kept in trust by the pledgee. In the instant case, a floating charge was made on the goods by way of security to cover up credit facility. In our view, in such case for disposing of the goods covering the security to cover up credit facility. In our view, In such case for disposing of the goods covering the security to cover up credit facility. In our view, in such case for disposing of the goods covering the security against credit facility the offence of criminal breach of trust is not committed. In the facts and circumstances of the case, it, however, appears to us that the Respondents moved the High Court only in 1991 although the first Fir was filed in 1987 and the second was filed in 1989. The CBI, therefore, Got sufficient time to complete the investigation for the purpose of framing the charge".

23. It is quite apparent from the reading of aforesaid law laid down by Hon'ble Apex Court that expression "entrusted with property" or "with any dominion over property" has been used in a wide sense in section 405 IPC, which includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of

law or in violation of contract. To attract case under section 405 IPC, it is necessary that ownership and beneficial interest in the ownership of the property entrusted in respect of which offence alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

24. It has been categorically held in the aforesaid judgment that if some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person, who has hypothecated such good, whereas to constitute offence, if any, under section 405 IPC the property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused. In the case at hand, admittedly the property in respect of which criminal breach of trust alleged to have been committed by the petitioner was his own property not of the bank. As has been observed hereinabove, during hypothecation ownership of the hypothecated goods remains with the person, who has hypothecated the such goods and as such, there appears to be merit in the case of the petitioner that no case much less under sections 405 and 406 of IPC is made out against him. Similarly, this court finds that no case is sustainable against the petitioner under section 410 of IPC, which reads as under:-

> **"410. Stolen property:-** Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "Stolen property" [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without [India]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property".

25. In the case at hand, property which was hypothecated and was further sold cannot be said to have acquired/transferred by theft or extortion or by robbery. Since the petitioner despite his having hypothecated property/machinery continued to be owner of the property, as has been discussed hereinabove, he cannot be said to have criminally misappropriated or committed criminal breach of trust as defined under section 405 IPC. No case under section 420 of IPC can be said to be sustainable against petitioner. Section 420 of IPC reads as under:-

> **"420. Cheating and dishonestly inducing delivery of property.-** whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

26. It is none of the case of prosecution that the petitioner dishonestly induced bank to deliver any property/ machinery which he allegedly further sold to other person during hypothecation, rather it is admitted case of the prosecution that property alleged to have been sold by the petitioner during hypothecation was entrusted to him by the bank. Though, hypothecated property does not fall in the meaning of entrustment as defined under section 405 IPC, as has been discussed hereinabove, but even if it is presumed as is being claimed by the prosecution that such property was entrusted to petitioner and he fraudulently sold the same would not make petitioner liable to be tried under section 420 of IPC, which clearly provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or

any part of a valuable security shall be punished with imprisonment of term which may extend to seven years.

27. Leaving everything aside, to constitute offence under section 420 of IPC, prosecution is required to prove that there was dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence. Reliance in this regard is placed upon the judgment rendered by Hon'ble Apex Court in **Joseph Salvaraj A** vs. **State of Gujarat and others** AIR 2011 SC 2258, wherein it has been held as under:-

> "21. Criminal breach of trust is defined under Section 405 of the IPC and 406 thereof deals with punishment to be awarded to the accused, if found guilty for commission of the said offence i.e. with imprisonment for a term which may extend to three years, or with fine, or with both.
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> 22. Section 420 of the IPC deals with cheating and dishonestly inducing delivery of property. Cheating has been defined under Section 415 of the IPC to constitute an offence. Under the aforesaid section, it is inbuilt that there has to be a dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence. Categorical and microscopic examination of the FIR certainly does not reflect any such dishonest intention ab initio on the part of the appellant".

28. In the case at hand, even if the allegations made in the complaint are accepted to be true and correct, petitioner cannot be said to have committed the offence of cheating. Offence of cheating is established when the accused whereby induced the person to deliver any property or to do or omit to do something, which he would not do if he were not so deceived. (See judgment **Mahadeo Prasad** vs. **State of West Bengal** AIR 1954 S.C.724).

29. Recently Hon'ble Apex Court in ***Satishchandra Rattanlal Shah(supra)*** held that mere inability of the person to return loan amount cannot give arise to a criminal prosecution for cheating unless fraudulent or

dishonest intention is shown right at the beginning of the transaction. The relevant paras No.12 to 15 of the judgment are as under:-

> ***"12.Having observed the background principles applicable h erein, we need to consider the individual charges against the appellant. Turning to Section 405 read with 406 of IPC, we observe that the dispute arises out of a loan transaction between the parties. It falls from the record that the respondent no.2 knew the appellant and the attendant circumstances before lending the loan. Further it is an admitted fact that in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/ investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.***
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> ***13.In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 of IPC. Hence the learned Magistrate committed a serious error in issuing process against the appellants for the said offence. Unfortunately, the High Court also failed to correct this manifest error.***
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> ***14. Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168). In the case***

before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached the respondent no. 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or 8 dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred.

15. Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes, such as breach of contractual obligations [refer to Gian Singh v. State of Punjab, (2012) 10 SCC 303]. The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers, under Section 415 of IPC".

30. Leaving everything aside, this Court after having perused the material available on record has no hesitation to conclude that evidentiary material on record, if accepted would not reasonably connect the petitioner with crime. Neither there is sufficient evidence to conclude that petitioner had an intention from very beginning to cheat the bank nor there is any material to suggest that petitioner unauthorizedly/illegally sold the property/machinery entrusted to it by the bank, rather as per own case of the prosecution same was hypothecated. Since ownership of the goods hypothecated in favour of the bank continues to be remained with the person, who has hypothecated such goods, no offence can be said to have been committed by the petitioner under

sections 405 IPC. The expression "entrusted" used in section 405 IPC, makes it clear that ownership or beneficial interest in the ownership of property entrusted in respect of which offence alleged to have been committed must be in some person other than the accused. Similarly to constitute the offence under section 420 of IPC, cheating as defined under section 415 of IPC is required to be proved, which consists of fraudulently and dishonestly inducing a person by deceiving him to deliver any property or to do or omit to do anything which he would not do or omit if he were not so deceived. Two essential ingredients of offence would be (i) to make a false statement so as to deceive any person (ii) fraudulently and dishonestly inducing the person to deliver any property or to do or omit to do something. Both the aforesaid essential ingredients are totally missing in the case at hand and as such, no case otherwise is sustainable against the petitioner under section 420 of IPC. Hence, no fruitful purpose would be served by allowing the proceedings, if any, based upon the FIR sought to be quashed in the instant proceedings, to continue.

31. To the contrary, petitioner would suffer irreparable loss, harassment and mental agony, if criminal proceedings in the present case, which manifestly appear to have been initiated on account of misconstruction and misunderstanding of provisions contained under sections 405 and 420 of IPC. Moreover, chances of conviction of petitioner are very remote and bleak on account of the facts and circumstances, as detailed hereinabove, as such, prayer made on behalf of the petitioner for quashing of FIR as well as consequent proceedings deserves to be accepted and in case proceedings based upon the FIR sought to be quashed are allowed to sustain, petitioner would be unnecessarily put to ordeals of protected trial, which ultimately may lead to his acquittal.

32. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, present

petition is allowed and FIR No. 129, dated 12.04.2019, registered at police Station, Una Sadar, District Una, H.P., under Sections 406, 410, 420, 120-B and 34 of IPC as well as consequent proceedings, if any, pending before the competent court of law are quashed and set-aside Accordingly, the present petition is disposed of, so also pending applications, if any.

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

Between:

VIJAY KUMAR SON OF SH. DEEP RAM, RESIDENT OF HOUSE NO.326/12, SUNNY SIDE, NEAR AMIT APARTMENT SOLAN, TEHSIL AND DISTRICT SOLAN, H.P.

....PETITIONER

(BY MR. SUDHIR THAKUR, SENIOR ADVOCATE WITH
MR. KARUN NEGI, ADVOCATE)

AND

SANJANA KUMARI DAUGHTER OF LATE SH. LAXMI RAM, RESIDENT OF VILLAGE & P.O. GAURA, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

....RESPONDENT

(BY MR. RAJNISH MANIKTALA, SENIOR ADVOCATE
WITH MS. RINKI KASHMIRI, ADVOCATE)

CRMMO No. 428 OF 2019
Reserved on: 23.08.2022
Decided on: 31.08.2022

Code of Criminal Procedure, 1973- Section 482- **Protection of Women from Domestic Violence Act, 2005**- Section 12- Challenge has been laid to order passed by Ld. Judicial Magistrate First Class whereby an application of the petitioner for rejecting the complaint of respondent came to be dismissed- Customary divorce- Parties residing separately since 13.12.2013- Complaint filed on 18.06.2018- Held- Respondent was stopped from filing the complaint under Section 12 of the Act against the petitioner after her having agreed to take divorce by way of mutual consent- Petition allowed. (Para 25, 31, 33)

Cases referred:

Inderjit Singh Grewal vs. State of Punjab and another, 2011(12) SCC 588;

Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori and another 2014(10) SCC 736;
Vikas & others vs. Smt. Usha Rani and another (Pb. & Hr.), 2018(3) RCR(Criminal) 307;

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, challenge has been laid to order dated 31.05.2019, passed by learned Judicial Magistrate, 1st Class, Kandaghat, District Solan, H.P., in case No.3/S of 2018, titled as *Sanjana Versus Vijay Kumar*, whereby an application having been filed by the petitioner-husband, praying therein to dismiss/reject the complaint having been filed by the respondent-wife under Section 12 of the Protection of Women from Domestic Violence Act, came to be dismissed.

2. Facts, relevant for adjudication of the case at hand are that the marriage *interse* petitioner and the respondent was solemnized on 11.03.2011, but no issue was born out of their wedlock. Since the parties were unable to live together happily, after some time of their marriage, respondent-wife was compelled to live at her parental house. Though, elder from both sides made an attempt for amicable settlement interse parties, but ultimately on 5.01.2014, allegedly parties decided to take mutual divorce (*Apasi Talaqnama)* and since then both petitioner and respondent had been living separately (Annexure P-2). Approximately, after 4 ½ years of alleged customary divorce, respondent, who had started residing with her parents, lodged complaint to SHO, police Station, Solan, stating therein that she is residing in Amit Apartment, Sunny Side, Solan alongwith her parents. She alleged that in March, 2013 after the death of her cousin, she had come to her maternal house and thereafter she was not permitted to come back to her

matrimonial house. She alleged that when she went to her in laws house, her mother-in-law and sister-in-law gave beatings and thrown her out of the house. While praying for handing over Supardari report of that day, she also alleged that her husband has contracted second marriage, as a consequence of which, she is mentally upset.

3. Police after having recorded the complaint of the complainant in General Diary Details vide G.D.No.053, dated 18.06.2018(Annexure P-4), found the matter/dispute to be of Domestic Violence and as such, sent the same to CDPO Solan, for further investigation. Legal-cum- Probation Officer apprised the Child Development Project Officer with regard to domestic violence allegedly committed upon the respondent vide communication dated 30.06.2018 (Annexure P-6) and thereafter Protection Officer was appointed and domestic incident report was prepared by the Protection Officer, which has been placed on record as Annexure P-7. On the basis of aforesaid domestic incident report (Annexure P-7), matter came to be landed before the Judicial Magistrate, 1st Class, Kandaghat, District Solan, H.P.

4. Having taken note of the allegations contained in the domestic incident report, learned court below issued summons to the petitioner. After having received summons in the aforesaid case, petitioner filed an application, praying therein to dismiss the complaint filed under the provisions of Protection of Women from Domestic Violence Act (Annexure P-8) on the ground that there is no relationship of husband and wife interse petitioner and respondent and their marriage already stands annulled vide mutual divorce dated 5.01.2014. Aforesaid prayer made on behalf of the petitioner for dismissal of complaint came to be resisted on behalf of the respondent by way of filing reply (Annexure P-9), wherein she claimed that the divorce papers signed by her and her father has no legal sanctity in the eye of law as they were forced/coerced to sign the papers.

5. Taking note of aforesaid pleadings adduced on record by the respective parties, learned Judicial Magistrate, 1st Class, Kandaghat vide order dated 31.05.2019 ***(Annexure P-1)*** dismissed the application for dismissal/ rejection of the complaint filed by the petitioner and vide same order directed the petitioner to pay sum of Rs. 3000/- per month to the respondent as interim maintenance. Being aggrieved and dissatisfied with aforesaid order dated 31.05.2019, petitioner approached this Court in the instant proceedings filed under Section 482 Cr.P.C, praying therein to set aside the order dated 31.05.2021 as well as complaint under Section 12 of the Act. Since, the respondent was unable to engage lawyer, this Court vide order dated 2.9.2019 appointed legal aid counsel on her behalf and having taken note of the controversy interse parties, deemed it necessary to make an effort for amicable settlement. However, fact remains that no further headway could be made towards amicable settlement and as such, this Court is compelled to decide the case at hand on its own merit.

6. Mr. Sudhir Thakur, learned Senior Counsel duly assisted by Mr. Karun Negi, Advocate, vehemently argued that impugned order dated 31.05.2019 is not legally sustainable and as such, deserves to be quashed and set-aside. Mr. Thakur, submitted that in proceedings under Section 12 of the Act, there was no occasion, if any, for Judicial Magistrate to go into the correctness and legality of the customary divorce, especially when respondent-wife at no point of time disputed the factum with regard to customary mutual divorce allegedly took place interse her and petitioner-husband on 5.01.2014 (Annexure P-2). Learned counsel representing the petitioner strenuously argued that since 5.01.2014, both petitioner and respondent are living separately and during this period, no challenge ever came to be laid to the customary divorce by the respondent-wife in the Civil Court, which is only competent authority to declare customary divorce to be null and void. Mr. Thakur further argued that domestic incident report itself suggests that

respondent -wife had left her matrimonial house in the year 2013 and as per the allegations of the respondent-wife, she was given beatings and maltreated by her mother-in-law and sister-in-law in the year, 2013, whereas complaint under Domestic Violence Act came to be lodged in the year 2018 and as such, same otherwise ought to have been dismissed being highly belated. Lastly, Mr. Thakur, learned Senior Counsel argued that once factum with regard to annulment of marriage interse petitioner-husband and respondent-wife by way of customary divorce never came to be refuted by the respondent-wife, coupled with the fact that since she had been living in her maternal house since 2013, there was otherwise no occasion for the petitioner to commit/inflict "domestic violence" as defined under Section 12 of the Act. It is submitted that since at the time of filing of the complaint in the year 2018, petitioner was not sharing household with the petitioner and their relationship of husband and wife had come to an end on account of customary divorce, court below ought not have entertained complaint under Section 12 of the Act. Mr. Thakur, further argued that since there was no relationship of husband and wife and no "domestic violence" in terms of Section 3 of the Act, was inflicted upon the respondent by the petitioner, court below ought not have directed the petitioner to pay interim maintenance to the complainant to the tune of Rs. 3000/- per month.

7. Mr. Rajnish Maniktala, learned Senior counsel duly assisted by Ms. Rinki Kashmiri, Advocate while supporting the impugned order dated 31.05.2019, vehemently argued that till the time marriage interse petitioner-husband was not annulled by competent court of law, no illegality can be said to have been committed by the court below while dismissing the application for rejection of the complaint filed by the petitioner. Learned counsel further argued that there is no custom prevailing in the area where parties can take mutual divorce and as such, Talaqnama/mutual divorce dated 5.01.2014, is of no consequence. It is submitted that since existence of any such customs

was denied by the complainant and no material was placed on record to prove tradition of the customary divorce in the area by the petitioner, Court below rightly held that power of learned District Court cannot be exercised by the Panchayat, especially when there is no such custom prevailing in the society, where the parties reside. Learned counsel representing the respondent further argued that there is no limitation prescribed under the Act for filing the complaint under domestic violence Act. He further submitted that though respondent started living at her parental house in the year, 2013 but once her husband i.e. petitioner contracted second marriage in the year 2018, she rightly filed complaint under the Act, alleging therein domestic violence. While referring to the definition of domestic violence, as provided under Section 3 of the Act, learned counsel for the respondent stated that the "emotional abuse" also falls in the category of "domestic violence". Since, in the case at hand, petitioner during subsistence of his first marriage, contracted second marriage and on account of the same respondent became mentally upset, she rightly filed complaint under section 12 of the Act and her case squarely falls in the category of "emotional abuse". Learned counsel for the respondent argued that since respondent successfully proved that she is legally wedded wife of the petitioner, court below rightly awarded monthly maintenance to the tune of Rs. 3000/- per month in favour of the respondent.

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

9. After having noticed pleadings as well as above rival contentions, following questions need to be answered for adjudicating the controversy at hand:-

(i). ***Whether the complaint filed by the respondent under the provisions of Domestic Violence Act, is barred by limitation?***

(ii). Whether the fact that the marriage of the petitioner stood dissolved by way of customary divorce, when the complaint under Domestic Violence Act was filed, would render the complaint not maintainable?

10. Before exploring the answer to aforesaid questions, it is apposite to bear in mind the relevant provisions under the scheme of the Domestic Violence Act, which vests a wife with certain rights in case she is wronged by her husband or other members of his family. Section 12(1) of the Act provides that an aggrieved person may file an application to the Magistrate seeking one or more reliefs under the Act. Under the provisions of Section 20(1), the Magistrate while dealing with an application under Sub section (1) of Section 12 is empowered to direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by an "aggrieved person" and any child of the aggrieved person as a result of domestic violence. An "aggrieved person" has been defined section 2(a) of the Act as follows:-

> ***2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;***

11. The term "respondent", as used in section 2(a) of the Act is defined in Section 2(q) which reads as under:-

> ***2(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:***
>
> ***Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;***

12. A perusal of section 2(q), clearly reveals that the expression "respondent" means any adult male person who is, or has been, in a domestic relationship with the 'aggrieved person' and against whom relief has been sought. The proviso to aforesaid provisions suggests that both, an aggrieved wife or a female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner, as the case may be.

13. Section 2(f) defines "domestic relationship" which reads as under:

> ***2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;***

14. The expression "shared household" is defined in Section 2(s) of the Act, as follows:-

> ***2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a house hold whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;***

15. In order to determine as to whether the respondent had a domestic relationship with the petitioner, one of the material fact to be considered is as to during which period the respondent had been staying together with her petitioner-husband in her matrimonial house.

16. From the facts, as noticed hereinabove, it is not in dispute that after marriage, both the parties to the *lis* lived together for almost three years, whereafter allegedly on account of maltreatment and beatings given to the respondent-wife by the family members of the petitioner-husband, she started living with her parents. In the case at hand, there is no dispute that on 5.1.2014, petitioner and respondent divorced each other by way of customary divorce (Annexure P-2). Customary divorce placed on record clearly reveals that besides, respondent-wife, her father, Ex-Pradhan of the Gram Panchayat, Gaura also appended his signatures and factum with regard to mutual divorce was reported to the concerned Gram Panchayat. As per mutual divorce, it was agreed interse parties that respondent-wife would receive her entire belongings, Streedhan and all the articles to which she is entitled to receive and after execution of divorce deed, all the articles and belongings of the respondent-wife lying in the matrimonial house were returned to her. After four years of customary divorce, petitioner contracted second marriage with lady namely, Nisha Kumari on 2.04.2018. Respondent having came to know factum with regard to second marriage of the petitioner with Smt. Nisha Kumari, filed complaint to the SHO, Solan vide complaint dated 18.06.2018 (Annexure P-3). After having found the nature of the allegation to be of "domestic violence" as defined under Section 3 of the Act, police referred the matter to CDPO Solan (Annexure P-5), who further transferred the complaint to CDPO, Kandaghat t(Annexure P-6). The protection Officer prepared the domestic incident report (Annexure P-7), perusal whereof clearly reveals that since 2013 respondent had been living separately from her husband and other family members. She categorically reported to the Protection Officer that

she was forced/coerced to give consent for divorce with the petitioner. She alleged that her mother-in-law and sister-in-law pressurized her to take mutual divorce from her husband. Interestingly, in the domestic incident report allegation is of 13.12.2013, that too against mother-in-law and sister-in-law. However, there is no document available on record suggestive of the fact that report, if any, was ever made by the respondent to the police qua the alleged incident of beatings and maltreatment on 13.12.2013. It is after 18.06.2018 respondent after having came to know the factum with regard to second marriage of the petitioner, lodged the complaint with SHO, Solan (Annexure P-3). Since allegation in the complaint was with regard to domestic violence, police referred the matter to CDPO, Solan. Most importantly, in the complaint given to the police, respondent categorically stated that since March 2013, she had been living with her parents at Solan, meaning thereby after March, 2013 respondent neither shared household with her husband nor other family members i.e. mother-in-law and sister-in-law.

17. Similarly, there is no allegation of "domestic violence", if any, against the petitioner or other family members qua the period starting from March, 2013 to 18.06.2018, when for the first time complaint with regard to domestic violence came to be lodged by the respondent to SHO, Solan. Though, domestic incident report reveals that the respondent alleged that on 13.12.2013 she was given beatings by her mother-in-law and sister-in-law, but since did not lodge the complaint qua the aforesaid incident, if any, immediately after alleged incident, that could not be taken cognizance at this belated stage, especially on account of intervening developments i.e. alleged customary divorce interse parties on 5.01.2014.

18. Though, in the instant case, respondent-wife while opposing the prayer made on behalf of the petitioner-husband for rejection of the complaint, nowhere disputed factum with regard to customary divorce dated 5.01.2014, but claimed before the court below that same was obtained under

coercion and by way of undue influence. She alleged that her mother-in-law and sister-in-law pressurized her to take divorce. She also alleged that since there is no provisions of customary divorce in the area, customary divorce placed on record is of no consequence and she continues to be wife of the petitioner.

19. Since, customary divorce (Annexure P-2) was reported to Gram Panchayat, Gaura and father of the respondent was one of the signatory to the same, this Court with a view to ascertain the factum with regard to genuineness of the customary divorce placed on record, directed Secretary Gram Panchayat, Hinnar, Kandaghat and brother of the respondent namely, Rajinder Kumar to come present before this Court. Sequel to order dated 7.11.2019, Sh. Bant Ram, S/o Sh. Ramia Ram, R/o village Deothal, P.O. Kuji, Tehsil Pachhad, District Sirmaur, H.P., came present in Court alongwith Secretary of Gram Panchayat concerned. Mr. Rup Singh Ex- Pradhan, Gram Panchayat, Hinner, who had appended his signature on Annexure P-2, was also present. All the above named persons categorically stated before this Court that the customary divorce placed on record as Annexure P-2 bears their signatures and same was entered interse parties in their presence. Secretary Gram Panchayat also made available Pariwar register, perusal whereof revealed that factum with regard to customary divorce interse petitioner and respondent was brought to the notice of the Gram Panchayat concerned, on the basis of the same, name of the respondent was deleted from the Pariwar register.

20. Perusal of order impugned in the instant proceedings clearly reveals that though petitioner placed on record customary divorce dated 5.01.2014, but was unable to prove custom, if any, prevalent in the area with regard to customary divorce, as a consequence of which, court below paid no heed to the claim of the petitioner with regard to his having taken divorce from the respondent by way of customary divorce and proceeded to grant

interim maintenance to the tune of Rs.3000/- per month. Now question remains to be decided is" whether Magistrate while proceedings under Section 12 of the Act was required/competent to go into the question of correctness/legality of customary divorce placed on record indicative of the fact that petitioner and respondent had taken divorce by way of mutual consent on 5.01.2014 in the presence of their family members and Gram Panchayat officials, especially when such fact was not disputed by the respondent. It is not in dispute that respondent never disputed factum with regard to her having signed divorce deed (Annexure P-2) alongwith the petitioner, rather she claimed that she was compelled/forced to sign the divorce deed. If it is so, it is not understood what prevented respondent to approach competent court of law for annulment of divorce deed being obtained under coercion.

21. Mr. Sudhir Thakur, learned Senior counsel representing the petitioner, vehemently argued that in these proceedings, which is criminal in nature, court below could not go into the question of correctness of the divorce deed, especially when same was not disputed by the respondent. He argued that it stood established on record with placing of divorce deed that relationship of husband-wife interse petitioner-husband stands severed on 5.01.2014 and thereafter respondent was not entitled to claim maintenance, if any, under various provisions of law. Mr. Thakur also argued that being aggrieved, if any, on account of customary divorce allegedly obtained under coercion, respondent had remedy to file appropriate proceedings before the Civil Court but definitely such question could not be gone into by criminal court in criminal proceedings. Mr. Rajnish Maniktala, learned Senior counsel representing the respondent, contended that once respondent was unable to prove provisions of customary divorce, if any, prevalent in the area and respondent had specifically alleged that she was forced/coerced to take customary divorce, court below rightly ignored divorce deed placed on record.

22. This Court finds considerable force in the submission of learned counsel for the petitioner that court while considering complaint under Section 12 of the Act, could not have gone into the question of correctness/legality of the divorce deed placed on record, especially when factum with regard to customary divorce interse petitioner and respondent was not denied by the respondent. Whether the respondent was forced/ coerced to take divorce by customary divorce is/was a question which could not be decided in these proceedings, rather respondent being aggrieved of the same could file appropriate proceedings for annulment of such divorce deed before the Civil Court. Once respondent had admitted factum of her having taken mutual divorce by way of customary divorce, court below had no option but to accept the prayer made on behalf of the petitioner for rejection of the complaint.

23. It stands duly established on record that on 5.01.2014 petitioner and respondent decided to take divorce by way of mutual consent as per the custom prevalent in the area and thereafter admittedly parties never resided/cohabited with each other. As per own case of the respondent, she had been living separately from the petitioner since 13.12.2013 i.e. when she was allegedly thrown out of her house by her mother-in-law and sister-in-law. There is no material/record, worth credence, made available on record that report, if any, ever came to be lodged at the behest of the respondent after 13.12.2013 till filing of the complaint to the police on 18.06.2018(Annexure P-3), wherein she alleged that petitioner has spoiled her life after having contracted second marriage. In this complaint, she alleged that petitioner has mentally tortured her. It is not understood that if respondent was forced/compelled by the petitioner or his other family members to take divorce by way of mutual consent on 5.01.2014 what prevented her for more than four years to lay challenge to aforesaid deed in the competent court of law. Here in the case at hand, parties after having taken divorce, started living

separately and it is only after contraction of second marriage by the petitioner with lady namely Nisha Kumari, respondent woke up from deep slumber and lodged the report to the police on 18.06.2018, alleging therein her mental harassment on account of second marriage of her husband, meaning thereby though respondent was aware of the fact that she was forced/coerced to enter into the customary divorce by the petitioner or other family members but yet she chose to remain silent and live separately from her husband for more than four years.

24. At the cost of repetition, it may be noticed that factum with regard to the respondent having signed the divorce deed along with her father stands duly established with the statement of father of the respondent and Secretary of Gram Panchayat concerned. Be that as it may, this Court is of the definite view that learned Magistrate while considering the complaint under Section 12 of the Act had no jurisdiction/competence to go into the question of correctness/legality of the customary divorce deed placed on record, especially when same was not disputed by the respondents. Whether there is/was custom prevalent in the area of taking customary divorce is/was not a question to be gone into by the Magistrate in these proceedings, rather he/she was/is only to ascertain whether there is any kind of domestic relationship between petitioner and respondent and if the Magistrate was convinced that there is domestic relationship interse petitioner and respondent, he could further proceed to ascertain whether respondent is an "aggrieved person" in terms of Section 2 of the Act or not. If Magistrate was convinced that complainant is an aggrieved person he was to further ascertain whether "domestic violence" as defined under Section 3 of the Act has been inflicted/ committed upon the respondent by the petitioner or his family members. Since in the case at hand petitioner by way of placing customary divorce deed (Annexure P-2) succeeded in establishing factum with regard to mutual divorce interse him and the respondent, coupled with

the fact that respondent had been living separately from her husband and other family members since 2013, learned Magistrate ought not have taken cognizance of the complaint filed under Section 12 of the Act and it should have allowed the prayer made on behalf of the petitioner for rejection of the complaint.

25. In view of the aforesaid detailed discussion made herein, this Court is of the view that respondent was estopped from filing the complaint under Section 12 of the Act against the petitioner after her having agreed to take divorce by way of mutual consent vide divorce deed dated 5.01.2014(Annexure P-2). Unless aforesaid divorce deed is not quashed and set-aside/annulled by competent court of law, same could not have been ignored by the Magistrate in the instant proceedings.

26. It is well settled that there is no limitation prescribed for instituting a complaint under Domestic Violence Act and it is only if any person is to be prosecuted under the provisions of section 31 of Domestic Violence Act, there would be a limitation of one year in terms of section 468 of Cr.P.C. In this regard, reliance is placed upon the judgement reported as 2018(3) RCR(Criminal) 307, ***Vikas & others vs. Smt. Usha Rani and another (Pb. & Hr.),*** wherein it has been held as under:-

> "**16. An aggrieved person is permitted to present an application to the Magistrate seeking one or more reliefs under this Act and the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer also. section 12 of the Domestic Violence Act is enabling provision to file an application, whereas Sections 18 to 22 of the Domestic Violence Act provide for rights of the aggrieved person to seek different reliefs like protection, residence, monetary relief, custody of minor and compensation. No limitation has been prescribed for seeking any such relief. Penal provisions under section 31 of the Domestic Violence Act would get attracted on a breach of a protection order. It is only in a situation when there is a breach of any protection order on an application under Section 12 or on any**

of the reliefs under Sections 18 to 22 of the Domestic Violence Act, then and then only, an application under section 31 of the Domestic Violence Act is to be filed within one year from the date of such breach and not thereafter. Therefore, the court is of the opinion that there is no limitation prescribed to institute a claim seeking relief under Sections 17 to 22 of the Domestic Violence Act."

27. While there can be no doubt that an application under provisions of section 17 to 22 of Domestic Violence Act would be maintainable even if filed belatedly after the alleged incident of domestic violence as no limitation is prescribed under the Act for instituting such an application, but the Court, as a matter of caution, would be required to satisfy itself as regards the genuineness of a claim made therein so as to rule out the possibility of any concocted version which may have been put forth as an afterthought to settle scores with the applicant's husband or other members of his family merely on account of the relations having turned sour between the applicant and her in-laws. Having held that no limitation is prescribed for instituting a complaint under provisions of Section 17 to 12 of the Act and that an applicant cannot be thrown out of the Court solely on account of delay in approaching the Courts, the next question before this Court is as to "whether in view of the circumstances that the marriage between the petitioner and respondent stood dissolved by way of customary divorce and husband of the applicant have already solemnized second marriage, an application on behalf of the respondent would be maintainable under provisions of Domestic Violence Act?".

28. Mr. Rajnish Maniktala, learned counsel representing the respondent, in order to demonstrate that grant of divorce would not absolve the liability of the respondents under provisions of Domestic Violence Act pressed into service a judgement of Hon'ble Apex Court reported as 2014(10) SCC 736 **Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori and another**. On the other hand, Mr. Sudhir Thakur, learned Senior counsel representing

the respondent the petitioner invited attention of this Court to judgment rendered by Hon'ble Apex Court in ***Inderjit Singh Grewal vs. State of Punjab and another,*** 2011(12) SCC 588, to state that once the relationship of husband-and-wife stood severed by a decree of divorce, no complaint under provisions of domestic violence act would be maintainable. In ***Inderjit Singh Grewal vs. State of Punjab and another***, wherein a wife whose marriage stood dissolved by a decree of divorce but even after the said divorce, had allegedly been staying together held that a complaint under provisions of Domestic Violence Act was not maintainable as the marriage between the parties no longer subsisted. The relevant extract read as such:

> "***33. In view of the above, we are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the Act 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same.***"

29. In Juveria Abdul's case (supra), the Hon'ble Supreme Court noticed the earlier judgement rendered in ***Inderjit Singh Grewal's case (supra***) but upon finding the factual matrix to be distinct, held the complaint under Domestic Violence Act maintainable. The distinction noticed is that while in Inderjit Singh Grewal's case, the marriage stood finally dissolved amongst the parties and neither any complaint under provisions of Domestic Violence Act had been filed nor any FIR/complaint under section 406 or 498-A IPC or under any other penal provisions had been instituted prior to grant of divorce, whereas in *Juveria Abdul's case (supra*), a FIR under provisions

of section 498-A IPC already stood lodged before the husband got his marriage dissolved. It was on account of the said distinguishable facts in Juveria Abdul's case that Hon'ble Supreme Court held that complaint under provisions of Domestic Violence Act was maintainable.

30. Though, from the direct reading of aforesaid judgment, it appears that there is no such rule that divorce between a couple would absolutely debar a wife from invoking provisions of Domestic Violence Act and that in certain exceptional circumstances, as in Juveria Abdul's case (supra), a wife, despite her divorce, may still be able to make out a case for grant of relief. However, as far as the present case is concerned, the facts are more akin to the facts in *Inderjit Singh Grewal's case* because in the case at hand neither any complaint under domestic Act nor any FIR under section 406 or 498-A of IPC or under any other penal provisions had ever been instituted before the dissolution of marriage. Rather, after five years of dissolution of marriage by customary divorce respondent instituted complaint to the police alleging therein maltreatment and harassment at the hands of the petitioner. Police after having found the allegations to be of “domestic violence”, referred the matter to CDPD, who after having drawn domestic violence report, referred the matter to concerned Magistrate.

31. Since in the case at hand, matter was listed before the court below on the basis registration of case with the police and on the basis of report furnished by the police to the CDPO, wherein factum with regard to dissolution of marriage by way of mutual consent stood established, court below otherwise could not go into the legality and correctness of the divorce deed placed on record. Leaving everything aside, there is no material/ convincing evidence to show that the respondent had resided in share household with the petitioner or other family members after March, 2013 and they had subjected her to domestic violence.

32. Mr. Rajnish Maniktala, learned Senior counsel representing the respondent argued that since there is no provisions of customary divorce in the area, the divorce obtained by customary divorce is of no consequence and as such, respondent was not required to get it annulled from the competent court of law. However, this Court is not persuaded to agree with aforesaid contention of learned counsel for the respondent. As has been observed hereinabove, court while considering complaint under Section 12 of the Act could not go into the question of legality and correctness of the customary divorce deed placed on record, especially when factum with regard to respondent having signed such divorce deed was not disputed. In such like situation, appropriate remedy for respondent was to get such divorce deed annulled from the competent court of law. Till the time aforesaid customary deed allegedly obtained under coercion was not set aside by the competent court of law, relationship interse petitioner husband shall be considered as severed. At this juncture, it is profitable to take note of the judgment rendered by Hon'ble Apex Court in ***Inderjit Singh (supra)***, wherein it has been held as under:-

> ***"18. However, the question does arise as to whether it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent Court. The issue is no more res integra and stands settled by a catena of decisions of this Court. For setting aside such an order, even if void, the party has to approach the appropriate forum. (Vide: State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors., AIR 1996 Supreme Court 906; and Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd., 1997(2) R.C.R.(Civil) 473 : 1997(2) R.C.R.(Rent) 682).***
>
> ***19. In Sultan Sadik v. Sanjay Raj Subba & Ors., 2004(1) R.C.R.(Civil) 767 : 2004(3) S.C.T. 395 , this Court held that***

there cannot be any doubt that even if an order is void or voidable, the same requires to be set aside by the competent court.

20. In M. Meenakshi & Ors. v. Metadin Agarwal (dead) by Lrs. & Ors., (2006)7 SCC 470, this Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is nonest/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The Court observed as under :-

"18. It is well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est. An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof."

33. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds merit in the present petition and same is accordingly allowed. The order dated 31.05.2019, passed by learned Judicial Magistrate, 1st Class, Kandaghat, District Solan, H.P., in case No.3/S of 2018, rejecting the complaint and granting the maintenance in favour of the respondent as well as complaint filed by the respondent, are quashed and set-aside. Pending applications, if any, also stands disposed of.

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

Between:

1. VIKRAM SINGH S/O SOM NATH, R/O FLAT NO.101-B, GH-86, SECTOR 20, PANCHKULA(HARYANA) AT PRESENT POSTED AS DGM-HUMAN RESOURCES & ADMINISTRATIVE AT JSW HYDRO ENERGY LIMITED (BASPA-II & KARCHAM WANGTOO HYDRO PROJECT) DISTRICT KINNAUR , H.P. AGED 51 YEARS.

2. YOGESH MOHTA S/O BHAGWATI PRASAD MOHTA, R/O B/503, EXOTICA ELEGANCE, 9A, MALL ROAD, AHINSA KHAND-II,

INDIRAPURAM, GAZIABAD (UP) AT PRESENT POSTED AGM-HUMAN RESOURCES & ADMINISTRATIVE AT JSW HYDRO ENERGY LIMITED (BASPA-II & KARCHAM WANGTOO HYDRO PROJECT) DISTRICT KINNAUR, H.P. AGED 50 YEARS.

....PETITIONERS

(BY MR. AJAY KOCHHAR, ADVOCATE WITH
MR. VIVEK SHARMA AND MR. VARUN CHAUHAN and MS. AVNI KOCHHAR, ADVOCATES.)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL).

CRIMINAL MISC. PETITION (MAIN)
U/S 482 Cr.P.C
No.591 OF 2021
Decided on: 05.08.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 306, 34- Quashing of F.I.R.- Held- Contents of FIR and Final Report filed under Section 173 Cr.P.C, if are taken to be correct, on its face value, do not prima facie constitute the offence against the accused- Neither FIR nor Final Report filed under Section 173 Cr.P.C, disclose offences, if any, punishable under Section 306 IPC against the accused named in the FIR- There is no sufficient evidence available on record to connect the accused named in the FIR for the offences alleged to have been committed by them- Chances of conviction of accused named in the FIR, are very remote and bleak- Petition allowed. (Para 29, 30, 31)

Cases referred:

Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210;

Geo Varghese v. State of Rajasthan and Anr, 2021 (4) RCR (Criminal) 361;

M. Arjunan Vs. State, Represented by its Inspector of Police (2019) 3 SCC 315;

Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;
Ramesh Kumar Vs. State of Chhattisgarh 2001 9 SCC 618;
S.S.Cheena Vs. Vijay Kumar Mahajan and Anr. (2010) 12 SCC 190;
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;
Ude Singh & Ors. Vs. State of Haryana, 2019 17 SCC 301;

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

O R D E R

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioners, who are posted as DGM and AGM, respectively at JSW Hydro Energy Limited ((Baspa-II & Karcham Wangtoo Hydro Project) District Kinnaur, H.P., for quashing of FIR No.62 of 2020, dated 27.07.2020 registered at police Station Bhabanagar, District Kinnaur, H.P., under Section 306 and 34 of IPC as well as consequent proceedings i.e. case No.25 of 2021 (CNR No. HPK 1050022322021), pending in the Court of learned Chief Judicial Magistrate, Kinnaur, District Kinnaur, H.P.

23. Precisely, the facts of the case, which led to lodging of the FIR sought to be quashed in the instant proceedings are that on 27.07.2020, police after having received information that one of the worker in JSW complex has committed suicide, reached the spot and recorded the statement of complainant Sh. Sukhi Ram under Section 154 Cr.P.C, wherein he alleged that since the year 2008 he is posted as Laboratory Assistant at JSW Power House Wangtoo. On 27.07.2020, at 1:00 PM, he alongwith other employees went to JSW Field Hostel No.6 for having his meal, but since on that day there

was lot of noise, he enquired from the fellow employee, who disclosed that carpenter Jai Prakash Vishwakarma has committed suicide by hanging himself in his quarter i.e. room No.24. He alleged when he reached room No.24, he found that Jai Prakash Vishwakarma hanging with the hook of the ceiling fan. He stated that thereafter police visited the room of the deceased and recovered one suicide note lying on the bed, wherein deceased had written to President Sh. Jiwan Negi that he did not want to take Voluntary Retirement Scheme ***(for short 'VRS'),*** but he has been harassed by Sh. Vikram Singh and Yogesh Mohta. In suicide note, deceased further alleged that he is committing suicide after being harassed mentally by Vikram Singh and Yogesh Mohta. Deceased also written details in the English notebook with regard to loans taken by him. He requested Jiwan Kumar to return the loan with his son. On the basis of aforesaid statement and suicide note recovered from the room, police lodged the FIR against the accused, named in the FIR. After completion of the investigation, police has already presented the challan in competent court of law, but before same could be taken to its logic end, petitioners have approached this Court in the instant proceedings for quashing of FIR as well as consequent proceedings pending in the competent court of law on the ground that at no point of time deceased was compelled by the accused, named in the FIR, to take 'VRS', rather he himself in terms of the scheme formulated by JSW Company opted for 'VRS', but before same could be finalized, he committed suicide. It has been further claimed by the petitioners that otherwise also, they are not the competent authority to take decision on the request made by the deceased for 'VRS' in terms of policy formulated by the Government, rather such decision was to be taken by the Head of plant, who has been not arrayed as an accused in the instant case. In nutshell, it has been claimed on behalf of the petitioners that no case muchless under Section 306 of IPC, is made out against them and they have been falsely implicated.

24. Pursuant to the notice issued in the instant proceedings, respondent-State has filed reply, wherein facts, as narrated hereinabove, have been not disputed. Respondent in reply has claimed that since deceased was compelled to take 'VRS' and he had liability to pay loan, he being under pressure committed suicide. It has been further stated in the reply that there is ample evidence collected on record suggestive of the fact that deceased was being constantly harassed by the accused, named in the FIR ,and they compelled him` to take voluntarily retirement and as such, it cannot be said that they have been falsely implicated.

25. I have heard the learned counsel for the parties and perused the record.

26. Before ascertaining the genuineness and correctness of the submissions and counter submissions having been made by the learned counsel for the parties vis-à-vis prayer made in the instant petition, this Court deems it necessary to discuss/elaborate the scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC.

27. 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.

28. Subsequently, 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.

29. 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.PC, 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."

30. 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.

31. Sh. Narender Guleria, learned Additional Advocate General, contended that since investigating agency after having completed investigation has already filed challan under Section 173 Cr.PC., in the competent court of law, prayer made on behalf of the petitioners for quashing FIR cannot be accepted at this stage. However, this Court is not inclined to accept the aforesaid submission made by the learned Additional Advocate General for the reason that High Court while exercising jurisdiction under Section 482 Cr.PC can even proceed to quash charge, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situations is allowed to continue, person arraigned as an accused would be unnecessarily put to ordeals of protracted trial on the basis of flippant and vague evidence.

32. Recently, the Hon'ble Apex Court in case tilted ***Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210***, has held that abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation and as such, the abuse of law or miscarriage of justice can be rectified by the court while exercising power under Section 482 Cr.PC. The relevant paras of the judgment are as under:

> ***16. Even otherwise it must be remembered that the*** provision invoked by the accused before the High Court is Section 482 Cr. P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -
>
> > "482. Saving of inherent power of the High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to

> prevent abuse of the process of any Court or otherwise to secure the ends of justice."
>
> 17. There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court (G. Sagar Suri and Anr. V. State of U.P. and Others, (2000) 2 SCC 636 (para 7), Umesh Kumar v. State of Andhra Pradesh and Anr. (2013) 10 SCC 591 (para 20). Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

33. Recently, the Hon'ble Apex Court in case titled ***Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608,*** has elaborated the scope of exercise of power under Section 482 Cr.PC, the relevant para whereof reads as under:-

> "7. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently

followed and re-iterated by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.

> "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:
>
> (iii) to give effect to an order under the Code;
> (iv) to prevent abuse of the process of the court, and
> (iii) to otherwise secure the ends of justice.
>
> 24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

8. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335

> "102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).
>
> .....
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra, 2018 SCCOnLine SC3100 ("Dhruvaram Sonar") :

> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to

quash the same in exercise of its inherent powers."

34. In the light of aforesaid law laid down by the Hon'ble Apex Court, now this Court would make an endeavour to examine and consider the prayer made in the instant petition vis-à-vis factual matrix of the case. Close scrutiny of the material available on record reveals that FIR sought to be quashed came to be instituted on the basis of the statement made by complainant Sh. Sukhi Ram, who was also working in JSW Power House. It is none of the case that prior to committing suicide, deceased ever complained him of mental harassment caused by the accused, named in the FIR, on account of voluntary retirement, rather complainant himself stated in his statement recorded under Section 154 Cr.P.C., on the basis of which, formal FIR came to be lodged that he after having heard noise inquired and found that deceased Jai Prakash Vishwakarma has committed suicide. He alleged that he went to the room of the deceased and found that he had committed suicide by hanging himself with the hook of the ceiling fan. As per complainant one suicide note duly signed by deceased was found lying on the bed, wherein deceased had alleged that he is committed suicide on account of harassment meted to him at the hands of the accused, named in the FIR. In the suicide note, deceased also alleged that though he did not want to take 'VRS', but he was compelled by Vikram Singh and Yogesh Mohta. On the second page of suicide note addressed to Sh. Vijay Kumar deceased has furnished information with regard to loan taken by him. He also made request to Sh. Vijay Kumar to repay the loan alongwith his son.

35. Mr. Ajay Kochhar, learned counsel representing the petitioners while inviting attention of this Court to the policy formulated by JSW with regard to voluntary retirement (Annexure P-2) contended that decision, if any, with regard to voluntary retirement was to be taken by an employee not by the company and as such, it cannot be said that deceased was ever compelled by

the officials of the company to take 'VRS'. He further submitted that though decision with regard to prayer made on behalf of an employee for 'VRS' was to be taken by the Head of the plant, but there are ample documents available on record suggestive of the fact that fellow employees, who had earlier applied for 'VRS', subsequently withdrawn their 'VRS' and permission was granted by the company (Annexure P-3 to P-5). Lastly, learned counsel representing the petitioners submitted that accused named in the FIR, are also the employees of JSW Company and difference between them and deceased is/ was that accused named in the FIR are/were holding managerial position, whereas deceased was carpenter. However, ultimate decision with regard to formulation of Voluntary Retirement Scheme and thereafter acceptance of proposal, if any, made by an employee was to be taken by the Head of the plant and as such, no role can be said to have been played by the accused named in the FIR in accepting the prayer made on behalf of the deceased for taking voluntary retirement, which was actually accepted by the Head of the Plant. Mr. Kochhar, while inviting attention of this Court to Section 306 IPC, contended that when there is no evidence of abetment/instigation, if any, on the part of the accused named in the FIR, which compelled deceased to commit suicide, no case muchless under Section 306 of IPC can be said to be made out against the petitioners and they are liable to be discharged. While inviting attention of this Court to the material placed on record with the final challan, learned counsel for the petitioners argued that case filed under Section 306 of IPC in all probabilities is likely to fail, but in case proceedings are not quashed at this stage, great prejudice would be caused to the petitioners, who would be unnecessarily compelled to go through ordeal of the protected trial, which is likely to culminate into acquittal.

36. While refuting aforesaid submissions made on behalf of learned counsel for the petitioners, Mr. Narender Guleria, learned Additional Advocate General, strenuously argued that all the ingredients as are required to bring

the case in the ambit of Section 306 IPC are attracted in the present case and as such, it cannot be said that petitioners have been falsely implicated. While referring to the suicide note left behind by the deceased, learned Additional Advocate General argued that it is ample clear that accused, named in the FIR, compelled the deceased to take 'VRS'. He argued that since accused named in the FIR made deceased to sign 'VRS' document forcibly, as a consequence of which, he was compelled to commit suicide, it can be safely presumed that accused named in the FIR, abetted/instigated the deceased to commit suicide and as such, they have been rightly booked under Section 306 of IPC. He further argued that as per RFSL Report handwriting with which suicide note has been written is of deceased.

37. Careful perusal of Voluntary Retirement Scheme (Annexure P-2) reveals that vide communication dated 11th October, 2019, JSW Company with a view to reduce the manpower circulated the policy for voluntary retirement, but if the preamble of aforesaid scheme is read in its entirety, it clearly reveals that ultimate decision with regard to 'VRS' was to be taken by an employee not by the company. Employee interested in taking voluntary retirement was to furnish his/her option. Policy, if read in its entirety, nowhere reveals that it was compulsory for all the employees, who were earlier working with JP Industries to take voluntary retirement. Policy further reveals that in lieu of voluntary retirement some amount was to be paid by the company. In the case at hand, though prosecution case is that deceased was compelled by the accused named in the FIR to take voluntarily retirement, but as has been discussed hereinabove, option in that regard was to be exercised by an employee. Even for the sake of arguments, it is presumed to be correct that deceased was compelled by accused named in the FIR to take 'VRS' even then he had an opportunity to make the request to re-consider his decision. There is/ are ample evidence/documents available on record that employees, who at one point of time had applied for 'VRS' and actually taken 'VRS'

requested the company to permit them to reconsider their decision and company not only permitted such employees to reconsider their decision, but also took them back in the job. However, in the instant case application by deceased for voluntary retirement was filed on 13.07.2020, which is part of the challan and date of his reliving was 31.07.2020. Deceased sworn an affidavit on 25.07.2020 before Sub Divisional Magistrate, Tapri, stating therein that he has voluntarily applied for voluntary retirement. If he was being compelled by the management or by the accused named in the FIR, he had an opportunity to state before Sub Divisional Magistrate that though he does not want to take voluntary retirement but is being compelled by the accused named in the FIR as well as their management. Two days after his having sworn affidavit before the Sub Divisional Magistrate, he committed suicide leaving behind suicide note, as detailed hereinabove. It is pertinent to take note of the fact that at the time of suicide deceased was found heavily drunk, meaning thereby he was not in his senses and was unable to think his good or bad.

38. Since deceased took extreme step of committing suicide while in state of heavy intoxication, it cannot be said that he was in his senses while writing suicide note as writing of the deceased which has been considered suicide note by investigating agency could not and ought not to be read like a Will, especially when the deceased was not in his senses due to his inebriated condition and also in the absence of any other evidence on record evidencing abetment on the part of the petitioners.

39. Leaving everything aside, this Court finds from the record, as has been observed hereinabove, that final decision, if any, with regard to acceptance of voluntary retirement, if any, mooted by the petitioners was to be taken by the deceased and as such, it is not understood how petitioners, who were merely working as DGM and AGM in the plant could be held liable for compelling deceased to take voluntary retirement, which otherwise as per affidavit sworn by him before the Sub Divisional Magistrate was voluntarily

taken by him. Voluntary Retirement Scheme (Annexure P-2) itself suggests that accused named in the FIR was only to process the proposal of voluntary retirement, if any, made by the employees in terms of scheme formulated by the company, but ultimate decision in that regard was to be taken by the Head of plant. Even in the case of the deceased, decision with regard to acceptance of voluntary retirement was to be taken by the Head of the plant, but he was not arrayed as an accused. Even if it is presumed that accused named in the FIR persuaded deceased to apply for 'VRS' which he never wanted to take, petitioners cannot be held liable for their having committed offence punishable under Section 306 of IPC, unless it is proved on record that they had *mens rea* to abet/ instigate the deceased to commit suicide, which is otherwise basic requirement to bring the case in ambit of Section 306 of IPC. Apart from above, there is no material available on record suggestive of the fact that accused named in the FIR had any kind of prior animosity with the deceased and in past on any occasion they had humiliated ,admonished the deceased or in that regard complaint, if any, was ever made by the deceased to the higher authorities. Moreover, accused named in the FIR came in the contact of the deceased after company was taken over by JSW and as such, it is difficult to conclude that they forcibly wanted to throw the petitioner out of the job, especially when there is material evidence, as has been pointed hereinabove, that request made by some of the employees for withdrawal of their voluntarily retirement was duly considered and they were permitted to continue in the company.

40. Since as per prosecution case there was a liability on the deceased to repay the loan, as has been recorded by him in the suicide note, it can be inferred that he was under some sort of pressure to repay the loan, which compelled him to commit the suicide.

41. To prove allegation, if any, under Section 306 IPC, it is incumbent upon the prosecution to prove abetment or instigation, if any, at

the hands of accused named in the FIR, which is totally missing in the case at hand. At this stage, it would be apt to take note of provision contained under Section 306 of IPC, which reads as under:-

> ***"Section 306- Abetment of suicide****.- If any person commits suicide, whoever abets the commission of such suicide , shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

Abetment is defined under Section 107 of IPC, which reads as under:-

> ***"Abetment of a thing.—A person abets the doing of a thing, who—***
>
> *(First) — Instigates any person to do that thing; or*
> *(Secondly)—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
> *(Thirdly)— Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.—A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C. Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the*

commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

42. Abetment is defined under Section 107 of IPC,which reads as under :-

> "107. Abetment of a thing-A person abets the doing of a thing, who — First. — Instigates any person to do that thing; or Secondly.— Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Explanation 2.—Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission there of, is said to aid the doing of that act."

43. Similarly, the dictionary meaning of the word instigate' is to bring about or initiate, incite someone to do something. The Hon'ble Apex Court in the case of ***Ramesh Kumar Vs. State of Chhattisgarh 2001 9 SCC 618*** has defined the word 'instigate' as instigation is to goad, urge forward, provoke, incite or encourage to do an act."

44. Hon'ble Apex Court in case of **S.S.Cheena** Vs. **Vijay Kumar Mahajan and Anr**. (2010) 12 SCC 190 has dealt with scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC. Relevant pars of the aforesaid judgment read as under:

> "Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

45. In the case of ***M. Arjunan Vs. State, Represented by its Inspector of Police (2019) 3 SCC 315***, the Hon'lbe Apex Court has held as under:

> "The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C."

46. The Hon'ble Apex Court in ***Ude Singh & Ors. Vs. State of Haryana, 2019 17 SCC 301***, has held that in cases of alleged abetment of suicide, there must be a proof of direct or indirect act/s of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behavior and responses/reactions. In the case of accusation for abetment of

suicide, the Court is required to look for cogent and convincing proof of the act/s of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

47. Recently, the Hon'ble Apex Court in a case ***(Geo Varghese v. State of Rajasthan and Anr, 2021 (4) RCR (Criminal) 361)*** where student committed suicide after being reprimanded by the teacher/administration, categorically held that reprimanding student would not amount to instigation to commit suicide. Relevant para of the aforesaid judgment reads as under:

> 27. It is a solemn duty of a teacher to instil discipline in the students. It is not uncommon that teachers reprimand a student for not being attentive or not being upto the mark in studies or for bunking classes or not attending the school. The disciplinary measures adopted by a teacher or other authorities of a school, reprimanding a student for his indiscipline, in our considered opinion, would not tantamount to provoking a student to commit suicide, unless there are repeated specific allegations of harassment and insult deliberately without any justifiable cause or reason. A simple act of reprimand of a student for his behaviour or indiscipline by a teacher, who is under moral obligations to inculcate the good qualities of a human being in a student would definitely not amount to instigation or intentionally aid to the commission of a suicide by a student.
>
> 28. 'Spare the rod and spoil the child' an old saying may have lost its relevance in present days and Corporal punishment to the child is not recognised by law but that does not mean that a teacher or school authorities have to shut their eyes to any indiscipline act of a student. It is not only a moral duty of a

> teacher but one of the legally assigned duty under Section 24 (e) of the Right of Children to Free and Compulsory Education Act, 2009 to hold regular meetings with the parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other act or relevant information about the child.
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> .....
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> 32. Considering the facts that the appellant holds a post of a teacher and any act done in discharge of his moral or legal duty without their being any circumstances to even remotely indicate that there was any intention on his part to abet the commission of suicide by one of his own pupil, no mens reacan be attributed. Thus, the very element of abetment is conspicuously missing from the allegations levelled in the FIR. In the absence of the element of abetment missing from the allegations, the essential ingredients of offence under section 306 IPC do not exist
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> .....
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> 40. In the absence of any material on record even, prima-facie, in the FIR or statement of the complainant, pointing out any such circumstances showing any such act or intention that he intended to bring about the suicide of his student, it would be absurd to even think that the appellant had any intention to place the deceased in such circumstances that there was no option available to him except to commit suicide.

48. In the aforesaid judgment, the Hon'ble Apex Court has categorically held that simple act of reprimand of a student for his behaviour or indiscipline by a teacher, who is under moral obligations to inculcate the good qualities of a human being in a student would definitely not amount to instigation or intentional aid to the commission of a suicide by a student. In the absence of the element of abetment missing from the allegations, the essential ingredients of offence under Section 306 IPC do not exist. Apart from

above, the Hon'ble apex Court has held that victim committed suicide allegedly for being reprimanded for repeatedly bunking classes. Reading of victim's suicide note shows that same was penned by immature and hypersensitive mind, thus act of accused being teacher would not ordinarily induce a circumstances to a student to commit suicide. In the case at hand, allegedly deceased has committed suicide after his being compelled to take voluntary retirement by the accused name in the FIR, but since decision with regard to 'VRS' was to be taken by the Head of the plant and accused named in the FIR were merely holding managerial positions in the company, they cannot be said to have abetted/ instigated deceased to commit suicide.

49. Close scrutiny of aforesaid law taken into consideration clearly reveals that mere allegation of harassment of deceased by the accused named in the FIR may not be sufficient to conclude guilt, if any, under Section 306 of IPC, rather to bring the accused in ambit of Section 306 of IPC, it is required to be established on record that deceased committed suicide after being instigated and abetted by the accused, which is totally missing in the instant case.

50. Contents of FIR and Final Report filed under Section 173 Cr.P.C, if are taken to be correct, on its face value, do not *prima facie* constitute the offence against the accused. Neither FIR nor Final Report filed under Section 173 Cr.P.C, disclose offences, if any, punishable under Section 306 IPC against the accused named in the FIR. There is no sufficient evidence available on record to connect the accused named in the FIR for the offences alleged to have been committed by them.

51. Having scanned the entire material adduced on record by the prosecution alongwith Final Report filed under Section 173 Cr.P.C, this Court has no hesitation to conclude that evidentiary material on record, if accepted, would not reasonably connect the petitioners with the crime and as such, no

fruitful purpose would be served, in case, accused are put to protracted trial, which otherwise, is likely to fail on account of lack of evidence.

52. Having perused the material available on record, this Court finds that chances of conviction of accused named in the FIR, are very remote and bleak and as such, it may not be in the interest of justice to let accused named in the FIR face trial, which in any eventuality is likely to fail.

53. Consequently, in view of the above, present petition is allowed and FIR No.62 of 2020, dated 27.07.2020 registered at police Station Bhabanagar, District Kinnaur, H.P., under Section 306 and 34 of IPC as well as consequent proceedings i.e. case No.25 of 2021 (CNR No.HPK 1050022322021), pending in the Court of learned Chief Judicial Magistrate, Kinnaur, District Kinnaur, H.P. are quashed and set-aside and the petitioners-accused are acquitted of the charges framed against them under Section 306 and 34 IPC. Interim order, if any, is vacated.

Accordingly, petition is disposed of alongwith pending applications, if any.

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

Between:

RAVI KUMAR @ MANI, S/O SH. PREM SINGH RESIDENT OF Q-1, SARDARNI LINE, N.S. NIS PATIALA, POLICE STATION CIVIL LINE, DISTRICT PATIALA, PUBJAB, AGED ABOUT 24 YEARS THROUGH HIS FATHER SH. PREM SINGH S/O LATE SH. GURDIAL SINGH RESIDENT OF Q-1, SARDARNI LINE, N.S.NIS PATIALA, POLICE STATION CIVIL LINE, DISTRICT PATIALA, OCCUPATION GOVT. EMPLOYEE AS WATCHMAN IN N.S.NIS PATIALA, AGED ABOUT 55 YEARS.

....PETITIONER

(BY SH. MAN SINGH CHANDEL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

….RESPONDENT

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
No. 1274 OF 2022
Decided on: 27.06.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 506- Sexual assault of the prosecutrix against her wishes on the pretext of marriage- Held- No reason to let the bail petitioner incarcerate in jail for indefinite period during the trial specially when nothing remains to be recovered from him- Normal rule is of bail and not jail- Bail allowed. (Para 8, 12)

Cases referred:

Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Sanjay Chandra vs 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

Bail petitioner namely, Ravi Kumar, who is behind the bars since 15.5.2022**,** 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. 24/2022, dated 12.05.2022 under Sections 376 and 506 of IPC, registered at Woman police Station, Baddi, District Solan, H.P.

2. Pursuant to order dated 13.06.2022, respondent-State has filed the status report and ASI Gian Chand has also come present alongwith the record. Record perused and returned.

3. Close scrutiny of the record/status report reveals that on 12.05.2022, victim/prosecutrix, aged 29 years (***name withheld to protect***

her identity), **lodged** a complaint at woman police Station, Baddi District Solan, H.P., alleging therein that she had come in the contact of bail petitioner on 14.02.2020 through social media, whereafter bail petitioner repeatedly requested her to meet him in Pinjore Garden, Panchkulla. Victim/prosecutrix alleged that on 18.02.2020, on the request of the bail petitioner, she went to Pinjore garden and there bail petitioner proposed her for marriage. She alleged that bail petitioner requested her to meet his mother, but she refused. She alleged that after some time bail petitioner requested her to meet her mother and as such, she made him to meet Smt. Sharda Devi, who had adopted her. She alleged that bail petitioner made proposal of marriage with her to her mother and her mother, who is a cancer patient, agreed for her marriage. She alleged that while in connection with her employment, she used to live at Barotiwala on 14.04.2020 bail petitioner came to her room and sexually assaulted her against her wishes on the pretext of marriage. However, on 16.11.2021 after the death of mother of victim/prosecutrix, bail petitioner and his family members started making excuses. She alleged that bail petitioner stopped talking with her, whereas her parents blocked her number and now she has come to know from somebody that bail petitioner is likely to marry somebody else. In the aforesaid background, FIR as detailed hereinabove, came to be lodged against the present bail petitioner and since 15.05.2022, he is behind the bars. 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.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to filing of the challan in the competent court of law, contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency and as such, prayer made on his behalf for grant of bail may be rejected outrightly. Learned

Additional Advocate General further submits that since report of RFSL is still awaited and as such, it may not be in the interest of justice to enlarge bail petitioner on bail, who in the event of being enlarged on bail may not only flee from justice, but can also tamper with the prosecution evidence. While making this Court to peruse the record of investigation, Mr. Bhatnagar, states that there is overwhelming evidence adduced on record suggestive of the fact that the bail petitioner taking undue advantage of innocence of the victim/ prosecutrix had been sexually assaulting her for so many years on the pretext of marriage and as such, it cannot be said that he has been falsely implicated.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that as per own version given by victim/prosecutrix she had prior acquaintance with the bail petitioner and she had been talking to him since April 2020. As per own case of the victim/prosecutrix, she was sexually assaulted against her wishes on 14.4.2020 on the pretext of marriage but yet she chose not to file any complaint either to police or her parents, rather she on the askance of bail petitioner made bail petitioner to meet her mother for finalization of their marriage. As per own case of the victim/prosecutrix, family of the bail petitioner and victim/prosecutrix had agreed for marriage and as such, victim/ prosecutrix of her own volition had been regularly meeting the bail petitioner, who is otherwise younger than the victim/prosecutrix. Victim/prosecutrix in her statement given to police has stated that on 16.11.2021 her mother expired and thereafter bail petitioner and his family started finding excuses for not solemnizing her marriage with petitioner. She stated that bail petitioner stopped giving her call regularly, whereas other family members blocked her calls and she has apprehension that bail petitioner is likely to marry somebody else.

6. Having carefully perused status report, especially statements of victim/prosecutrix, this Court has no hesitation to conclude that

victim/prosecutrix, who is major and 29 years old, had been meeting the bail petitioner of her own volition with a view to solemnize marriage and alleged incident of sexual assault had occurred on 14.4.2020. Now after almost two years of the alleged incident, victim/prosecutrix has lodged the FIR stating therein that on 23.1.2022 while she had gone to the house of the bail petitioner for collecting her certain documents, she was again subjected to forcible sexual intercourse by bail petitioner, but aforesaid version made by the victim/prosecutrix appears to be highly doubtful for the reasons that initially she herself stated that after 16.11.2021 when her mother expired, bail petitioner stopped talking to her, if it is/ was so there was no occasion, if any, for the victim/prosecutrix to visit the house of the bail petitioner on 23.1.2022.

7. Having noticed conduct of the victim/prosecutrix, which is apparent from her statements made to the police as well as judicial Magistrate, this Court finds it difficult to agree with contention of learned Additional Advocate General that bail petitioner taking undue advantage of innocence of the victim/prosecutrix exploited her against her wishes, rather as has been noticed hereinabove, victim/prosecutrix of her own volition had been meeting with bail petitioner with a view to solemnize marriage with him. Since bail petitioner has now shown reluctance to marry her, FIR as detailed hereinabove came to be lodged against the bail petitioner.

8. Though, case at hand is to be decided by the learned court below in totality of facts and evidence collected on record, but having taken note of aforesaid glaring aspects of the mater, this Court sees no reason to let bail petitioner incarcerate in jail for indefinite period during the trial, especially when nothing remains to be recovered from him. . 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.

9. Hon'ble Apex Court as well as this Court have held in catena of cases that one is deemed to be innocent till the time his /her guilt is not proved, in accordance with law and as such, this Court sees no reason to curtail the freedom of the bail petitioner for indefinite period during the trial, especially when nothing remains to be recovered from him

10. 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

11. 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."***

12. 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.

13. 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:

12. ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***

13. ***nature and gravity of the accusation;***

14. ***severity of the punishment in the event of conviction;***

15. ***danger of the accused absconding or fleeing, if released on bail;***

16. ***character, behaviour, means, position and standing of the accused;***

17. ***likelihood of the offence being repeated;***

18. ***reasonable apprehension of the witnesses being influenced; and***

19. ***danger, of course, of justice being thwarted by grant of bail.***

14. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail, subject to his furnishing personal bond in the sum of Rs. 1,00,000/- with one local surety in the like amount, to the satisfaction of the learned trial Court, with following conditions:

i. ***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;***

ii. ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

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

iv. ***He shall not leave the territory of India without the prior permission of the Court.***

15. 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.

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 bail petition stands disposed of accordingly.

17. Learned counsel for the petitioner is permitted to produce copy of order downloaded from the High Court website before the concerned authority, who shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

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

Between:

SMT. SUNITA CHANDEL W/O SHRI ANIL CHANDEL, R/O VILLAGE & P.O. SARAKAR, TEHSIL AND DISTRICT HAMIRPUR, H.P.

....PETITIONER

(BY MR. B.N. MEHTA, ADVOCATE)

AND

1. UNION OF INDIA THROUGH SECRETARY DEFENCE, GOVT. OF INDIA, NEW DELHI.

2. THE CHAIRMAN, LOCAL BOARD OF ADMINISTRATION FOR SAINIK SCHOOL, SUJANPUR TIHRA, H.P.

3. PRINCIPAL SAINIK SCHOOL, SUJANPUR TIHRA, H.P.

4. MS. INDU PURI W/O SH. RAJEEV PURI, TGT (ENGLISH), SAINIK SCHOOL, SUJANPUR TIHRA.

……RESPONDENTS.

(MR. SHASHI SHIRSHOO, CGC, FOR R-1 TO 3).
(MR. ABHINAV PUROHIT, ADVOCATE, FOR R-4).

CIVIL WRIT PETITION
NO. 1869 OF 2018
Decided on: 24.06.2022

Constitution of India, 1950- Article 226- Departmental Promotion Committee proceedings challenged- Petitioner failed in selection process- Held- Factum with regard to non-communication of adverse entries for the last five years was very much in the knowledge of the petitioner before her having participated in the selection process, made no representation of adverse entries to authorities- No illegality in Departmental Promotion Committee proceedings- Petition dismissed. (Para 9, 10)

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

O R D E R

By way of present petition, petitioner has prayed for the following main relief(s):

> "(i). That the petitioner in the facts and circumstances prayed that the Civil Writ Petition may very kindly be allowed and this Hon'ble Court may very kindly be pleased to set aside and quash the outcome of the DPC as per Annexure P-9 after calling for the scrutiny of entire DPC record w.e.f.24.02.2018 to 25.07.2018 for the kind perusal of this Hon'ble Court.

(ii) That after quashing and setting aside the promotion of the respondent No.4, the respondents may be directed to hold fresh DPC by assessing the merit of the candidate by perusing the 5 years ACR's or in the alternative since the school of respondents is situated in the territorial jurisdiction of this Hon'ble Court the respondents should follow the conduct of DPC as is application in HPPSC."

2. Precisely, the facts of the case as emerge from the record are that petitioner herein was appointed as Assistant Master (English) at Sainik School, Sujanpur Tihra, District Hamirpur, H.P., on 01.01.2011. One Sh. S.K. Chadda, a regular TGT (English) performing the duties against this post till January 2018, applied for voluntary retirement from service with effect from 26.04.2018. On 23.01.2018, Sainik School originated proposal to fill up aforesaid post of PGT (English) by way of promotion and accordingly vide communication dated 23.01.2018 requested to Hony Secy Sainik Schools Society, MOD, New Delhi to release the vacancy of PGT (English) with effect from 26.04.2018. Before vacancy could be released by the society, respondent-school with the sole objective of sounding the eligible candidates and allowing them sufficient preparation time, decided to issue letter No. SSST/DPC/2018, dated 24.02.2018 to the two eligible candidates for the Departmental Promotion Committee i.e. petitioner and respondent No.4, who was appointed as Assistant Master (English) on 4.4.2011. Vide aforesaid letter, the provisions of the Society Rule Book about composition of Departmental Promotion Committee as well as the tests planned to be conducted as part of the Departmental Promotion Committee were intimated. The Syllabus of written examination was also specified and finally the Sainik School Society vide their letter No.10(5)/2011/D(SSC) dated 27.04.2018 released the vacancy of Master (English). On 7.05.2018 respondent-school as per Rule 5.27 of Rule Book issued by the Board of Governors, Sainik School

Society constituted the Departmental Promotion Committee comprising of the following members:-

i)	Principal, Sainik School	: President Officer
ii)	Vice Principal, Sainik School	: Member
iii)	Representative from State Administration: Member	
iv)	Representative of Chairman LBA	: Member.
v)	Subject Expert	: Member.

3. Though, the meetings of all the Departmental Promotion Committee in Sainik School are to be conducted in accordance with the provisions of the SOP on the subject issued vide Sainik Schools Society letter No.14(22)/SSS/2017, dated 24.08.2017, but since SOP does not specifically lay down details, such as syllabus for the written exam, the maximum marks for the written exam, the qualifying marks for written exam, details of what is to be assessed during the Teaching demonstration, and whether an interview is to be conducted or not, DPC member with a view to ensure transparency and fair play, decided to keep the DPC candidates updated about the syllabus and the suggested scheme of examination. The standard Operating Procedure (SOP) provided that relative weightage of various elements such as written test, teaching demonstration, ACRs of the last five years are to be seen by DPC while considering the case of the candidate for promotion to the post of PGT. On 11.06.2018 DPC conducted written exam in accordance with provisions of SOP on the subject. Entire proceedings of DPC were video recorded to ensure total transparency. Teaching demonstration was held in the topic chosen by the candidates themselves. Answer sheets of written examination were evaluated by an independent subject expert detailed by the State Education Department. Subsequently, on the basis of overall merit respondent No.4, Ms.Indu Puri came to be promoted to the post of

PGT(English), as is evident from the proceedings of the DPC placed on record as Annexure R-3 by respondent No.1.

4. Being aggrieved and dissatisfied with selection of respondent No.4, petitioner has approached this Court in the instant proceedings, praying therein for the reliefs, as have been reproduced hereinabove.

5. In nutshell, grouse of the petitioner, as has been highlighted in the petition and has been further canvassed by learned counsel for the petitioner is that DPC while conducting proceedings failed to adhere to the procedure prescribed under SOP. Learned counsel for the petitioner also argued that ACR's pertaining to last five years were not taken into consideration because bare perusal of the same clearly reveals that petitioner was on better footing then respondent No.4 and as such, she could not have been awarded less marks on account of assessment of ACR. Besides above, it has been further argued on behalf of learned counsel for the petitioner that adverse entries never came to be communicated to the petitioner and as such, no reliance ought to have been placed by the DPC on the same while making assessment.

6. Mr. Shashi Shirshoo, Central Government Counsel representing respondents No.1 to 3 and Mr. Abhinav Purohit learned counsel representing respondent No.4, while supporting the selection of respondent No.4, contended that there is no illegality and infirmity in the DPC proceedings because same came to be conducted strictly on the basis of procedure laid down in SOP issued by the Society. Above named counsel argued that ACRs of last five years were assessed, as is evident from the DPC proceedings and if ACRs of the petitioner herein are perused juxtaposing ACRs of selected candidate respondent No.4, no illegality can be said to have been committed the DPC while awarding higher marks to respondent No.4 because ACRs for the last five years of respondent No.4 are/ were better than the petitioner.

7. Mr. Shashi Shirshoo, learned Central Government Counsel while inviting attention of this Court to the prayer made in the instant petition argued that at no point of time challenge ever came to be laid to the action of the respondent inasmuch as adverse entries in ACRs were not communicated, rather in the instant proceedings selection of respondent No.4 has been sought to be quashed on the ground that DPC has failed to assess the ACRs of both the candidates in terms of procedure laid down in the SOP. Lastly, learned counsel representing respondents No.1 to 4 stated that since respondent No.4 obtained higher marks in written examination than the petitioner, petition having been filed by the petitioner, seeking therein quashment of respondent No.4 is not maintainable, especially when petitioner participated in the proceedings and has approached this Court after having failed in the same.

8. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that in the instant proceedings action of respondents inasmuch as non-communication of adverse entries in the ACRs for the last five years has been not laid challenge, rather proceedings of DPC whereby respondent No.4 came to be promoted to the post of PGT has been laid challenge on the ground that DPC while assessing ACRs of the candidates have not followed the due procedure as laid down in SOP, which plea is totally contrary to the record, as is evident from the pleadings adduced on record by respondent No.1.

9. Proceedings of the DPC placed on record (Annexure R-3) by respondent No.1 clearly reveals that petitioner herein obtained less marks in written exam than respondent No.4. Though, petitioner obtained higher marks in teaching demonstration, but if result of last three years of CBSE is perused, respondent No.4 came to be awarded higher marks on account of her performance. As far as perusal/assessment of ACRs by DPC is concerned, no material worth credence has been led on record to suggests that the

assessment made by DPC on the basis of which marks/grade came to be awarded, is not based upon procedure prescribed under SOP. It is not the case of the petitioner that ACR for the last one year was assessed by the DPC while conducing DPC proceedings for promotion to the post of PGT, rather ACRs of last five years of both the candidates i.e. petitioner and respondent No.4 came to be evaluated by the DPC, who after having found respondent No.4 on better footing recommended her for promotion. Since at no point of time, challenge, if any, qua the action of the respondents inasmuch non-communication of adverse entry came to be laid in the competent court of law, no benefit on account of aforesaid omission, if any, on the part of the respondents, can be granted to the petitioner, who otherwise has approached this Court after having failed in selection process. Since factum with regard to non-communication of adverse entries for the last five years was very much in the knowledge of the petitioner before her having participated in the selection process, she instead of participating in the selection process could represent authorities for communication of adverse entries, so that authorities could decide her representation, if any, before her having participated in the selection process.

10. Having carefully perused the minutes of DPC placed on record, this Court finds no illegality in the same and as such, same are upheld. The present petition fails and same is dismissed accordingly. Pending applications, if any, stand disposed of.

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

Between:

BHUPINDER PAL SON OF SHRI PARAM DEV, R/O VILLAGE DRUBAL, PO KOT, (TUNGAL) KOTLI, DISTRICT MANDI, H.P. PRESENTLY WORKING AS ASI IN IRB PANDOH, DISTRICT MANDI, H.P.

....PETITIONER

(BY MR. ONKAR JAIRATH ADVOCATE WITH MR. MR. PRASHANT SHARMA AND MR. AJEET SHARMA, ADVOCATES)

AND

1. STATE OF H.P. THROUGH SECRETARY(HOME) GOVT. OF H.P. SHIMLA-2.

2. THE DIRECTOR GENERAL OF POLICE, SHIMLA, H.P.

3. INSPECTOR GENERAL, CENTRAL RANGE MANDI, DISTRICT MANDI, H.P.

4. SUPERINTENDENT OF POLICE, KULLU, DISTRICT KULLU, H.P.

....RESPONDENTS

(MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2887 of 2019
Decided on: 17.06.2022

Constitution of India, 1950- Article 226- Departmental Promotion Committee- Petitioner an ASI faced trial under Section 13(2) of the Prevention of Corruption Act, but after honourable acquittal respondent No. 2 ordered for fresh inquiry of the petitioner his name was recommended to Departmental Promotion Committee for promotion to the post of S.I.- petitioner assailed the order in writ and the order was quashed and set aside with the direction to accord necessary approval to promote the petitioner to the post of S.I.- Petitioner was promoted but with effect from 22.05.2010 instead of 17.07.2008 when it was due- Held- Adverse entry relating to specific incidents should ordinarily not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident - Petition allowed and remarks column in the Annual Confidential Report pertaining to the year 2005-06 are expunged. (Para 25, 26)

Cases referred:

Davinder Singh versus State of Haryana and others, 2011(4) SLR 211;
S.Bhaskar Reddy and another versus Superintendent of Police, and another (2015)2 SCC 365;
State of Gujarat and another versus Suryakant Chunilal Shah (1999)1 SCC 529;
Union of India and others vs. E. G. Namburdiri A.I.R. 1991 S.C. 1216;

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

O R D E R

In the year 1983, petitioner was initially appointed as constable with the respondent-Department and was promoted to the post of A.S.I. on 14.07.2000. While he was posted as ASI in the office of Superintendent of Police, Kullu, FIR was lodged on 13.6.2005 against a foreigner namely, Kozi Tateno (Japanese) and the petitioner under Section 13(2) of the Prevention of Corruption Act and Sections 201, 212, 217 and 120-B of IPC. Department after having placed the petitioner under suspension on 13.06.2005 initiated departmental inquiry. Inquiry Officer submitted the report stating therein that since the criminal case has been registered against the petitioner, he should not be proceeded departmentally on the same set of charges. Aforesaid report of inquiry was accepted by the Commandant, 1st Indian Reserve Battalion, Mangarh, District Una on 29.1.2007 vide Annexure P-2. Subsequently, petitioner was acquitted in corruption case vide judgment dated 22.08.2008/23.08.2008 passed by learned Special Judge, Kullu, District Kullu, H.P.(Annexure P-1). After acquittal of the petitioner in criminal proceedings, departmental inquiry was initiated on 16.6.2005 against the petitioner on the same set of charges. Interestingly, respondent No.3 after hounourable acquittal of petitioner in criminal proceedings, again directed respondent No.4 on 30.11.2009 to hold fact findings inquiry that in what manner pass port was handed over to Kozi Tateno. The fact finding inquiry was conducted by Superintendent of Police, Kullu, who submitted his report

on 21.1.2010. On the basis of the report of fact finding inquiry, fresh inquiry was ordered to be instituted against the petitioner on 9.4.2010. However, same was withdrawn on 4.5.2010 and thereafter again fresh inquiry was instituted against the petitioner on 3.6.2010. However, petitioner was again absolved by the inquiry officer on 6.6.2011. The Departmental Promotion Committee met on 28.10.2011, wherein name of the petitioner was recommended for promotion to the post of Sub Inspector, however, when the matter went for approval of the recommendations of the Departmental Promotion Committee, respondent No.2 instead of approving the same, instituted fresh inquiry to be conducted by the Deputy Superintendent of Police (Headquarters) Kullu, District Kullu, H.P.

2. Being aggrieved and dissatisfied with the aforesaid action of respondent No.2, petitioner herein filed writ petition bearing Civil Writ Petition No.1145 of 2012-E, praying therein for following reliefs:

"i). ***That the impugned order dated 22.2.2012 contained in Annexure P-13 vide which the respondent No.2 has ordered for fresh departmental inquiry may kindly be quashed and set-aside.***

ii). That the respondents may be directed to expunge the adverse entry in ACR which was entered due to court case in the year 2006 as the petitioner has now been acquitted form the charges by the competent court of law as well as by the departmental inquiry.

iii) That the respondents may be directed to grant the all service benefits which has wrongly been withheld by the respondents due to the court case."

3. This Court vide judgment dated 7.5.2013 quashed and set-aside the order of fresh inquiry issued by respondent No.2 and directed the respondents to accord the necessary approval to the recommendations of the Departmental Promotion Committee held on 28.10.2011 to promote the petitioner to the post of Sub Inspector from due date with all the consequential benefits. In terms of aforesaid judgment rendered by this Court petitioner though was promoted to the post of Sub Inspector, but with effect from 22.5.2010, whereas he was entitled to such promotion from 17.7.2008 i.e. when he was honourably acquitted in the criminal proceedings initiated against him.

4. On inquiry, it transpired that petitioner has not been given promotion with effect from 17.7.2008 on account of adverse entry in the ACR for the period of 2005-06, wherein it stands recorded that "*one criminal case is registered against the petitioner*". Being aggrieved and dissatisfied with the action of the respondents in as much as petitioner was not given promotion from due date, he filed representation to Director General of Police, Himachal Pradesh (Annexure P-9), praying therein to expunge adverse remarks made in his ACR pertaining to the year 2005-06 on account of his hounourable acquittal in the criminal case. However, aforesaid representation of him was rejected vide order dated 11.8.2010 (Annexure P-10) on the ground that the petitioner was acquitted because the prosecution could not prove the case against him beyond reasonable doubt. Apart from above, authority while passing order dated 11.8.2010, also recorded in the order that the then Superintendent of Police, Kullu had made adverse comments against the petitioner in his ACR on the basis of his personal knowledge leading to registration of case against the petitioner and stands by these comments even after the acquittal of the officer in the corruption case registered against him.

5. Being aggrieved and dissatisfied with the aforesaid order dated 11.8.2010 (Annexure P-10), petitioner approached this Court in the instant proceedings, praying therein for following reliefs:-

> "i) **That the respondents may be directed to expunge the adverse entry in ACR which was entered due to court case in the year 2006 as the petitioner has now been acquitted from the charges by the competent court of law as the said order has attained the finality.**
>
> **ii) That the petitioner may be confirmed from 1.12.2005 when his juniors were confirmed.**
>
> **iii) That the respondents may further be directed to comply with the order dated 7.5.2013 and promote the petitioner from the date when his juniors were promoted.**
>
> **iv) That the respondents may be directed to grant all the consequential benefits including the seniority from the date of confirmation i.e.1.12.2005.**
>
> **v) That Annexure P-8 and P-10 may kindly be quashed and set-aside."**

6. It is pertinent to take note of the fact that prior to filing of the petition at hand, petitioner had filed CWP No.3304 of 2010 in this Court, laying therein challenge to order dated 3.6.2010 vide which, the respondents again initiated departmental inquiry after acquittal of the petitioner in criminal case. In the aforesaid case, petitioner besides seeking quashment of order dated 3.6.2010, also prayed that respondents be directed to expunge the adverse entry in ACR, which was entered due to court case in the year 2006. However, this Court having taken note of letter dated 14.6.2011, placed on record by learned counsel for the petitioner, wherein it stood recorded that the petitioner stands absolved of the charges framed against him in the disciplinary proceedings, closed the proceedings and ordered that consequences to ensue.

7. However, as has been taken note hereinabove, that though petitioner was acquitted in criminal as well as departmental proceedings, but yet he was denied promotion to the post Sub Inspector from due date i.e. 17.7.2008 on account of adverse entry in his ACR pertaining to the year 2005-06. Since representation having been filed by petitioner for expungement of adverse entries in the ACR for the year 2005-06, stands dismissed vide order dated 11.8.2010 (Annexure P-10), he is compelled to approach this Court in the instant proceedings, praying therein for the reliefs, as have been reproduced hereinabove.

8. Reply to the petition stands filed on behalf of the respondents, wherein facts, as have been notice hereinabove, have not been disputed. However, in para-9 of the reply, respondents have submitted that in compliance of judgment /order dated 7.5.2013 the petitioner has been approved for promotion to the rank of Sub Inspector with effect from 22.5.2010. Respondents have further averred in the reply that plea of the petitioner that he was entitled for promotion w.e.f.17.7.2008 is incorrect because his ACR for the year 2005-06 was adverse and the impact of adverse ACR remained up to September, 2009. It has been stated in the reply that Deputy Inspector General of Police, Central Range Mandi, while deciding the representation of the petitioner, observed that the then Superintendent of Police, Kullu had made adverse comments against the petitioner in his ACR on the basis of his personal knowledge about the work performance leading to registration of case against the petitioner and these comments stand even after acquittal of the officer in the corruption case registered against him.

9. Having heard learned counsel representing the parties and perused the pleadings adduced on record by the respective parties, this Court finds that there is no dispute that in column No. 16 of the form of confidential report pertaining to the period 1.4.2005 to 1.2.2006, there is an adverse entry (Annexure P-7), which reads as under:-

"Charged with corruption in a criminal case & departmentally."

10. Apart from above, Superintendent of Police has also given remarks to the following effect that "***he was accused of corruption and in my own personal capacity I do not have a good opinion of him***". It is not in dispute that aforesaid entry with regard to corruption case as recorded in column No.16 of the form of confidential report (Annexure P-7) is based upon registration of corruption case against the petitioner i.e. FIR lodged against him as well as foreigner namely Kozi Tateno on 13.6.2005, wherein he was charged under Section 13(2) of the Prevention of Corruption Act and Section 201,212, 213 and 120-B of IPC.

11. Careful perusal of judgment dated 22/23.8.2008 passed by learned Special Judge, Kullu, District Kullu, H.P.,(Annexure P-1) reveals that petitioner was acquitted of the charges framed against him under Sections 201,212, 217 and 120-B of IPC and Section 13(2) of the Prevention of Corruption Act. Though, repeatedly attempt was made by the respondent-department to initiate disciplinary proceedings on the same allegations as were part of FIR, but nothing ever came to be proved against the petitioner even in departmental proceedings and as such, he was acquitted in both the criminal as well as disciplinary proceedings. Similarly, it is not in dispute that meeting of Departmental Promotion Committee was held on 28.10.2011 for promotion to the post of Sub Inspector and the name of petitioner was also recommended for promotion. Though, petitioner was recommended for promotion, but recommendation of Departmental Promotion Committee were not approved by respondent No.2, rather he instituted fresh inquiry, which subsequently came to be quashed and set-aside by this Court vide judgment dated 7.5.2013 passed in CWP No.1145 of 2012-E, as a consequence of which, recommendation of Departmental Promotion Committee held on 28.10.2011 subsequently came to be approved. But since petitioner was not promoted

from due date i.e. 17.07.2008, he inquired the matter and found that he has been not given promotion from due date i.e. 17.7.2008 for the reasons that there is adverse entry in his ACR pertaining to the year 2005-06. Since petitioner was honourably acquitted in both the criminal as well as departmental proceedings, he made representation to the competent authority, praying therein to expunge adverse entry. However, as has been taken note hereinabove, aforesaid prayer made on behalf of the petitioner was rejected for the reason, as has been noticed hereinabove.

12. In the aforesaid backdrop, there appears to be merit in the contention of learned counsel for the petitioner that once petitioner was honourably acquitted in departmental as well as criminal proceedings, entry with regard to registration of corruption case recorded in the ACR pertaining to the year 2005-06 ought to have been expunged.

13. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while justifying the action of the respondents in rejecting the representation, vehemently argued that apart from recording factum with regard to registration of corruption case the then Superintendent of Police, Kullu has also recorded in the ACR that as per his personal knowledge petitioner was accused of corruption and he has not good opinion of him and as such, his acquittal in criminal proceedings is of no consequence because that entry still stare at him. Mr. Bhatnagar further submitted that otherwise also relief sought in the instant petition is hit by principal of constructive res-judicata. He stated that before filing petition at hand, petitioner had approached this Court by way of CWP No.3304 of 2010, praying therein for issuance of direction to the respondents to expunge the adverse entry in the ACR for the year 2005-06 but such plea of him was not accepted.

14. However, in the totality of facts and circumstances, as detailed hereinabove, this Court finds no merit in the afore submission of learned Additional Advocate General for the reasons that though petitioner in his

earlier writ petition No.3304 of 2010 had prayed for issuance of direction to the respondents to expunge adverse entry in the ACR pertaining to the year 2005-2006, but before such plea of him could be decided by the Court below on its own merit, aforesaid writ petition filed by the petitioner came to be closed vide judgment dated 3.11.2011, perusal whereof reveals that this Court having taken note of the fact that petitioner has been absolved of the charges against him in the disciplinary proceedings closed the petition, but definitely at no point of time returned findings, if any, with regard to second relief made in the petition i.e. direction to expunge the adverse entry. Had court returned any finding qua aforesaid plea/relief prayer/sought by the petitioner, this court would have permitted the respondents to raise plea of res-judicata

15. At this stage, Mr. Sudhir Bhatnagar, learned Additional Advocate General further argued that at no point of time petitioner ever came to be acquitted honourably, rather his acquittal is on technical ground and as such, benefit, if any, otherwise cannot be availed of judgment of acquittal recorded in his favour. However, having carefully perused the judgment dated 22.08.2008 (Annexure P-1) passed by learned Special Judge, Kullu, this Court sees no reason to be persuaded by aforesaid submission made by learned Additional Advocate General because if judgment is read in its entirety, it clearly suggests that prosecution was unable to prove that petitioner indulged in corrupt practice while unauthorizedly releasing pass port in favour of foreign national during pendency of criminal case against him and he made an attempt to destroy the evidence.

16. Mere use of expression by learned trial Court in para-29 of the judgment that prosecution has been not able to prove complicity of petitioner beyond reasonable doubt cannot be construed acquittal of the petitioner on technical grounds. Otherwise, in para-31, Special judge has acquitted the accused of the charges under Sections 201, 212, 213, 120-B IPC and Section 13(2) of the Prevention of Corruption Act. Till the time there is nothing to show

that acquittal of the petitioner came to be recorded on technical grounds, acquittal recorded in his favour is necessarily required to be held as a hounourable acquittal, as a consequence of which, any entry recorded in the ACR with regard to registration of criminal case requires to be expunged. As has been taken note hereinabove, in the ACR pertaining to the year 2005-06, it has been recorded in column No.16 that "**charged with corruption in a criminal case and departmentally"**. With the acquittal of the petitioner in criminal and departmental proceedings aforesaid entry made in column No.16 of the ACR pertaining to the period from 1.4.2005 to 1.2.2006 is not sustainable.

17. 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."

18. Though, the personal opinion recorded by Superintendent of Police in remarks column is of no consequence, but even otherwise same is based upon the fact that accused was charged with the corruption case as has been recorded in the remarks column. Otherwise also, approach adopted by the authorities against the petitioner while deciding his representation is not free from bias because no cogent and convincing reasoning has been assigned for not accepting the prayer made on behalf of the petitioner, rather by stating that the then Superintendent of Police had personal knowledge with regard to conduct of the petitioner, efforts has been made to defeat the rightful claim of the petitioner, to which he has become entitled after his being honourably acquitted in criminal case vide judgment dated 22.8.2008.

19. Reliance is placed upon the judgment rendered by Hon'ble Apex Court in **State of Gujarat and another** versus **Suryakant Chunilal Shah** (1999)1 Supreme Court Cases 529, wherein it has been held as under:-

> "27. The whole exercise described above would, therefor, indicate that although there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a Govt. Servant or that he had lost his efficiency and had become a dead wood, he was compulsorily retired merely because of his involvement in two criminal case pertaining to the grant of permits in favour of take and bogus institutions. The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a

court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately conducted. But before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. We may, however, hasten to add that mere involvement in a criminal case would constitute relevant material for compulsory retirement or not would depend upon the circumstances of each case and the nature of offence allegedly committed by the employee.

28. There being no material before the Review Committee, in as much as there were no adverse remarks in the character roll entries, the integrity was not doubted at any time, the character roll entries subsequent to the respondent's promotion to the post of Asstt. Food Controller (Class II) were not available, it could not come to the conclusion that the respondent was a man of doubtful integrity nor could have anyone else come to the conclusion that the respondent was a fit person to be retired compulsorily from service. The order, in the circumstances of the case, was punitive having been passed for the collateral purpose of his immediate removal, rather than in public interest. The Division Bench, in our opinion, was justified in setting aside the order passed by the Single Judge and directing reinstatement of the respondent."

20. Division Bench of Punjab and Haryana High Court in C. W. P. No. 15070 of 1993 – **Des Raj vs. State of Haryana and others**, decided on 28.11.1994, quashed the adverse entry pertaining to doubtful integrity in the ACR of the petitioner therein, on the ground that no reasons had been recorded nor any material produced before the Court to justify the recording of the adverse entry regarding doubtful integrity, by holding as under :-

> ".....In the present case, the respondents have completely failed to produce any material before the Court to justify the adverse remarks made by respondent no. 4 regarding the integrity of the petitioner. The respondents have not produced any written complaint or record indicating that oral complaints were received against the honesty and integrity of the petitioner and he had made a record of the same in some file of the department. In this fact situation, it has to be held that the adverse report regarding

integrity has been made by respondent no. 4 without any basis and, therefore, his action will have to be held as arbitrary and unreasonable apart from being unfair."

21. Similarly, in C. W. P. No. 11695 of 1993 – **D. N. Dalal** vs. The **State of Haryana etc**., decided on 30.11.1994, while relying on the same circulars, as quoted above, it was held by a Division Bench of this Court as under :-

"A perusal of the above quoted extracts of the circulars shows that while recognising the importance of the entries made in the annual confidential reports in general and remarks relating to honesty and integrity of the officials in particular, the Government has made it obligatory for the concerned officers to be careful while recording adverse remarks relating to integrity. The Government has emphasised that the reporting officer should fortify with reasons his remarks relating to integrity of an official. It has been further emphasised that non-committal remarks or baseless remarks should not be made by the reporting officers. The Government has gone to the extent of observing that truth about the subordinates should be known to the reporting officers and should be brought to the notice of the higher authorities. We may observe that though the instructions issued by the Government do not have the force of law, the administrative authorities subordinate to the Government as also the Government are bound to act in accordance with these instructions. A minor deviation from the procedural aspect of the instructions may not by itself be sufficient to vitiate the adverse remarks, but a whole sale or wanton breach of the instructions may lead to an inference that the remarks have been made without application of mind or the same are baseless. It may also indicate arbitrariness and casualness in the approach of the reporting/reviewing officer. It cannot be over emphasised that the column regarding integrity is most vital both to the Government servant as well as the public service. It is well recognised that the integrity of a public servant is as important as his efficiency. A dishonest public servant or one whose

integrity is doubtful may cause greater injury to the public interest than an inefficient public servant. Adverse remarks regarding integrity ordinarily constitute sufficient material for superseding a senior official at the time of promotion, for withholding of the efficiency bar and can be used for retirement before superannuation. Therefore, it is imperative that the column regarding integrity is filled with greatest care and caution. If the adverse remarks regarding integrity are found casual, perfunctory or cryptic or where it is found that the adverse entries have been made for extraneous considerations or there is non application of mind, the Court will have to scrutinise the challenge to such remarks with greater seriousness.

xx xx xx xx xx xx .....

..... Though entries in the annual confidential reports are made by a competent officer on the basis of subjective satisfaction, such subjective satisfaction has to be arrived at after an objective assessment of the material available with the reporting officer or reviewing officer. As and when adverse remarks are challenged in a Court of law, it becomes an onerous duty of the respondents to place before the Court full material which is available with them in justification of the adverse remarks. In ***Union of India and others vs. E. G. Namburdiri A.I.R***. 1991 S.C. 1216, the Supreme Court has held that even though a decision on representation against the adverse remarks need not contain reasons, the administrative authority is not at liberty to pass orders without there being any reason for the same. In the present case the respondents have completely failed to produce any material before the Court to justify the adverse remarks made by respondent No. 3 regarding the integrity of the petitioner. The respondents have not produced any written complaint or record indicating that oral complaints were received against the honesty and integrity of the petitioner or that respondent No. 3 had received any other information casting doubt on the integrity of the petitioner and he had made a record of the same in some file of the department. In this fact situation it has to be held that the adverse report regarding integrity has

been made by respondent No. 3 without any basis and, therefore, his action has to be held as arbitrary and unreasonable apart from being unfair."

22. At this stage, learned Additional Advocate General has placed reliance upon the judgment rendered by Hon'ble Punjab and Haryana High Court in case titled **Davinder Singh** versus **State of Haryana and others**, 2011(4) SLR 211, to state that entry in the Annual Confidential report with regard to the doubtful integrity need not be supported by any accompanying record or detailed reasons and such an entry can be based on personal knowledge of the Reporting/Reviewing Officer. The relevant paras No. 11 to 13 of the aforesaid judgment are as under:-

"11. Apart from the view of the Letters Patent Bench and the Division Bench, Hon'ble the Supreme Court in the case of State of State of U.P. v. Yamuna Shanker Misra v. Yamuna Shanker Misra, (1997) 4 SCC 7, has categorically laid down that the entry in the Annual Confidential Report with regard to the doubtful integrity need not be supported by any accompanying record or detailed reasons and such an entry can be based on personal knowledge of the Reporting/Reviewing Officer. It is, thus, established that the view taken by the learned Single Judge suffers from inherent malady of imposing restriction on the Reporting Officer for recording integrity doubtful entry. It is trite to mention that in a large number of cases there is lack of proof and material to reach a conclusion that the integrity of the employee is doubtful. More than often it is seen that the interest of the State are marginalised at the instance of a beneficiary of an illegal act which is facilitated by the public servant on extraneous consideration including acceptance of illegal gratification from the public and no one comes forward because there are no adversary to the public servant and the person who has obtained undue favour by paying illegal gratification. If a magistrate acquits an accused on extraneous consideration who would come forward. The accused would be happy. The State represented by a Public Prosecutor would feel helpless. However, the Reporting Officer during the reporting period keep on hearing such illegal activities of the

public servant and on the basis of his subjective satisfaction he may have to reach an extreme conclusion that the public servant is indulging in corruption. In fact, this is the precise reason that expression 'doubtful' has been added with the expression 'integrity'. Had it been the case that there is material to impeach the integrity of the officer then a full-fledged departmental inquiry or criminal action could be initiated and the result in such cases would be dismissal of the employee not simple pre-mature retirement which earns him all retiral benefits. For the aforesaid view we place reliance on the observation of the Division Bench of this Court in the case of Puran Singh Puran Singh v. State of Punjab v. State of Punjab, 1981 (1) SLR 338. The nature, substance, purpose and scope of AC 338 R is fundamentally different than the departmental inquiry. Speaking for a Division Bench of this Court, Chief Justice S.S. Sandhawalia made following learned observations:

> "Whilst the former is specifically for the internal assessment or estimate of the performance of a public servant by his superiors over the period of one year, the latter is intrinsically intended as the foundation for taking a punitive action against him if the charges come to be proved. The very nature and purpose of the two are consequently distinct and separate and to confuse them as either identical or similar, would to my mind be patently erroneous. An annual confidential report is in essence subjective and administrative whilst a departmental enquiry is inevitably objective and quasi judicial."

12. Therefore to insist on material, objectivity and reasons for recording 'integrity doubtful entry' is not within the legal parameters. Hence, the view taken by the learned Single Judge would not be sustainable.

13. Coming back to the reasoning adopted by the learned Single Judge, it has been held that the basis for adverse remarks has come to an end because the writ petitioner ASI Davinder Singh was not even arrayed as an accused in Criminal Case No. 143-1/08, filed in pursuance to FIR No. 4, dated 3.1.2007, although he was initially involved in the same. The learned Single Judge further felt that he was also exonerated in the departmental inquiry and, therefore, the basis for adverse remarks has come to an end. It has also been pointed out that the order rejecting the representation made by the writ petitioner was non-speaking and

cryptic and counseling has been suggested after awarding the punishment. The learned Single Judge opines that there was no material before the reporting authority for recording an entry of integrity doubtful, which was requirement of instructions dated 12.12.1985."

23. Subsequently aforesaid judgment came to be distinguished by Hon'ble High Court of Punjab and Haryana in case titled **Sunil Dutt vs. The State of Haryana and others** passed in LPA No.224 of 2012, decided on 12.10.2012,wherein it has been held as under:

"Insofar the judgment relied upon by the learned State counsel in **Davinder Singh's case (supra)** is concerned, in that case, Davinder Singh was appointed as a Constable in Haryana Police. The said official was conveyed adverse remarks in which his honesty was recorded as "doubtful". His representation was rejected on 29.05.2008 which order was challenged by him by way of writ petition but during the pendency of the writ petition, a show cause notice was served upon him proposing to retire him compulsorily in public interest which was put into effect, as a result of which the said official challenged the order of compulsory retirement by way of separate writ petition. He had submitted that one FIR No.4 dated 03.01.2007 was registered against him under Sections 344, 383 and 34 IPC at Police Station GRP, Hisar but in the final report, he was not named as an accused nor summoned by the Court and the Chief Judicial Magistrate, Bhiwani, acquitted him on 06.12.2008 in the said case and in the departmental inquiry also, he was eventually conveyed with the punishment of Censure on 16.07.2008. In the said case, grievance of the said official was that the adverse remarks were recorded in violation of Government instructions dated 12.12.1985 which requires that if adverse remarks of `doubtful integrity' are to be recorded then the reporting officer must clearly state that the officer is suspected of corruption or is believed to be corrupt. This opinion should also be supported by reasons by the reporting officer. The learned Single Judge agreed to the contention of the said official by placing reliance on instructions dated 12.12.1985 which requires recording of reasons in support of an entry concerning doubtful integrity, but the Division Bench found the view of the learned

Single Judge unsustainable holding that to insist on material, objectivity and reasons for recording 'integrity doubtful entry' is not within the legal parameters.

As a matter of fact, the judgment relied upon by the learned State counsel in Davinder Singh's case (supra) is not applicable to the facts and circumstances of the present case in which reasons have been disclosed by the reporting officer in his order dated 09.09.2008 in which he has specifically said that because of the registration of criminal case against the appellant on account of accepting bribe he has been found to be dishonest and below average. Thus, all the remarks in the annual confidential report for the period 01.04.2006 to 31.03.2007 have originated from the registration of the criminal case under the P.C. Act in which the appellant has been honourably acquitted and has been exonerated for the said charge in the departmental inquiry. Thus, in our considered opinion, the judgment relied upon by learned counsel for the appellant in ***Randhir Singh, ASI's*** case (supra) is fully applicable instead of the judgment relied upon by the learned State counsel in **Davinder Singh's case (supra**)."

24. At this juncture, this Court deems it fit to take note of para para 19.18.3 of Handbook on personnel matters Vol-II, which reads as under:-

"19.18.3 **<u>Adverse entries relating to a specific incident</u>**.

A question has been raised wither an adverse entry relating to a specific incident can be made in a Government servant's confidential report without giving him an opportunity of showing cause against him especially when his work and conduct during the year or the period under report have otherwise been found to be satisfactory. The conclusions reached in this connected are as under:-

i) Adverse entries relating to specific incidents should ordinarly not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident.

ii) Even if the reporting officer feels that although the matter is not important enough to call for departmental proceedings it is important enough to be mentioned specifically in the confidential report of the officer concerned, he should, before making

such an entry, satisfy himself that his won conclusion has been arrived at only after a reasonable opportunity has been given to the officer reported on to present his case relating to the incident.

iii) Confidential reports should, as a rule give a general appreciation of the character, conduct and qualities of the officer reported on and reference to specific incidents should be made, if at all, only by way of illustration to support adverse comments of such a general nature, e.g. inefficiency, delay, lack of initiative or judgment etc."

25. Careful perusal of aforesaid provision clearly reveals that adverse entry relating to specific incidents should ordinarly not find a place in ACR, unless in the course of departmental proceedings, a specific punishment such as censure has been awarded on the basis of such an incident. Since in the case at hand though at first instance there is/was no requirement, if any, for Reporting Officer to take note of registration of corruption case in the ACR being solitary incident but even if same was recorded, same cannot be allowed to sustain for the fact that no punishment ever came to be awarded to the petitioner in criminal as well as in departmental proceedings.

26. 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 11.08.2010 (Annexure P-10) is quashed set aside and adverse entries recorded in column No.16 and the remarks column in the ACR pertaining to the year 2005-06, are expunged. Consequences to follow. Pending application(s), if also, stands disposed of.

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

BETWEEN:

VINOJ KUMAR SHARMA, S/O LATE SH. ROOP LAL SHARMA, AGED 42 YEARS, PRESENTLY HEAD CONSTABLE (UNDER SUSPENSION), R/O VPO PANWA, TEHSIL AND DISTRICT SHIMLA, H.P.

....PETITIONER

(BY MR. ONKAR JAIRATH, ADVOCATE)
AND

1. STATE OF HP THROUGH SECRETARY (HOME) TO THE GOVT. OF HP, SHIMLA (HP).

2. DIRECTOR GENERAL OF POLICE, HP, SHIMLA (HP).

3. DIRECTOR GENERAL OF POLICE, SOUTHERN RANGE, H.P., SHIMLA (HP).

4. SUPERINTENDENT OF POLICE, DISTRICT SIRMAUR AT NAHAN, DISTRICT SHIMLA (HP).

....RESPONDENTS

(MR. NARINDER GULERIA, ADDITIONAL ADVOCATE GENERAL WITH MS. SVANEEL JASWAL DEPUTY ADVOCATE GENERAL AND MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.4250 of 2019
Decided on: 01.09.2022

Constitution of India, 1950- Article 226- **CCS (CCA) Rules, 1965**- Rule 13- Dismissal of petitioner, a Head Constable from the service pursuant to disciplinary proceedings- Held- No proper procedure appears to have been followed by the Disciplinary Authority before initiating disciplinary proceedings against the petitioner- Disciplinary proceedings vitiated on account of framing of charge-sheet by incompetent officer- Penalty of dismissal cannot be said to be justifiable- Petition allowed- Petitioner is ordered to be reinstated in service. (Para 21, 24, 26, 28)

Cases referred:

B.C. Chaturvedi vs. Union of India and Others,1995(6) SCC 749;
Bharat Iron Works vs. Bhagubhai Balubhai Patel & Ors. (1976) 1 SCC 518;
Central Bank of India vs. Prakash Chand Jain, 1969 2 LLJ 377;
In Rajinder Kumar Kindra vs. Delhi Administration through Secretary (Labour) and Others, (1984) 4 SCC 635;
Kuldeep Singh versus Commissioner of Police and others, (1999) 2 SCC 10;

Lucknow Kshetriya Gramin Bank (Now Allahabad, Uttar Pradesh Gramin Bank) and Another vs. Rajendra Singh,(2013)12 SCC 372;
Roop Singh Negi versus Punjab National Bank and others (2009)2 SCC 570;
State of Andhra Pradesh vs. Rama Rao. 1964 2 LLJ 150;
State of Punjab versus Parkash Chand, Constable (1992)1 SLR 174;
Union of India and Ors v. B.V. Gopinath, (2014) 1 SCC 351;

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 1.07.2010 (Annexure P-16), passed by Director General of Police, Himachal Pradesh, whereby revision petition having been filed by the petitioner, laying therein challenge to order dated 2.03.2009 (Annexure P-14) passed by Deputy Inspector General of police, Southern Range, Shimla, Himachal Pradesh, whereby aforesaid authority while upholding the order dated 4.03.2008 passed by Disciplinary authority- Superintendent of Police, Sirmour at Nahan, thereby dismissing the petitioner from service, rejected the statutory appeal against the order of dismissal filed by the petitioner (Annexure P-13), petitioner has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for following main reliefs:-

> ***"(a). To issue a writ of certiorari or direction in nature thereof, quashing the impugned orders dated 5.03.2008, 2.03.2008 and 1.07.2010 being Annexures P-12, P-14 and P-16 of the writ petition respectively, as unconstitutional and illegal and contrary to the law;***
>
> ***(b). To issue a writ of mandamus, appropriate writ order or direction in nature thereof, directing the respondent department to reinstate the petitioner with effect from the illegal removal and low the***

petition are premature retirement with effect from 30/06/2008 with all the consequential benefits alongwith interest @ 18% per annum."

2. Precisely, the facts of the case, which may be relevant for adjudication of the case at hand are that the petitioner was appointed as Constable in the year 1986 and thereafter he was promoted as Head Constable in July, 1993 and since then he had been uninterruptedly working in the police department till the time he was removed from the service vide order dated 4.03.2008(Annexure P-12) on account of his having remained absent from duty. While discharging duty of Head Constable at CIA Nahan, petitioner proceeded on medical leave for forty five days with effect from 14.04.2006 and as per sanctioned leave, petitioner was to resume office on 29.05.2006 but since he was unable to resume duty on account of his ailment, he telegraphically informed the department on 29.06.2006 that he was unable to resume duty till the time he was declared fit by the medical authorities. Record reveals that Office of Superintendent of Police, Sirmour at Nahan vide communications dated 6.06.2006 and 30.09.2006 advised the petitioner to resume duty but fact remains that petitioner not joined services and replied to the department that he was unable to report to the duty till the time he recovers. But respondents vide communication dated 4.11.2006, called upon the petitioner to furnish medical record, if any, with regard to his illness. Though, on 8.11.2006 petitioner furnished medical record to Superintendent of Police, Sirmour at Nahan (Annexure P-1) but aforesaid authority without considering the documents made available by the petitioner, passed order dated 13.11.2006 (Annexure P-2), thereby putting the petitioner under suspension. Vide aforesaid order aforesaid authority, who is Disciplinary authority/Appointing authority of the petitioner, directed District Inspector, Amar Singh, to initiate disciplinary proceedings against the petitioner for his having remained absent from duty without sanctioned leave.

3. In compliance to aforesaid directions, District Inspector, Amar Singh vide order dated 27.12.2006 furnished charge sheet against the petitioner (Annexure P-3), stating therein that why action be not taken against him for his having remained absent from the duty. Petitioner replied to aforesaid charge sheet vide communication dated 3.01.2007 (Annexure P-4), wherein he reiterated that he was unable to report to the duty on account of his illness, which fact is substantiated from medical record made available by him to the Disciplinary authority vide communication dated 8.11.2006(Annexure P-1). However, aforesaid District Inspector after having recorded the statement of prosecution witnesses (Annexure P-5 Colly) arrived at a conclusion that all the charges framed against the petitioner stand proved and as such, furnished fresh charge sheet upon the petitioner on 10.5.2007, reiterating that charges as were framed vide earlier charge sheet (Annexure P-3) stand proved and called upon the petitioner to produce evidence, if any in support of his claim within 72 hours. Vide communication dated 27.07.2006 District Inspector while acceding to the request made by the petitioner for cross-examination of prosecution witnesses, also called upon him to give reply within seven days. Vide communication dated 31.07.2006 (Annexure P-8) petitioner sought further time of 25 days, enabling him to file reply and to cross-examine one of the prosecution witnesses. Finally, District Inspector, Amar Singh submitted Inquiry report undated (Annexure P-10), thereby holding petitioner guilty of willful absence and accordingly recommended Disciplinary authority to take disciplinary action against the petitioner. Superintendent of Police, Sirmour at Nahan vide communication dated 3.1.2008 (Annexure P-9) after having received inquiry report called upon the petitioner to explain within seven days that why he be not dismissed from the service on account of his having willfully remained absent from duty (Annexure P-9). Vide communication undated (Annexure P-11), petitioner submitted exhaustive reply to the show cause notice issued by the

Disciplinary authority, whereby penalty of dismissal was proposed. In the aforesaid reply, petitioner specifically stated that inquiry is vitiated on account of issuance of charge sheet by incompetent officer. He claimed before Disciplinary authority that charge sheet, if any, in his case was to be issued by Disciplinary authority i.e. Superintendent of Police, but since in the case at hand charge sheet has been issued by District Inspector, inquiry, if any, conducted pursuant to such charge sheet is not sustainable in the eye of law. However, facts remains that aforesaid objection raised by the petitioner was not paid any heed by the Disciplinary authority, who vide communication dated 4.03.2008 (Annexure P-12) dismissed the petitioner from service on the charge of willful absence.

4. Being aggrieved and dissatisfied with the aforesaid order of dismissal passed by Superintendent of Police, Sirmour at Nahan, petitioner preferred statutory appeal before the Deputy General Inspector of Police Southern Range, Himachal Pradesh(Annexure P-13), wherein he again raised the issue with regard to competence of District Inspector to issue charge sheet, but aforesaid authority ignoring all the grounds raised in the appeal upheld the order passed by Superintendent of Police, Nahan, thereby dismissing the petitioner from service on the charge of willful absence. Against aforesaid order petitioner approached Director General of Police by way of revision petition under Rule 16(32) of Police Rules (Annexure P-15) but same was also dismissed vide order dated 1.7.2010. In the aforesaid background, petitioner has approached this Court in the instant proceedings, praying therein reliefs, as have been reproduced hereinabove.

5. Pursuant to the notices issued in the instant petition, respondents have filed reply, wherein facts, as detailed hereinabove, are not disputed. However, it has been stated that charge sheet was not issued by the incompetent officer, rather disciplinary proceedings stood initiated in the instant case pursuant to order dated 13.11.2006 passed by Superintendent of

Police, Sirmour at Nahan, who is the Disciplinary authority. It has been further stated that District Inspector has merely acted at the behest of Superintendent of Police, because charges subsequently framed by him are the same, as stand mentioned in order dated 13.11.2006, issued by Disciplinary authority i.e Superintendent of Police, Sirmour at Nahan.

6. I have heard learned counsel representing the parties and gone through the record of the case.

7. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned in the orders impugned in the instant proceedings, following questions arise for adjudication of this Court:-

"1. Whether the charge sheets dated 27.12.2006 and 10.05.2007 (Annexure P-6) for willful absence against the petitioner could be issued by District Inspector, especially when Appointing authority/Disciplinary authority of the petitioner is/ was Superintendent of Police, Sirmour at Nahan?.

2. Whether District Inspector being enquiry officer after having conducted enquiry could issue second charge sheet, stating therein that since all the charges framed against the petitioner stands proved, he may file reply/evidence, if any, in support of his claim?.

3. Whether the penalty of dismissal imposed upon the petitioner commensurate with the offence alleged to have been committed by him?.

4. Whether the Appointing authority and thereafter revisional authority applied their judicial mind while rejecting the grounds raised by the petitioner in appeal and revision against the order of dismissal passed by Superintendent of Police, Sirmour at Nahan?

5. Last but most relevant question is "whether this Court is competent to interfere in the disciplinary proceedings or not while exercising power under Article 226 of the Constitution of India?"

8. Before exploring/ ascertaining the answer to aforesaid questions formulated by this Court, this Court finds it necessary to deal with the last question at first instance i.e. with regard to competence and scope of judicial review.

9. By now it is well that High Court while exercising power under Article 226 of the Constitution of India would not interfere with the findings recorded at the departmental enquiry by the Disciplinary authority or the enquiry officer as a matter of course. The Court cannot sit in appeal over those findings and assume the role of the appellate authority, but that does not mean that in no circumstance court can interfere. The power of judicial review is available to the High Court under the Constitution and it can interfere with the conclusions reached in the disciplinary proceedings if it has reason to believe that there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictates of the superior authority. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in case **Kuldeep Singh versus Commissioner of Police and others,** (1999) 2 supreme Court Cases 10, wherein it has been held as under:-

> "6. It is no doubt true that the High Court under Article 226 or this Court under Article 32 would not interfere with the findings recorded at the departmental enquiry by the disciplinary authority or the Enquiry Officer as a matter of course. The Court cannot sit in appeal over those findings and assume the role of the Appellate Authority. But this does not mean that in no circumstance can the Court interfere. The power of judicial review available to the High Court as also to this Court under the Constitution takes in its stride the domestic enquiry as well and it can interfere with the conclusions reached therein if there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary

prudent man or the findings were perverse or made at the dictate of the superior authority.

7. ***In Nand Kishore vs. State of Bihar***, (1978) 3 SCC 366 , it was held that the disciplinary proceedings before a domestic Tribunal are of quasi-judicial character and, therefore, it is necessary that the Tribunal should arrive at its conclusions on the basis of some evidence, that is to say, such evidence which, and that too, with some degree of definiteness, points to the guilt of the delinquent and does not leave the matter in a suspicious state as mere suspicion cannot take the place of proof even in domestic enquiries. If, therefore, there is no evidence to sustain the charges framed against the delinquent, he cannot be held to be guilty as in that event, the findings recorded by the Enquiry Officer would be perverse.

8. The findings, recorded in a domestic enquiry, can be characterised as perverse if it is shown that such a findings are not supported by any evidence on record or are not based on the evidence adduced by the parties or no reasonable person could have come to those findings on the basis of the that evidence. This principle was laid down by this Court in ***State of Andhra Pradesh vs. Rama Rao.*** 1964 2 LLJ 150, in which the question was whether the High Court, under Article 226, could interfere with the findings recorded at the departmental enquiry. This decision was followed in ***Central Bank of India vs. Prakash Chand Jain***, 1969 2 LLJ 377 and ***Bharat Iron Works vs. Bhagubhai Balubhai Patel & Ors.*** (1976) 1 SCC 518. ***In Rajinder Kumar Kindra vs. Delhi Administration through Secretary (Labour) and Others***, (1984) 4 SCC 635, it was laid down that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be rejected as perverse. It was also laid down that where a quasi-judicial tribunal records findings based on no legal evidence and the findings are his mere ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated."

10. It is quite apparent from the aforesaid law laid down by the Hon'ble Apex Court that normally the High Court would not interfere with the findings of fact recorded in enquiry but if the finding of "guilt" is based on no

evidence, it would be a perverse findings and would be amenable to judicial scrutiny.

11. Similar view has been taken by Hon'ble Apex Court in **Roop Singh Negi versus Punjab National Bank and others** (2009)2 Supreme Court Cases 570, wherein it has been held as under:-

> *"14. 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 be found 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 witnesses merely 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".*
>
> *23.* Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn

by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof.

12. If the aforesaid judgments relied upon by the Hon'ble Apex Court are read in its entirety, there is no complete ban for this Court to interfere in disciplinary proceedings while exercising power under Article 226 of the Constitution of India, but before exercising this jurisdiction this court is to satisfy itself whether enquiry report submitted by enquiry officer, which ultimately came to be made basis by Disciplinary authority to impose penalty upon the delinquent officer, is based upon evidence or there is no evidence to support the finding.

13. Now being guided by aforesaid law laid down by Hon'ble Apex Court, this Court would make an endeavour to find out whether enquiry report submitted by the enquiry officer is supported by any evidence or same could be arrived at by man of ordinary prudence.

14. Mr. Onkar Jairath, learned counsel representing the petitioner while making this Court to peruse Clause 16.1 of the Punjab Police Rules 1934, which is applicable to the State of H.P., contended that aforesaid provisions deals with authorized punishments. As per aforesaid provisions, no police officials shall be departmentally punished otherwise then as provided in these rules. It would be apt to take note of aforesaid Rule 16.1 hereinbelow"

> **"16.1. <u>Authorized punishments</u>**. - (1) No police officer shall be departmentally punished otherwise than as provided in these rules.
>
> (2) The departmental punishments mentioned in the second column of the subjoined table may be inflicted on officers of the various ranks

shown in the heading Nos. 3 to 6, by the officers named below each heading in each case, or by any officer of higher rank :-

1	2	3	4	5	6
Sr. No.	Departmental punishment	Inspectors	Sergeants, Sub-Inspectors and Assistant Sub-Inspectors	Head Constables	Head Constables
1	Dismissal	Deputy Inspectors-General, Assistant Inspector-General, Government Railway Police, the Assistant Inspector General, Provincial Additional Police, designated as Commandant, Provincial Additional Police, and the Assistant Inspector-	Superintendents of Police, commandants of Punjab Armed Police and Deputy Superintendent (Administrative), Government Railway Police	Superintendents of Police; Deputy Superintendent (Administrative), Government Railway Police; Deputy Superintendents in-charge of Railway Police Sub-Divisions, Senior Assistant Superintendent of Police, Lahore; Officers-in-	Superintendents of Police, Deputy Superintendent (Administrative), Government Railway Police; Deputy Superintendents in-charge of Railway Police Sub-Divisions; Senior Assistant Superintendent of Police, Lahore; Officer-in-

		General of Police (Traffic)		charge of Police Constables Training Centres Deputy Superinten dent of Police, Lahaul and Spiti	charge of Recruits Training Centres. Deputy Superinten dent of Police, Lahaul and Spiti

15. Mr. Onkar Jairath, learned counsel representing the petitioner submitted that as per aforesaid provisions penalty of dismissal, if any, upon constables/Head constables can only be levied by Superintendent of Police. While placing reliance upon the Rule 13(2) and 14 of CCS (CCA) Rules, learned counsel for the petitioner submitted that Disciplinary authority is only competent to issue charge sheet against the delinquent officer and no order imposing penalty can be passed by such authority if inquiry is not conducted in mode and manner as prescribed under Rule 14 of CCS (CCA) Rules.

16. At this stage, it would be apt to take note of Rule 13(2) and of the Rules herein below:-

> ***"13(2):- A disciplinary authority competent under these rules to impose any of the penalties specified in Clause (i) to (iv) of Rule 11 may institute disciplinary proceedings against any Government servant for the imposition of any of the penalties specified in Clauses (v) to (ix) of Rule 11 notwithstanding that such Disciplinary Authority is not competent under these rules to impose any of the latter penalties."***

17. It is not in dispute that in the case of the petitioner Disciplinary authority is/was Superintendent of Police because at the time of initiation of disciplinary proceedings petitioner was working as Head Constable and as such, charge sheet, if any, qua the charge levelled against the petitioner could only be issued by Disciplinary authority i.e. Superintendent of Police. In the instant case, record reveals that Superintendent of Police vide order dated 13.11.2006 (Annexure P-2) after having noticed the reply filed by the petitioner put petitioner under suspension and directed District Inspector, Sh. Amar Singh to conduct disciplinary proceedings .

18. Though, Mr. Narender Guleria, learned Additional Advocate General while referring to aforesaid communication, vehemently argued that with the issuance of aforesaid communication, disciplinary proceedings stood initiated against the petitioner, but such plea of him deserves outright rejection being devoid of any merit. Bare perusal of aforesaid communication reveals that Superintendent of Police after having received reply of petitioner to the communication dated 4.11.2006 dismissed the claim of the petitioner that he was unable to resume duty on account of his illness and accordingly put him under suspension. Though, vide aforesaid order, authority passed the order with regard to initiation of disciplinary proceedings but interestingly, he delegated such power to District Inspector, who otherwise was not competent to issue charge sheet. As per Rule 13 of CCS(CCA) Rules, as reproduced hereinabove, it is only the Disciplinary authority, who could issue charge sheet. In the case at hand, District Inspector, Sh. Amar Singh issued charge sheet dated 27.12.2006 (Annexure P-3) giving therein details of allegations of willful absence against the petitioner.

19. Petitioner replied to the aforesaid charge sheet reiterating that he was unable to report to the duty on account of his illness, which is supported by documents related to his treatment duly signed by the Doctor, but interestingly District Inspector without taking cognizance of the reply filed

by the petitioner proceeded to record statement of prosecution witnesses(Annexure P-5) and after conclusion of the evidence without affording an opportunity to the petitioner to lead evidence in defence, furnished fresh charge sheet dated 10.05.2007 (Annexure P-6), stating therein that charge framed against the petitioner vide charge sheet dated 27.12.2006 (Annexure P-5) stands proved with the statements made by the prosecution witnesses and in case petitioner wants to lead evidence, if any, in defence same can be furnished within 72 hours. Though, petitioner requested for extension of time to file reply, but District Inspector after having completed disciplinary proceedings furnished enquiry report (Annexure R-10), stating therein that charge of willful absence stands proved against the petitioner and as such, appropriate action in accordance with law be taken against him.

20. Now, question which remains to be decided at this stage is "whether procedure followed by Superintendent of Police, who is/was Disciplinary authority of the petitioner after putting petitioner under suspension is as per law or aforesaid authority adopted procedure unknown to the law?". As has been taken note hereinabove, Superintendent of Police being Disciplinary authority of the petitioner ought to have issued charge sheet, but in the instant case he delegated such authority to District Inspector, who is subordinate to him. Apart from above, District Inspector being appointed as an enquiry officer in terms of order dated 13.11.2006 (Annexure P-2) passed by Superintendent of Police otherwise could not have issued charge sheet that too on two occasions, rather he being enquiry officer was only to ascertain correctness of the charges framed against the petitioner by way of charge sheet, if any, framed by the Disciplinary authority. However, in the instant case charge sheet was never submitted by Disciplinary authority but such power was delegated to District Inspector, who thereafter in the capacity of enquiry officer conducted disciplinary proceedings in most casual manner. As per Rule 14 of CCS(CCA) Rules, after framing of charge

opportunity is required to be given to the delinquent officer to file reply and in case Disciplinary authority is not satisfied with the reply, it can proceed to appoint an enquiry officer, who with a view to ascertain correctness of the charge shall hold enquiry. Enquiry officer while affording time to prosecution to prove its case would also afford opportunity of cross-examination to the delinquent officer. After recording of evidence enquiry officer would draw enquiry report and shall submit the same to the Disciplinary authority, who after being satisfied with the correctness of the enquiry report would proceed accordingly. Disciplinary authority may agree or disagree with enquiry report but in case it agrees it shall issue notice to the delinquent officer to explain that why penalty proposed be not awarded. Disciplinary authority after having received reply, if any, on behalf of the delinquent officer may pass appropriate orders.

21. In the instant case, no proper procedure appears to have been followed by Disciplinary authority before initiating disciplinary proceedings against the petitioner. First of all, no charge sheet could be issued by District Inspector, who subsequently came to be appointed as an enquiry officer. There was no occasion, if any, for enquiry officer to first record evidence and thereafter serve another charge sheet to petitioner, calling upon him to adduce on record evidence, if any, in support of his claim. Rather, he after having recorded evidence of prosecution witnesses ought to have afforded an opportunity to the delinquent officer to cross-examine and lead evidence in defence and thereafter after closure of the evidence should have directly placed the enquiry report before the Disciplinary authority, enabling him/her to pass appropriate orders. Interestingly, in the case at hand enquiry officer served two charge sheets, firstly he served charge sheet dated 27.12.2006 (Annexure P-3) and thereafter ignoring reply to the aforesaid charge sheet filed by the petitioner, recorded the statements of prosecution witnesses and thereafter again served petitioner with another charge sheet dated 10.5.2007

(Annexure P-6), calling upon him to adduce evidence, if any, in support of his case, which procedure is totally unknown to the law. Moreover record reveals that while conducting enquiry pursuant to first charge sheet dated 27.12.2006, no opportunity of cross-examination was granted to the petitioner and as such, he was compelled to write to the Inquiry officer, who subsequently while issuing second charge sheet called upon petitioner to furnish evidence in support of his claim and cross-examine prosecution witnesses.

22. In view of the detailed discussion made hereinabove, first two questions formulated by this Court stand answered with the conclusion that it is only disciplinary authority which can issue charge sheet to the delinquent officer and there is no provision under service jurisprudence to issue two charge sheets that too after appointment of enquiry officer and by the enquiry officer.

23. Though, Mr. Narender Guleria, learned Additional Advocate General while making this Court to peruse the record of enquiry made serious attempt to persuade this Court to agree with his contention that due procedure as prescribed under law was followed by the Disciplinary authority but having scanned entire material available on record, this Court finds no reason to agree with aforesaid submission made by learned Additional Advocate General. His second submission that mere issuance of second charge sheet will not vitiate the inquiry proceedings, is also liable to be rejected because it is not only factum of issuance of second charge sheet, which has weighed with this Court while answering first two questions but very first action of Superintendent of Police, who is disciplinary/ appointing authority of petitioner, to delegate the power of issuance of charge sheet to his subordinate i.e. District Inspector, which is not permissible under law, has persuaded this Court to agree with the submission of the petitioner.

24. Rule 14 of CCS(CCA) Rules clearly provides that whenever departmental proceedings are held against the Government servant under Rule 14 and Rule 15, Disciplinary authority shall draw up or cause to be drawn up the charge sheet. Rule 14(4) clearly mandates that the disciplinary authority shall deliver or cause to be delivered to the government servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved. Procedure as provided under Article 14 of CCS(CCA) Rules is strictly in conformity with the provisions contained under Article 311 (2) of the Constitution of India and as such, if same is not followed, it would be violative of provisions contained under Section 311 (2) of the Constitution of India, which clearly provides that no public servant is dismissed, removed or suspended without following fair procedure in which he/she is to be given a reasonable opportunity to meet the allegations contained in the charge sheet. Since in the case at hand, aforesaid procedure has been not followed, entire departmental proceedings stands vitiated and cannot be allowed to sustain.

25. Reliance is placed upon judgment rendered by the Hon'ble Apex Court in ***Union of India and Ors v. B.V. Gopinath, (2014) 1 SCC 351*** (alongwith connected matters), which reads as under:

> *"40.Article 311(1) of the Constitution of India ensures that no person who is a member of a civil service of the Union or an all India service can be dismissed or removed by an authority subordinate to that by which he was appointed. The overwhelming importance and value of Article 311(1) for the civil administration as well as the public servant has been considered stated and re- stated, by this Court in numerous judgments, since the Constitution came into effect on 19th January, 1950. Article 311(2) ensures that no civil servant is dismissed or reduced in rank except after an inquiry held in accordance with the rules of natural justice. To effectuate the guarantee contained in Article*

311(1) and to ensure compliance with the mandatory requirements of Article 311(2), the Government of India has promulgated CCS (CCA) Rules, 1965.

"41. Disciplinary proceedings against the respondent herein were initiated in terms of Rule 14 of the aforesaid Rules. Rule 14(3) clearly lays down that where it is proposed to hold an inquiry against a government servant under Rule 14 or Rule 15, the disciplinary authority shall draw up or cause to be drawn up the charge sheet. Rule 14(4) again mandates that the disciplinary authority shall deliver or cause to be delivered to the government servant, a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and the supporting documents including a list of witnesses by which each article of charge is proposed to be proved. We are unable to interpret this provision as suggested by the Additional Solicitor General, that once the disciplinary authority approves the initiation of the disciplinary proceedings, the charge sheet can be drawn up by an authority other than the disciplinary authority. This would destroy the underlying protection guaranteed under Article 311(1) of the Constitution of India. Such procedure would also do violence to the protective provisions contained under Article 311(2) which ensures that no public servant is dismissed, removed or suspended without following a fair procedure in which he/she has been given a reasonable opportunity to meet the allegations contained in the charge sheet. Such a charge sheet can only be issued upon approval by the appointing authority i.e. Finance Minister.

45. Rule 14 of the CCS (CCA) Rules provides for holding a departmental enquiry in accordance with the provisions contained in Article 311(2) of the Constitution of India. Clause (8) also makes it clear that when the Finance Minister is approached for approval of charge memo, approval for taking ancillary action such as appointing an inquiry officer/presiding officer should also be taken. Clause (9) in fact reinforces the provisions in clause (8) to the effect that it is the Finance Minster, who is required to approve the charge memo. Clause (9) relates to a stage after the issuance of charge sheet and when the charge sheeted officer has submitted the statement of defence. It

provides that in case the charge sheeted officer simply denies the charges, CVO will appoint an inquiry officer/presiding officer. In case of denial accompanied by representation, the Chairman is to consider the written statement of defence. In case the Chairman comes to a tentative conclusion that written statement of defence has pointed out certain issues which may require modification/ amendment of charges then the file has to be put up to the Finance Minster. So the intention is clearly manifest that all decisions with regard to the approval of charge memo, dropping of the charge memo, modification/ amendment of charges have to be taken by the Finance Minister.

51. Ms. Indira Jaising also submitted that the purpose behind Article 311, Rule 14 and also the Office Order of 2005 is to ensure that only an authority that is not subordinate to the appointing authority takes disciplinary action and that rules of natural justice are complied with. According to the learned Addl. Solicitor General, the respondent is not claiming that rules of natural justice have been violated as the charge memo was not approved by the disciplinary authority. Therefore, according to the Addl. Solicitor General, the CAT as well as the High Court erred in quashing the charge sheet as no prejudice has been caused to the respondent.

52.In our opinion, the submission of the learned Addl. Solicitor General is not factually correct. The primary submission of the respondent was that the charge sheet not having been issued by the disciplinary authority is without authority of law and, therefore, nonest in the eye of law. This plea of the respondent has been accepted by the CAT as also by the High Court. The action has been taken against the respondent in Rule 14(3) of the CCS(CCA) Rules which enjoins the disciplinary authority to draw up or cause to be drawn up the substance of imputation of misconduct or misbehaviour into definite and distinct articles of charges. The term "cause to be drawn up" does not mean that the definite and distinct articles of charges once drawn up do not have to be approved by the disciplinary authority. The term "cause to be drawn up" merely refers to a delegation by the disciplinary authority to a subordinate authority to perform the task of drawing up substance of proposed "definite and distinct articles of

charge sheet". These proposed articles of charge would only be finalized upon approval by the disciplinary authority. Undoubtedly, this Court in the case of P.V.Srinivasa Sastry & Ors. Vs. Comptroller and Auditor General & Ors.[19] has held that Article 311(1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, at the same time it is pointed out that

"4……However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority." It is further held that

"4…….Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holders of a civil post."

26. Though, this court is of the definite view that entire disciplinary proceedings was vitiated on account of framing of charge sheet by incompetent officer but even if it presumed that disciplinary proceedings has acted in accordance with law, penalty of dismissal imposed upon the petitioner does not commensurate with the offence alleged to have been committed by him. In the case at hand, charge against the petitioner was that he remained wilfully absent from duty. This court having scanned entire charge sheet vis-à-vis evidence led on record, has no hesitation to conclude that petitioner by way of placing medical record attempted to prove that he had rendered immobile on account of slip disc but interestingly department for no plausible reason rejected all the documents and without calling upon the petitioner to explain the documents rendered on record by him proceeded to dismiss him from service . Penalty of dismissal imposed by Disciplinary authority cannot be said to be justifiable in the case at hand, rather same being conscious shocking deserves to be interfered with**.**

27. Rule 16.2 of the Punjab Police Rules which reads as under deals with the dismissal of police officials:-

> ***"16.2. Dismissal. - (1) Dismissal shall be awarded only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. In making such an award regard shall be had to the length of service of the offender and his claim to pension.***
> ***[(2) If the conduct of an enrolled police officer leads to his conviction on a criminal charge and he is sentenced to imprisonment, he shall be dismissed :***
>
> ***Provided that a punishing authority may, in an exceptional case involving manifestly extenuating circumstances for reasons to be recorded and with the prior approval of the next higher authority impose any punishment other than that of dismissal Provided further that in case the conviction of an enrolled police officer is set aside in appeal or revision, the officer empowered to appoint him shall review his case keeping in view the instructions issued by the Government from time to time in this behalf.]***
> ***(3) When a police officer is convicted judicially and dismissed, or dismissed as a result of a departmental enquiry, in consequence of corrupt practices, the conviction and dismissal and its cause shall be published in the Police Gazette. In other cases of dismissal when it is desired to ensure that the officer dismissed shall not be re-employed elsewhere, a full descriptive roll, with particulars of the punishments, shall be sent for publication in the Police Gazette."***

28. Bare perusal of aforesaid provision clearly reveals that penalty of dismissal shall be awarded only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service.

29. ***State of Punjab versus Parkash Chand, Constable*** (1992)1 SLR 174, has held that absence without leave would not amount to the

gravest act of misconduct. Punishment of dismissal of service should be awarded for gravest act of misconduct. However in the case at hand petitioner remained absent for 23 days, but yet Disciplinary authority proceeded to award gravest punishment of dismissal from the service, which by no stretch of imagination can be said to be justifiable, rather same being conscious shocking deserves to be quashed and set-aside. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that where punishment awarded by Disciplinary authority appears to be conscious shocking, it can interfere and quash the same. It would be profitable to reproduce relevant para of aforesaid judgment herein:-

> ***"11. This court has in a number of cases gone into the matter in order to find as to what would really constitute a gravest act of misconduct. A number of cases have been, cited before us but we have chosen to pick up only one which deals with the question of absence without leave. In Darshan Singh's case (supra), the learned single Judge has held that absence without leave for almost 13 months would not in the circumstances of that case amount to the gravest act of misconduct."***

30. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in Civil Appeal No. 6723 of 2021, titled ***Union of India and others versus Ex. Constable Ram Karan,*** decided on 11th November, 2021, wherein it has been held as under:-

> *"Even in cases where the punishment imposed by the disciplinary authority is found to be shocking to the conscience of the Court, normally the disciplinary authority or the appellate authority should be directed to reconsider the question of imposition of penalty. The scope of judicial review on the quantum of punishment is available but with a limited scope. It is only when the penalty imposed appears to be shockingly disproportionate to the nature of misconduct that*

the Courts would frown upon. Even in such a case, after setting aside the penalty order, it is to be left to the disciplinary/ appellate authority to take a call and it is not for the Court to substitute its decision by prescribing the quantum of punishment. However, it is only in rare and exceptional cases where the court might to shorten the litigation may think of substituting its own view as to the quantum of punishment in place of punishment awarded by the competent authority that too after assigning cogent reasons."

31. The principles have been culled out by a three Judge Bench of this Court way back in **B.C. Chaturvedi vs. Union of India and Others**,1995(6) SCC 749 ,wherein it was observed as under:-

"18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/ Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/ Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

32. It has been further examined by this Court **in Lucknow Kshetriya Gramin Bank (Now Allahabad, Uttar Pradesh**

Gramin Bank) and Another vs. Rajendra Singh,(2013)12 SCC 372

as under:-

> *19.1. When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.*
>
> *19.2. The courts cannot assume the function of disciplinary/departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.*
>
> *19.3. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.*
>
> *19.4. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.*
>
> *19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge sheet in the two cases. If the co-delinquent accepts the charges,*

indicating remorse with unqualified apology, lesser punishment to him would be justifiable."

33. It is the classic case, wherein not only Disciplinary authority failed to apply its mind rather Appellate authority as well as revisional authority in stereotype manner passed the order without bothering to look into the correct position of law as well as ground taken in the appeal and the revision. Both the authorities without there being any application of mind and without there being cogent and convincing reason rejected the appeal and revision and upheld the order of dismissal passed by Disciplinary authority, which is otherwise not sustainable being based upon the charge sheet furnished by incompetent office.

34. Hon'ble Apex Court in ***Roop Singh Negi (supra),*** has categorically held that departmental enquiry is a quasi-judicial proceedings. The Enquiry Officer performs a quasi judicial function and as such, it has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. If the orders passed by the Appellate authority and revisional authority are read juxtaposing each other there is nothing to suggests that both the authorities while considering appeal and revision filed by the petitioner made an attempt if any, to look into the legal grounds raised by the petitioner qua the competence of District Inspector to issue charge sheet and thereafter procedure followed by him while conducting disciplinary proceedings. In the aforesaid judgment, it has been categorically held that it is duty of Disciplinary authority/Appointing authority to record reasons while passing order but as has been discussed hereinabove, there is no cogent and convincing reasons assigned by all the authorities while imposing punishment of dismissal against the petitioner.

35. Consequently, in view of the detailed discussion made hereinabove, this Court finds merit in the present petition and accordingly

same is allowed and orders dated 5.03.2008, 2.03.2008 and 1.07.2010 being Annexures P-12, P-14 and P-16 are quashed and set-aside and petitioner is ordered to be reinstated in service from due date with all consequential benefits. Pending applications, if any, also stand disposed of.

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

Between:

MS. POOJA KAUSHAL, D/O SHRI MAHENDER SINGH, RESIDENT OF VILLAGE & POST OFFICE KATOHAR KALAN, TEHSIL AMB, DISTRICT UNA,(H.P.)

....PETITIONER

(BY MR. BHUVNESH SHARMA AND MR. RAMAKANT SHARMA, ADVOCATES)

AND

H.P. STAFF SELECTION COMMISSION, HAMIRPUR, DISTRICT HAMIRPUR (H.P) THROUGH IS SECRETARY.

....RESPONDENT

(MR. ANGREZ KAPOOR, ADVOCATE)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.6280 of 2020
Decided on: 31.05.2022

Constitution of India, 1950- Article 226- Application for the post of Pharmacist (Allopathy)- Petitioner being eligible for the post entitled to apply as OBC candidate but since portal did not show the option of OBC category she applied against general category- During interview petitioner claimed that she belongs to OBC category, however, Commission rejected her prayer- Held- Once petitioner participated in the written exam as general unreserved category, she is stopped at this stage to claim that respondent Commission

ought to have considered her in the category of OBC- Petition dismissed. (Para 5)

Cases referred:

J & K Public Service Commission vs Israr Ahmad and others, (2005)12 SCC 498;

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

O R D E R

Vide advertisement No.33-2/2017, respondent-Commission advertised various posts including the post of Pharmacist (Allopathy) bearing Code No.586 *(Annexure A-5),* petitioner being fully eligible for the post of Pharmacist (Allopathy) though intended to apply online as OBC category candidate, but since portal did not show the option of OBC category, she applied against the general category. Respondent-Commission after having found petitioner eligible to participate in selection process, issued her admit card vide Annexure A-6 and assigned Roll No.586006120. The petitioner was declared qualified in written test and as such, was called for interview. On 29.12.2018, during interview petitioner claimed that she belongs to OBC category, but was compelled to apply under general category as on that day portal did not show OBC category. Respondent-Commission rejected aforesaid prayer made on behalf of the petitioner on the ground that once category opted cannot be changed subsequently that too after participation in written examination.

2. Being aggrieved and dissatisfied with the aforesaid decision of the respondent-Commission, petitioner filed representation, but same was rejected by the respondent vide letter dated 9.1.2019 (*Annexure* A-8) intimating therein that request of petitioner for change of her category from General un-reserved to OBC(UR) vide letter dated 29.12.2008 has not been accepted by the Commission as no change of category is allowed after

submission of application for the post as per the terms and conditions of the advertisement. Petitioner was unable to secure place in merit list of general category (UR) and as such, after being rejected, she approached erstwhile H.P. State Administrative Tribunal by way of Original Application 340 of 2019, which now on account of abolishment of erstwhile H.P. Administrative Tribunal, came to be transferred to this Court and stands re-registered as CWPOA No.6280 of 2020, praying therein for following reliefs:-

> "i) ***That the letter, dated 9.1.2019, Annexure A-8, of rejection of the representation of the applicant for correction of her category from general category to OBC category for recruitment to the post of Pharmacist (Allopathic), may kindly be quashed and set aside, in the interest of justice.***
>
> ***ii) That the respondent Commission further be directed to consider the candidature of the applicant for recruitment to the post of Pharmacist (Allopathic) against OBC category for making recruitment as per advertisement at Annexure A-5."***

3. Reply to the petition stands filed on behalf of the respondent, wherein it has been categorically stated that petitioner applied for the post in question as a general unreserved candidate. It is also stated in the reply that petitioner appeared in written examination under general unreserved category and at no point of time after submission of application form, she made request to change her category, but request for first time to change category came to be made on behalf of the petitioner at the time of interview, wherein admittedly she appeared as general unreserved candidate. Respondent-Commission while denying the claim of the petitioner that portal of the replying respondent was not showing the option of OBC category has specifically stated that 720 other candidates of OBC category filled up the form using the same portal.

4. Having heard learned counsel representing the parties and perused the material available on record, this court finds no merit in the present petition. It is quite apparent from the pleadings adduced on record by the respective parties that petitioner herself applied against the post in question under general unreserved category. It is also not in dispute that petitioner participated in the written test as general unreserved category. It is only at the time of interview she claimed that she belongs to OBC category, but since she had herself filled up form of the general unreserved category, she rightly came to be considered in that category.

5. By now it is well settled that category once claimed cannot be allowed to be changed subsequently. Though, in the instant case petitioner has claimed that on the date when she filled up the form, portal was not showing the option of OBC category, but such stand of her stands falsified with the reply filed by the respondent, wherein it has been categorically stated that 720 other candidates belonging to OBC category filled up online form from the same portal from which the petitioner had filled up her form. Otherwise, it is not understood that in case petitioner was unable to apply online as OBC category, what prevented her to approach respondent commission immediately intimating therein that portal is not showing the option of OBC category. But interestingly in the case at hand she applied under general unreserved category and thereafter participated in the written exam also. Once, she participated in the written exam as general unreserved category, she is estopped at this stage to claim that respondent commission ought to have considered her in the category of OBC unreserved.

6. The Hon'ble Apex Court in **J& K Public Service Commission** versus **Israr Ahmad and others**, (2005)12 Supreme Court Cases 498, has category held that category once claimed cannot be changed and each direct recruitment is to be regulated by the terms of the advertisement. It would be profitable to reproduce para No.5 of the aforesaid judgment herein:-

> ***"5.We have considered the rival contentions advanced by both the parties. The contention of the first respondent cannot be accepted as he has not applied for selection as a candidate entitled to get reservation. He did not produce any certificate along with his application. The fact that he has not availed of the benefit for the preliminary examination itself is sufficient to treat him as a candidate not entitled to get reservation. He passed the preliminary examination as a general candidate and at the subsequent stage of the main examination he cannot avail of reservation on the ground that he was successful in getting the required certificate only at a later stage. The nature and status of the candidate who was applying for the selection could only be treated alike and once a candidate has chosen to opt for the category to which he is entitled, he cannot later change the status and make fresh claim. The Division Bench was not correct in holding that as a candidate he had also had the qualification and the production of the certificate at a later stage would make him entitled to seek reservation. Therefore, we set aside the judgment of the Division Bench and allow the appeal. No costs."***

7. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds no merit in the present petition and accordingly, same is dismissed alongwith pending applications, if any.

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

Between:

SMT. UMA SHARMA (AGED 70 YEARS) WIFE OF LATE SHRI RANBIR SHARMA, RESIDENT OF HOUSE NO. 107/1, KRISHNA NAGAR, SHIMLA, TEHSIL AND DISTRICT SHIMLA, H.P. 171001.

……..PETITIONER

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

AND

STATE OF HIMACHAL PRADESH THROUGH DISTRICT COLLECTOR, SOLAN, DISTRICT SOLAN,H.P.

……..RESPONDENT

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL & MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
No. 45/2022
Reserved on: 09.09.2022
Decided on: 16.09.2022

Code of Civil Procedure, 1908- Section 115- **Limitation Act, 1963**- Section 5- Delay in filing the appeal- Application for condonation of delay allowed- Held- No reason assigned for delay in filing the appeal- Order passed by Divisional Commissioner is not speaking and cryptic- Petition allowed- Order of Divisional Commissioner set aside. (Para 8, 10)

Cases referred:

State of Madhya Pradesh Vs. Bherulal (2020) 10 SCC 654;
State of Odisha and ors. Vs. Sunanda Mahakude (2021) 11 SCC 560;

This petition coming on for pronouncement of judgment, this Courtpassed the following:-

ORDER

By way of instant petition, petitioner has prayed for following relief:-

> *" It is, therefore, prayed that the petition may be accepted and impugned orders Annexure P-4 and Annexure P-6 may be ordered to be quashed and set aside, resultantly application filed by respondent under Section 5 of Limitation Act seeking condonation of delay in filing appeal before the Divisional Commission, Shimla Divisional in Case No. 202/2020 may be ordered to be dismissed with costs upon respondent throughout. Any other order or direction that this Hon'ble Court may deem fit in the facts and circumstances of the case may also be passed in favour of the petitioner in the* interest of justice."

2. Brief facts necessary for adjudication of the petition are that proceedings under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, were initiated against the petitioner by District Collector, Solan, which were decided in favour of the petitioner on 11.07.2014. An appeal was filed before Divisional Commissioner, Shimla by respondent against order dated 11.07.2014, passed by District Collector, Solan, registered as RevenueAppeal No. 202/2020. Since, the appeal was filed beyond the prescribed period of limitation, an application under Section 5 of the Indian Limitation Act, read with Section 64 of the H.P. Tenancy and Land Reforms, Act, was also filed seeking condonation of delay in filing the appeal. The Divisional Commissioner allowed the application under Section 5 of the Limitation Act filed byrespondent, vide order dated 21.10.2021. Petitioner herein, assailed the said order in Revision Petition before Financial Commissioner (Appeals) Himachal Pradesh. The prayer of the petitioner was rejected by Financial Commissioner (Appeals), vide impugned order dated 26.11.2021.

3. Petitionerhas challenged the order dated 21.10.2021, passed by Divisional Commissioner,Shimla, Annexure P-4 in RevenueAppeal No. 202/2020 and order dated 26.11.2021, passed by Financial Commissioner (Appeals) Himachal Pradesh in Appeal No. 02/2021. The contention of the

petitioner is that the impugned orders are against all canons of law. There was no justification for condonation of delay, still the Divisional Commissioner allowed the application by a non speaking and cryptic order. The Financial Commissioner (Appeals) Himachal Pradesh also failed to pass the order within the fourwalls of law. The impugned order passed by Financial Commissioner (Appeals) Himachal Pradesh, is the result of surmises and conjectures. It has not been appreciated that no credible reason, whatsoever, was assigned for huge delay that had occurred in filing the appeal, still the undue benefit was allowed in favour of the respondent by way of impugned orders.

4. In reply, respondent has submitted that orders passed by Divisional Commissioner and Financial Commissioner (Appeals), are in accordance with law. In such view of the matter, a prayer has been made to uphold the impugned orders Annexures P-4 and P-6.

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

6. The order assailed by respondent before Divisional Commissioner, Shimla in Review Appeal No. 202/2020 was passed by the District Collector, Solan on 11.07.2014. The appeal was filed in 2020. In the application under Section 5 of the Limitation Act, it was averred that order dated 11.07.2014 came to the notice of respondent only on 20.09.2019, when the petitioner herein made a request for recommending her case to the Government. It was further averred that thereafter it was noticed that legal opinion had not been supplied by the Standing Counsel for the State. Inquiry was made from Shri Vijay Kumar Sultanpuri, the then Standing Counsel for the State, vide letter dated 21.10.2019. The Standing Counsel on 06.11.2019 explained that the legal opinion could not be furnished as the original record of the case was with District Revenue Officer, Solan. The legal opinion was stated to have been received by respondent on 06.11.2019, which was sent to the office of Principal Secretary (Revenue) for examination on 21.10.2019. The

Principal Secretary-cum-F.C(Revenue) conveyed the decision to file appeal on 17.02.2020, which was received in the office of respondent on 24.02.2020, whereafter, the appeal alongwith application for condonation of delay was preferred.

7. Noticeably, the application under Section 5 of the Limitation Act for condonation of delay preferred by therespondent before Divisional Commissioner has been signed by none else than District Collector, Solan himself. The order dated 11.07.2014 was also passed by the same authority i.e. District Collector, Solan. When order dated 11.07.2014 was passed by District Collector, Solan, it is not understandable, as to how, he was not aware about the order till 2019, when it was allegedly noticed on the representation of the petitioner.

8. A perusal of the contents of the application under Section 5 of the Limitation Act filed by respondent before Divisional Commissioner reveal that there was absolutely no reason assigned for delay in filing the appeal. The application is totally silent on the aspect, as to whom, the representation had been addressed by the petitioner on 20.09.2019. Further, there is nothing on record to suggest that legal opinion was ever solicited from the Standing Counsel after passing of order dated 11.07.2014. In absence of such material, it cannot be presumed that the Standing Counsel was under obligation to render the opinion of his own. This fact gains significance in the background where the order was passed by District Collector, Solan and it is not clear, as to whom, the legal opinion was to be rendered by Standing Counsel. Thus, the averments in the application for condonation of delay were clear concoction. Not only this, even after receipt of legal opinion on 06.11.2019, the matter was not attended to with required promptitude. The permission to file appeal was received in the office of respondent on 24.02.2020. Meaning thereby that even after 06.11.2019, the period of limitation prescribed for

filing the appeal in Section 62 of H.P. Tenancy and Land Reforms Act, was allowed to elapse. This is a case of sheer inaction on the part of the authorities.

9. As per Section 62 of the H.P. Tenancy and Land Reforms Act, the period of limitation for filing the appeal before Divisional Commissioner is sixty days. Section 64 of the Act ibid provides for computation of the period for an appeal as per the Limitation Act, 1963. Thus, the period of limitation for filing of appeal commenced from the date of order i.e. 11.07.2014. The appeal was to be filed within sixty days. The Limitation Act equally applies to all including the Government. For condonation of delay, there has to be sufficient cause. The sufficiency of a cause can be assessed keeping in view the facts and circumstances of the case. As noticed above, what to talk of sufficient cause, respondent had not been able to assign any reason for delay in filing the appeal. Undue laxity of government officials cannot be provided with any credit. The law has equal balance for all. Though, some leeway is permissible in the case of government but that cannot be construed as an absolute license to flout the law at whims. In ***State of Madhya Pradesh*** *Vs.* ***Bherulal (2020) 10 SCC 654,*** Hon'ble Supreme Court observed as under:-

> "*2. We are constrained to pen down a detailed order as it appears that all our counseling to Government andgovernment authorities have fallen on deaf ears i.e., the Supreme Court of India cannot be a place for the Governments to walk in when they choose ignoring the period of limitation prescribed. We have raised the issue that if the Government machinery is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the Legislature to expand the time period for filing limitation for Government authorities because of their gross incompetence. That is not so. Till the Statute subsists, the appeals/petitions have to be filed as per the Statues prescribed.*
>
> *3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had*

not advanced and a greater leeway was given to the Government (LAO V. Katiji). This position is more than elucidated by the judgment of this Court in Post Master General V. Living Media (India) ltd. (2012) 3 SCC 563 where the Court observed as under:(Post master General case, SCC pp. 573-74, paras 27-30)

"27) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28) Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

29) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay." Eight years hence the judgment is still unheeded!

4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In paragraph 4 a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs."

The same reiteration is again found in ***State of Odisha and ors.*** *Vs.* ***Sunanda Mahakude (2021) 11 SCC 560,*** in which it has been observed as under:-

"3. A reading of the aforesaid shows that there is no reason much less sufficient and cogent reason assigned to explain the delay and the application has also been preferred in a very casual manner. We may notice that there are number of orders of this State Government alone which we have come across where repeatedly matters are being filed beyond the period of limitation prescribed. We have been repeatedly discouraging such endeavours where the Governments seem to think that they can walk in to the Supreme Court any time they feel without any reference to the period of limitation, as if the statutory Law of Limitation does not exist for them.

4. There is no doubt that these are cases including the present one where the Government machinery has acted in a inefficient manner or it is a deliberate endeavour. In either of the two situations, this court ought not to come to the rescue of the petitioner. No doubt, some leeway is given for Government inefficiency but with the technological advancement now the judicial view prevalent earlier when such facilities were not available has been over taken by the elucidation of the legal principles in the judgment of this Court in the Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. – (2012) 3 SCC 563. We have discussed these aspects in SLP [C] Diary No.9217/2020, State of Madhya Pradesh v. Bheru Lal decided on 15.10.2020 and thus, see no reason to repeat the same again.

> *5. In the present case, the State Government has not even taken the trouble of citing any reason or excuse nor any dates given in respect of the period for which condonation is sought. The objective of such an exercise has also been elucidated by us in the aforesaid judgment where we have categorized such cases as "certificate cases".*

10. The impugned order dated 21.10.2021, Annexure P-4, passed by Divisional Commissioner is non speaking and cryptic. No reason whatsoever, has been assigned for allowing the application of respondent for condonation of delay. Similarly, order dated 26.11.2021, Annexure P-6, passed by Financial Commissioner (Appeals) Himachal Pradesh, is against the settled principles of law. It was incumbent upon both the authorities to have assessed the merits of the application at the touch stone of settled legal principles. The application could only be allowed if authorities could arrive at the conclusion that delay was on account of sufficient cause shown by the applicant. The impugned orders reveal that no such exercise was undertaken. Without holding existence of sufficient cause for delay, the application under Section 5 of the Limitation Act, could not have been allowed.

11. In view of above discussion, the petition is allowed. Order dated 21.10.2021, passed by Divisional Commissioner, Shimla, Annexure P-4 in Revenue Appeal No. 202/2020 and order dated 26.11.2021, passed by Financial Commissioner (Appeals) Himachal Pradesh, Annexure P-6, in Appeal No. 02/2021, are set aside. Application of respondent under Section 5 of the Limitation Act, seeking condonation of delay in filing the Appeal No. 202/2020 before the Divisional Commissioner, Shimla, is ordered to be dismissed.

12. Petition is disposed of accordingly, with no order as to costs. Pending miscellaneous application(s) if any, also stands disposed of.

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

Between:-

SH. MOHINDER KUMAR, S/O LATE SH. ANAND PRAKASH, R/O DULI CHAND BROTHERS, 86 THE MALL SHIMLA, H.P.

....PETITIONER

(SH. SUMEET RAJ SHARMA, ADVOCATE)

AND

SH. GODWIN BINDRA, S/O LATE SH. DHEERAJ SINGH BINDRA R/O REGENT HOUSE, THE MALL SHIMLA.

....RESPONDENT

(SH. KHUB SINGH THAKUR, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.310 OF 2022
Reserved on:9.9.2022
Decided on: 21.9.2022

Code of Civil Procedure, 1908- Order 22 Rule 3- Impleading L.Rs of deceased plaintiff- Application allowed by the Ld. Trial Court- Held- Term legal representative is much wider in scope than the legal heir, especially in the context of provisions of Order 22 of the CPC- . Legal representative includes even a person entitled to intermeddle with the estate of the deceased- Petition dismissed. (Para 7, 8)

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

O R D E R

By way of instant petition, petitioner has assailed order dated 30.6.2022, passed by learned Senior CivilJudge, Court No.2, Shimla in case No. 90037 of 2010, whereby the application of the respondent herein filed under Order 22 Rule 3 read with Section 151 of the Code of Civil Procedure for bringing on record legal representatives of deceased petitioner/landlord was allowed.

2. Petitioner has assailed the impugned order on the ground that Master Krish Bindra could not have been brought on record to substitute the

deceased petitioner by way of application under Order 22 Rule 3 CPC, as he did not qualifyto be the legal heir of original petitioner/landlord. It is contended that the deceased petitioner/landlord Sh. Godwin Bindra did not have any biological son. In case Master Krish Bindra was his adopted son, the fact had to be supported by a document, evidencing such adoption. As per petitioner, the right to sue could survive in favour of the legal heirs entitled to inherit the estate of deceased petitioner/landlord.

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

4. Perusal of application under Order 22 Rule 3 of the CPC filed before the learned trial Court reveals that Smt. Meena and Master Krish Bindra were sought to be brought on record to substitute the deceased petitioner/landlord after his death. The application was resisted on behalf of the petitioner herein on the ground that there was no legal and valid adoption by virtue of which, Master Krish Bindra could be said to be the son and legal heir of Sh. Godwin Bindra. It is also submitted that the right to sue had not survived in favour of Master Krish Bindra. Therefore, he could not be allowed to be brought on record as one of the petitioners.

5. Learned trial Court having taken note of all relevant facts rejected the contention of respondent herein and allowed the application vide impugned order. It was also held that the application was within limitation and was accompanied by a legal heir certificate, issued by the competent authority, in which Master Krish Bindra was shown as one of the legal heirs of Sh. Godwin Bindra. Learned trial Court held that while deciding application under Order 22 Rule 3, the heirship of the person sought to be brought on record as legal representative was not required to be determined.

6. No fault can be found with impugned order. For the purpose of Order 22 Rule 3 of the CPC, the relevant and necessary determinative factor is

that the person sought to be brought on record to substitute deceased party should be his legal representative. The term legal representative has been defined in Section 2 (11) of the CPC, as under: -

> *"legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued"*

7. Thus, the term legal representative is much wider in scope than the legal heir, especially in the context of provisions of Order 22 of the CPC.

8. Learned counsel for the petitioner referredto paragraph 10 of the judgment, passed by High Court of Judicature of Madras on 17.6.2022 in Writ Petition No. 25247 of 2021 along with connected matters, to assert that the legal heir certificate issued by Tehsildar was not legal document to ascertain heirship. The contention raised on behalf of the petitioner deserves to be rejected for the reasons that legal heirship is not to be decided while adjudicating an application under Order 22 Rule 3 of the CPC. The Court is to be satisfied that the person sought to be brought on record to substitute deceased party is his legal representative. Legal representative includes even a person entitled to intermeddle with the estate of the deceased. In such circumstances, there was sufficientprima facie material before learned trial Court in the shape of legal heir certificate, issued by the competent authority to infer that Master Krish Bindra was legal representative of deceased petitioner/landlord.

9. In view of above discussion, there is no merit in the instant petition and the same is accordingly dismissed with no orders as to costs. Pending applications, if any, also stand disposed of.

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

Between:-

DUNI CHAND S/O LATE SH. HEERU, AGED ABOUT 45 YEARS, R/O VILLAGE KUTHAKAR, PARGNA TIUN, TEHSIL GHUMARWIN, DISTRICT BILASPUR, HIMACHAL PRADESH.

....PETITIONER.

(BY MR. VIJAY BHATIA, ADVOCATE)

AND

1. GIAN CHAND S/O LATE SH. HEERU,
2. JEET RAM S/O LATE SH. HEERU,

BOTH ARE RESIDENTS OF VILLAGE KUTHAKAR PARGNA TIUN, TEHSIL GHUMARWIN, DISTRICT BILASPUR, HIMACHAL PRADESH.

....RESPONDENTS.

(BY MR. HEMANT THAKUR & MR. ANKIT DHIMAN, ADVOCATES.)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO. 378 OF 2022
Reserved on:23.9.2022
Decided on:30.9.2022

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Supervisory jurisdiction- Interim injunction- Held- Impugned order of Ld. Additional District Judge is barred as facts available on record and cannot be said to be suffering from vice of perversity- Petition dismissed. (Para 14, 16)

Case referred:

Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181;

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

O R D E R

By way of instant petition, order dated 25.07.2022, passed by learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., in Civil Misc. Appeal No. 10-14 of 2021 has been assailed.

2. The Civil Misc. Appeal decided by learned Additional District Judge, Ghumarwin, had arisen from an order dated 06.04.2022, passed by learned Civil Judge, Court No.-3, Ghumarwin, in CMA No. 171-06/2022.

3. The parties hereto shall be referred by the same status as they held before the learned trial Court. Petitioner herein is the plaintiff and respondents herein are the defendants.

4. Plaintiff has filed a suit against the defendants seeking following reliefs:-

> *"i) Decree for permanent prohibitory injunction restraining the defendants from digging the land, raising any type of construction, cutting the trees, occupying the valuable and specific portion of the suit land, changing the nature of the land measuring 2-5 bighas, comprised in Khasra Numbers 5, number Khata/Khatoni 20 min/23 situated in Village Nagroun, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P. in any manner either personally or through their family members, agents, servants, representatives and assignees, until the partition of the suit land by metes and bounds by the competent revenue authority amongst cosharers, be passed;*
>
> *2. In the alternative, decree for joint possession by demolishing the construction if any raised or for the restoration of the land on its original position, if any constructed by defendant during pendency of the suit, over the suit land or any part of it exceeding the share forcibly, be passed."*

5. The suit has been filed by the plaintiff on the premises that suit land comprised in Khata Khatauni No. 21min/23, Khasra No.5, measuring

205 bighas, situated in Village Nagroun, Pargna Tiun, Tehsil Ghumarwin, District Bilaspur, H.P., is jointly owned by the parties to the suit and other co-sharers. As per plaintiff, the suit land was joint and partition had not been effected. Plaintiff further alleged that defendants were threatening to raise construction forcibly on the suit land by dispossessing the plaintiff. The conduct of defendants in raising construction was objected on the ground that the same would adversely affect the rights of the plaintiff.

6. Along with the Civil Suit, Civil Misc. Application for interim injunction restraining the defendants from raising construction on the suit land, till the pendency of the suit, was also filed.

7. Defendants are contesting the suit of the plaintiff. It is submitted on behalf of the defendants that the parties have much more joint land than the land detailed as suit land by the plaintiff. The defendants have claimed much more share in the entire land than being utilized by them for the time being. Defendants have also raised plea of private partition between the parties. It has also been specifically averred that defendant No.1 had an old cowshed which was being reconstructed along with the reconstruction of old toilet and WC. A retaining wall was also sought to be raised only for the purposes of protection of already existing house of defendant No.1. It is also alleged that plaintiff has his double storeyed house on the joint land and he is also in possession of an old house inherited by him and defendants from their father. Plaintiff is stated to have reconstructed the first floor of the inherited house without any objection from defendants. As per defendants, total area in occupation of defendant No.1 for his house and cowshed, toilet etc., is not more than four biswas, whereas the defendants have much more share in the entire suit land.

8. Learned trial Court dismissed the application of plaintiff. An appeal under Order 43, Rule 1(r) of the Code of Civil Procedure, was preferred

by plaintiff, which also stands dismissed vide impuged order passed by learned Additional District Judge, Ghumarwin, District Bilaspur, H.P.

9. I have heard Mr. Vijay Bhatia, learned counsel for the plaintiff and Mr. Hemant Kumar Thakur, Advocate, for the defendants, and have also carefully perused the record.

10. The scope of this Court to exercise jurisdiction under Article 227 of the Constitution of India is restrictive and well defined. This Court in exercise of aforesaid jurisdiction will not sit as Court of appeal to reappreciate and reweigh the evidence or facts upon which the determination under challenge is based. The jurisdiction is to be exercised only to set right grave dereliction of duty or flagrant abuse and violation of fundamental principles of law or justice. Recently, in ***Grament Craft vs. Prakash Chand Goel, (2022)4 SCC 181***, Hon'ble Supreme Court has reiterated the legal position in this behalf in following manner:-

> "*8. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is*

axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.
9. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.(2001)8 SCC 97 has observed:-

> ***"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."***

11. Coming to the facts of the case, total joint land of parties is more than 16 hectares. This fact has not been controverted by the plaintiff, rather

he himself has placed on record jamabandi for khasra Nos. 2, 3, 6 and 7, showing total area of joint land 15-19-00 hectares. That being so, plaintiff in order to succeed in getting interim injunction against the defendants, had to specifically plead and prima facie satisfy the Courts below that some exclusivity was attached to that portion of joint land which was being utilized by the defendants for raising construction or by doing so, defendants would exceed to their share. Undisputedly, there is nothing on record to suggest any of these pleas.

12. Further, the specific allegation in written statement of defendants is that the plaintiff already has two houses on the joint land, which factual position has not been controverted by the plaintiff.

13. Both the Courts below have dismissed the plea for interim injunction raised by plaintiff on the ground that plaintiff had not approached the Court with clean hands. He had not disclosed correct and true factual position. Reliance has also been placed on photographs showing the houses of plaintiff on joint land. What weighed with the Appellate Court is that when plaintiff has already raised construction of his house, he has no right to object the raising of construction by defendants which was less than their recorded share.

14. Perusal of the impugned order reveals that the same has been passed by the learned Additional District Judge, Ghumarwin, in exercise of his lawful jurisdiction. The impugned order is based on facts available on record and hence it cannot be said to be suffering from vice of perversity. The principle of equity, which is cardinal while deciding the grant of equitable relief of injunction, has duly been considered.

15. Another fact which needs notice is that plaintiff though had not mentioned about the private partition inter se the parties in the plaint, however, in replication he admitted such fact and raised the plea that defendants were not adhering to private partition. The said conduct of

plaintiff again disentitles him from grant of discretionary relief in his favour. The plaintiff has suppressed material facts in the plaint.

16. Keeping in view the restrictive jurisdiction of this Court under Article 227 of the Constitution of India, as discussed above, and also by analysing the facts of the case, this Court does not find any merit in this petition and the same is accordingly dismissed. Consequently, the impugned order is affirmed.

17. All pending applications also stand disposed of.

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

Between:

SHRI BHAJNA NAND (AGED 75 YEARS) SON OF SHRI UMA DUTT VILLAGE NALAG, P.O. PAHAL, SUB TEHSIL DHAMI, DISTRICT SHIMLA (HP)-171007.

....DEFENDANT-PETITIONER

(BY MR. BHUPINDER GUPTA, SENIOR ADVOCATE WITH MR. JANESH GUPTA, ADVOCATE)

AND

SHRI BHARAT RAM SON OF SHRI UMA DUTT, VILLAGE NALAG, P.O. PAHAL, SUB TEHSIL DHAMI, DISTRICT SHIMLA (HP)-171007.

....PLAINTIFF-RESPONDENT

(MR. G.D. VERMA, SENIOR ADVOCATE WITH
MR. B.C. VERMA, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.211 of 2022
Reserved on:23.8.2022
Decided on:31.8.2022

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Injunction- Ingredients- Held- Apart from prima facie case, balance of convenience and

irreparable loss, conduct of the party seeking injunction, is also of utmost importance- Petition dismissed. (Para 12)

Cases referred:

Ajay Kumar and Ors v. Ishwar Dutt, 2021 (3) SLC 1714;
Ashok Kapoor v. Murtu Devi 2016 (1) Shim. LC 207;
Chaman Lal v. Smt. Dropti and Ors, 2021 (2) SLC 1145;
Dalpat Kumar v. Prahlad Singh (1992) 1 SCC 719;
Garment Craft v. Prakash Chand Goel, 2022 (4) SCC 181;
Jai Singh and Ors v. Gurmej Singh (2009) 15 SCC 747;
Keshavadas Shridharao Savakar and Ors v. Assistant Commissioner and Land Acquisition Officer and Another, 2011 (11) SCC 476;
M/S Gujarat Bottling Co. Ltd. & Ors. Vs. The Coca Cola Co. & Ors., AIR 1995, 2372;
Mahadeo Savlaram Shelke v.The Puna Municipal Corpn., J.T. 1995(2) S.C. 504;
Mangat Ram v. Gulat Ram (Since deceased) through his LRs Jagdeep Kumar and Ors, Latest HLJ 2011 (HP) 274;
Raj Kumar Bhatia v. Subhash Chander Bhatia 2018 (2) SCC 87;
Sadhana Lodh v. National Insurance Co Ltd and Anr, 2003 (3) SCC 524;
Seema Arshad Zaheer & Ors. Vs. Municipal Corporation of Greater Mumbai & Ors. (2006) 5 SCC 282;
T. Ramalingerswara Rao (dead) through Legal Representatives and Another v. N. Madhava Rao and Ors, (2019) 4 SCC 608;

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

O R D E R

Instant petition filed under Article 227 of the Constitution of India, lays challenge to judgment dated 4.5.2022, passed by the learned District Judge Shimla, HP, in CMA No. 11-S/14 of 2022 (CNR No. HPSH100023452022, reversing the order dated 12.4.2022, passed by the learned Civil Judge-3, Shimla, District Shimla, H.P., in CMA Filing No. 391/2022 (CNR No. HPSH 120003942022; Registration No. 215/2022) in CS No. 30 of 2022, whereby learned trial court dismissed the application filed by the respondent-plaintiff (hereinafter referred to as “the plaintiff”) for grant of

temporary injunction, restraining the petitioner-defendant (hereinafter referred to as "the defendant"), from causing interference in any manner by way of raising construction, digging and excavating the suit land.

2. Precisely, the facts of the case as emerge from the record are that plaintiff filed a suit for permanent prohibitory injunction as well as mandatory injunction against the defendant, claiming himself to be owner of the suit land. Plaintiff also prayed for permanent prohibitory injunction restraining the defendant from raising any kind of construction, digging, encroaching upon the suit land bearing khasra No. 565 or any portion thereof and Khata Khatauni No. 57/55 to 60/58, total plots 105 measuring 05-43-67 hectares situate at Mauja Nalag, Tehsil and District Shimla (HP) till the same is partitioned by metes and bounds. Alongwith the aforesaid suit, plaintiff also filed application under Order 39 Rules 1 & 2 CPC, praying therein to grant temporary injunction, restraining the defendant from causing any interference in the suit land till the disposal of the main suit. In the application, it came to be averred by the plaintiff that plaintiff and defendant are co-owner in the suit land and till date, same has not been partitioned by metes and bounds. Plaintiff averred that he has filed application for partition of the suit land before the Assistant Collector, 2nd Grade Dhami, which is pending adjudication. It has been further averred that until and unless, suit land is partitioned by metes and bounds, no co- owner has right to change the nature of suit land either by way of raising construction or by way of excavation or digging up the specific portion of the suit land. Plaintiff alleged in the application that defendant, without seeking any permission from him, started raising construction on the suit land comprising khasra No. 565, which is a valuable portion of the land abutting to the road and in case, he is permitted to go ahead with the construction, irreparable loss would be caused to him, which cannot be compensated in terms of cash or any kind. Besides above,

plaintiff prayed that there is prima-facie case in his favour and balance of convenience also lies in his favour.

3. Aforesaid prayer made on behalf of the plaintiff came to be resisted by the defendant, who by way of reply to the application while admitting factum with regard to revenue entries qua the suit land claimed that though land is joint inter-se parties, but parties are in their settled possession as per the family arrangement, which took place between the parties 40 years ago and stands duly recorded in the revenue record. Defendant also claimed that parties are in exclusive possession of the particular khasra number, which fact is duly recorded in the revenue record on the basis of actual possession that too after due verificaiton. Besides above, defendant also submitted that plaintiff is in exclusive possession of khatauni No. 55 old (new khatauni No. 60) Kitas 49 measuring 02-51-07 hectares as per Jamabandi for the year 1997-98 and still so recorded in successive jamabandies for the years 2001-02, 2006-07, 2011-12 and 2016-17 and he is in exclusive possession of the suit land as per the family arrangement comprised in Khatauni No. 57 old (new khatauni No. 62) Kitas 51 measuring 02-83-39 and other remaining land in other khewats are still lying joint. Defendant also averred in the reply to the application that he has developed the land in his possession from time to time by spending huge money and at no point of time, any objection came to be raised qua the same by the plaintiff. Defendant also submitted before the court below that on one hand, plaintiff himself has raised the construction of his house in the suit land by way of family arrangement but on the other hand he with a view to harass him has unnecessarily filed the instant suit. Defendant also submitted in the reply that both the parties have raised construction over the land in their possession as per family arrangement and plaintiff has not only exchanged the some portion of the land, but also gifted the land to him as well as some other persons. He submitted that since he is owner of half share of the khata, he cannot be termed as encroacher on his

own land. He claimed that plaintiff is in possession of khasra No. 522 measuring 00-04-87 hectares situate at the distance of 150 meters and khasra No. 384 situate on the same vicinity i.e. within radius of 20 meters from the suit land is also adjoining and abutting to the road side. Lastly, defendant submitted before the court below that he is not raising any construction beyond/ exceeding his share.

4. Learned trial court on the basis of aforesaid pleadings adduced on record by the respective parties dismissed the application filed under Order 39 Rules 1 & 2 CPC by the plaintiff. Being aggrieved and dissatisfied with aforesaid order passed by the learned trial court refusing the ad-interim injunction, plaintiff filed an appeal in the court of learned Additional District Judge, Shimla, which came to be allowed vide judgment dated 4.5.2022 (Annexure P-9). In the aforesaid backdrop, defendant has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to restore the order dated 12.4.2022, passed by the learned Civil Judge, Shimla, after setting aside the judgment dated 4.5.2022, passed by the learned District Judge.

5. Mr. Bhupender Gupta, learned Senior Counsel representing the petitioner-defendant vehemently argued that impugned judgment passed by the learned District Judge is not sustainable in the eye of law as same is not based upon the proper appreciation of the facts as well as law, as such, same deserves to be quashed and set-aside. While making this court peruse the pleadings adduced on record by the respective parties, Mr. Gupta contended that when at no point of time, factum with regard to family arrangement arrived inter-se parties forty years ago came to be disputed and it stands duly established on record that parties are in settled possession of the respective shares in the suit land, there was no occasion, if any, for the learned District Judge to reverse the findings of the learned trial court merely on the ground that family arrangement/settlement arrived inter-se parties forty years back

was not placed on record. While making this court peruse revenue record placed on record alongwith the application filed under Order 39 Rules 1 and 2 CPC, Mr. Gupta submitted that as per revenue record, both the plaintiff and defendant are in possession of their specific shares and both the parties prior to filing the suit at hand have already raised construction on the land under their possession. While fairly admitting that land comprising khasra No. 565 is abutting to the road, Mr. Gupta, submitted that as per revenue record and other material placed on record, land compromising khasra No. 522 on which, plaintiff has already raised construction is also abutting to the road. Mr. Gupta argued that though suit land is joint inter-se parties, but since both the parties are in possession of their specific shares as given to them by way of family arrangement, defendant cannot be stopped from raising the construction on the land, which is exclusively in his possession. He stated that defendant is owner of one half of the property, whereas construction is being raised by him on the very small portion of the land comprising khasra No. 562. He strenuously argued that since no prima-facie case exists in favour of the respondent-plaintiff and he himself has already raised construction on some portion of the joint land, there was no occasion, if any, for the learned District Judge, Shimla, to set-aside the finding returned by the learned trial court being based upon the proper facts and law. With a view to prove that co-owner can be permitted to raise construction in the land still to be partitioned among co-owners, Mr. Gupta placed reliance upon ***Ajay Kumar and Ors v. Ishwar Dutt, 2021 (3) SLC 1714, Chaman Lal v. Smt. Dropti and Ors, 2021 (2) SLC 1145*** and judgment dated 28.7.2022, passed by this Court in ***CMPMO NO. 431 of 2022 titled Dharam Prakash v. Jeet Ram***, wherein it has been held that grant of temporary injunction is not to be claimed by a party as a matter of right nor can be denied by a court arbitrarily rather, discretion in this regard is to be exercised by a court on the basis of principles i.e. prima-facie, balance of convenience and irreparable loss.

6. Per contra, Mr. G.D. Verma, learned Senior Counsel appearing for the respondent-plaintiff while supporting the impugned judgment passed by the learned District Judge, submitted that since no family arrangement depicting apportionment of the land inter-se plaintiff and defendant ever came to be placed on record, learned trial court could not have proceeded to conclude factum with regard to specific possession, if any, of the defendant over a specific portion of the land in the joint land on the basis of revenue record. Mr. Verma further submitted that since partition proceedings are pending adjudication before the Assistant Collector 1st Grade and defendant was aware of this fact, there was no occasion for him to start the construction on the land, which is still to be partitioned. While referring to the revenue record placed on record, Mr. Verma, submitted that though as per revenue record, plaintiff and defendant are shown to be in the possession of the different khasra numbers in one khata number, but since khata is still to be partitioned by metes and bounds, defendant cannot be permitted to raise construction over one portion of the suit land. Mr. Verma further submitted that suit land comprising khasra No. 565, on which the plaintiff is intending to raise construction is most valuable portion of the suit land and in case, he is permitted to go ahead with the construction, plaintiff will suffer irreparable loss, which cannot be compensated in terms of money, whereas no prejudice, if any, would be caused to the defendant if he is restrained from raising the construction on the suit land comprising khasra No. 565 till the time entire suit land is ordered to be partitioned by metes and bounds. He submitted that it is well settled that till the time joint land is not partitioned by way of metes and bounds, there is right of every co-owner over every inch of joint land. Lastly, Mr. Verma submitted that otherwise also, since there is no illegality and infirmity in the judgment passed by the learned District Judge, Shimla, this court may not interfere with the same save and except it is established by the defendant on the record the finding returned by the learned

District Judge being not based upon proper facts and law are perverse. In support of his aforesaid submissions, he also placed reliance upon following judgments: ***Garment Craft v. Prakash Chand Goel, 2022 (4) SCC 181, Raj Kumar Bhatia v. Subhash Chander Bhatia 2018 (2) SCC 87, Sadhana Lodh v. National Insurance Co Ltd and Anr, 2003 (3) SCC 524, Jai Singh and Ors v. Gurmej Singh (2009) 15 SCC 747, Keshavadas Shridharao Savakar and Ors v. Assistant Commissioner and Land Acquisition Officer and Another, 2011 (11) SCC 476, Mangat Ram v. Gulat Ram (Since deceased) through his LRs Jagdeep Kumar and Ors, Latest HLJ 2011 (HP) 274, T. Ramalingerswara Rao (dead) through Legal Representatives and Another v. N. Madhava Rao and Ors, (2019) 4 SCC 608 and Ashok Kapoor v. Murtu Devi 2016 (1) Shim. LC 207***.

7. Before ascertaining the correctness and genuineness of the aforesaid submissions made by the learned counsel for the parties, this Court, at the first instance deems, it fit to deal with specific question raised with regard to maintainability of the petition filed under Article 227 of the Constitution of India, laying therein challenge to the finding rendered by the learned District Judge in an appeal filed against the order passed by the learned trial court in application filed under Order 39 Rules 1 & 2 CPC. At this juncture, it would be apt to take note of the judgment passed by the Hon'ble Apex Court in case titled ***Garmet Craft v. Prakash Chand Goel, 2022 4 SCC 181***, wherein it has been specifically held that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, the High Court does not act as a Court of First Appeal to re-appreciate, reweigh the evidence or facts upon which the determination under challenge is based. It has been further held in the afore judgment that supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. Power under Article 227 of the Constitution of India is to be exercised where there is no evidence at all to justify or the

finding is so perverse, that no reasonable person can possibly come to such a conclusion arrived at by the Courts below. Relevant part of the judgment reads as under:

> "15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.
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> 16. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.2 has observed: (SCC pp. 101-102, para 6)
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> > "6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds oftheir authority and to see that they do the duty expected or required of them in a legal manner.

> The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

8. There cannot be any quarrel with the aforesaid exposition of law laid down by the Hon'ble Apex Court because admittedly, while exercising supervisory jurisdiction under Article 227 of the Constitution of India, this Court cannot act as court of First Appeal and as such, cannot re-appreciate the evidence on facts while ascertaining the correctness of the order impugned in such proceedings. However, this Court would be justified in exercising power under Article 227 of the Constitution of India in such like cases where the findings are not based upon the evidence available on record or same are so perverse that no reasonable person could possibly come to such a conclusion as has been arrived by the court.

9. Now being guided by the aforesaid principle of law laid down by the Hon'ble Apex Court with regard to exercise of supervisory jurisdiction under Article 227 of Constitution of India, this court proceeds to ascertain on

the basis of material available on record whether findings returned by learned District Judge while setting aside the order passed by the learned trial court dismissing the application filed under Order 39 Rules 1&2 CPC are based upon material/evidence adduced on record by the respective parties or same is totally contrary to the record and the evidence.

10. No doubt, until partition is complete, parties are to be treated as co-owners in the joint land. It is well settled that possession of one of the co-sharers is possession of all in the eye of law, unless the person, who has been in exclusive possession asserts his title, in himself to the exclusion of the other co-sharers, which may amount to ouster. All the co-owners have equal rights and coordinate interest in the property though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoy the possession equally to that of co-owner. It has been repeatedly held by Hon'ble Apex Court as well as this Court that a person, who has been in the possession of joint property, is holding the property not only of himself, but also in favour of other co-sharers. Similarly, by now it is well settled that mere fact that one of the party is recorded as co-owner of the suit land cannot deprive or suppress the right of other co-owners to utilize the land by raising construction. Issue with regard to rights and liabilities of the co-sharers has been aptly dealt with by Coordinate Bench of this Court in case titled ***Ashok Kapoor vs. Murtu Devi 2016 (1) Shim. LC 207 (2015) ILR H.P.1312***. Relevant paras of aforesaid judgment are as under:-

> "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 possess ion 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."

11. In the case at hand, pleadings adduced on record by the respective parties clearly reveal that parties to the lis are recorded as co-owners in the big chunk of the joint land. Copies of jamahbandis for the year, 1997-98, 2001-02, 2006-07, 2011-12 and 2016-17 with regard to suit land clearly reveal that though plaintiff and defendant are co-owners in the suit land, but in column of possession, they stand recorded in separate possession as per their respective shares. Though case of the plaintiff is that defendant has raised construction on the suit land more than his share, but no material worth credence ever came to be led on record to rebut the revenue entries, perusal whereof clearly reveals that defendant is raising construction on the suit land measuring khasra No. 565, which as per the revenue records is in possession of the defendant. Revenue record clearly reveals that defendant is in exclusive possession of the suit land comprising khasra No. 565 on the spot and it has been further claimed by the plaintiff that suit land comprising khasra No. 565 is more valuable being abutted to the road and same is trying to be grabbed by the defendant on the basis of his possession despite the fact that main Khata, in which entire suit land situate is not partitioned inter-se parties. On the other hand, defendant has categorically submitted that plaintiff is in possession of the land measuring khasra No. 522

and 384 which are also adjoining to the roadside. Plaintiff has not specifically denied being in possession of khasra Nos. 522 and 384. Order passed by the learned trial court, which subsequently came to be set-aside by the order passed by the learned District Judge clearly reveals that defendant successfully proved by placing on record the photographs that plaintiff has constructed house/structure on the suit land comprising khasra No. 384. Otherwise also, perusal of revenue record clearly reveals that plaintiff has already raised construction on khasra Nos. 522 and 384 and as such, he is estopped at this stage to claim that defendant cannot be permitted to raise construction on the suit land till the time same is not partitioned by metes and bounds, especially when there is no dispute that defendant is in exclusive possession of the land comprising khasra No. 565. Learned trial court having taken note of the revenue record as has been detailed herein above, rightly arrived at a conclusion that when there is no dispute that parties are in possession of the separate khasra numbers in joint land and they have already raised some construction on the land in their possession and as such, there was no occasion for the learned District Judge to set-aside the aforesaid finding on the ground that no family arrangement arrived inter-se parties was on record. True it is that family arrangement, if any, arrived inter-se parties never came to be placed on record by the defendant, but same time, revenue record as has been taken note by the learned trial court while dismissing the application filed under Order 39 Rule 1 &2 CPC was never rebutted by the plaintiff. Revenue record i.e. Jamabandi for the year 1997-98, 2001-02, 2006-07, 2011-12 and 2016-17 clearly reveals that parties to the lis though are joint owner of the land in question, but they are in possession of the specific khasra number in the joint land in one khata, if it is so, non-placing of family arrangement/settlement, if any, by the defendant is of no consequence. Once plaintiff himself has not denied the factum with regard to his having possession over some khasra numbers as is reflected in the

revenue record placed on record, coupled with the fact that he has already raised construction on khasra Nos. 522 and 384, which are in his possession, he cannot be permitted to seek discretionary relief of injunction from the competent court of law on the ground that land is still joint and yet to be partitioned by metes and bounds. Leaving everything aside, this Court finds that defendant is raising construction only on small portion of land whereas he is owner of the half portion of the entire suit land. Plaintiff as well as defendant have already raised some construction on the land adjoining to the road and much area is vacant which is available for partition. Since it is not in dispute that defendant is already in possession of the land, over which he has raised some construction, coupled with the fact that plaintiff has already rasied construction on some portion of the land adjoining to the road and area of the land is still left, it cannot be said that construction if permitted would amount to ouster of the plaintiff from the suit land. Since defendant is intending to raise construction over the small portion of the land in his possession, no prejudice would be caused to the plaintiff in case he is permitted to go ahead with the construction, especially when it stands established on record that plaintiff himself has already raised some construction on his portion of the land.

12. By now it is well settled that before grant of injunction, Court must be satisfied that the party praying for relief has a prima facie case and balance of convenience is in its favour. Besides above, while granting injunction, if any, Court is also required to consider that whether the refusal to grant injunction would cause irreparable loss to such a party. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost importance, as has been held by Hon'ble Apex Court in case ***M/S Gujarat Bottling Co. Ltd. & Ors. Vs. The Coca Cola Co. & Ors., AIR 1995, 2372***. In case a party seeking injunction fails to make out any of three ingredients, it would not be entitled to injunction.

Phrases, “prima facie case”, “balance of convenience” and “irreparable loss”, have been beautifully interpreted/defined by Hon’ble Apex Court in case titled ***Mahadeo Savlaram Shelke v.The Puna Municipal Corpn., J.T. 1995(2) S.C. 504*** relying upon its earlier judgment in case titled ***Dalpat Kumar v. Prahlad Singh (1992) 1 SCC 719*** has held as under:-

> “...the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The existence of prima fade right and infraction of the enjoyment of him property or the right is a condition forthe grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Only prima facie case is a 4277 substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The court further has to satisfy that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury but means only that the Injury must be a material one, namely one that cannot be adequately compensated by way of damages. The balance of convenience must be in favour of granting injunction. The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the

> amount of substantial mischief or injury which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. The court has to exercise discretion in granting or refusing the relief of ad interim injunction pending the suit."

13. As has been stated hereinabove, conduct of the parties seeking injunction is very relevant for considering prayer made for injunction. In the case at hand, conduct of the plaintiff is not above the board. He after having raised construction on some portion of the joint land under his possession, filed suit restraining the defendant from raising construction on the pretext that suit land is still un-partitioned. In case titled ***M/S Gujarat Bottling Co. Ltd. & Ors***.' case supra, it has been categorically held that while passing interim order of injunction under Order 39 Rule 1 & 2 CPC, court besides taking into consideration three specific principles, i.e. "prima facie case", "balance of convenience" and "irreparable loss", must also take into consideration the conduct of the parties. In the case at hand, interestingly, plaintiff himself has already raised construction on the best piece of joint land and as such, his action of stopping other co-owner, i.e. defendant from raising construction on the specific portion of the land, adversely reflect upon his conduct and as such, he is otherwise not entitled to discretionary relief of injunction. Once plaintiff has been not able to dispute that defendant is co-owner in the suit land and he is in possession over specific portion of the suit land, over which, he is raising construction coupled with the fact that he has already raised construction on the best portion of the land, he is estopped

from claiming discretionary relief of injunction on the ground that since suit land is still un-partitioned, defendant cannot raise construction.

14. Hon'ble Supreme Court in **Seema Arshad Zaheer & Ors. Vs. Municipal Corporation of Greater Mumbai & Ors. (2006) 5 SCC 282**, has held as under:-

> "29. 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 plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of plaintiff's rights is compared with or weighed against the need for protection of defendant's rights or likely infringement of defendant's rights, the balance of convenience tilting in favour of plaintiff; and (iii) clear possibility of irreparable injury being caused to 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."

15. It can be safely inferred from aforesaid law laid down by this court that grant of temporary injunction is not to be claimed by a party as a matter of right nor can be denied by a court arbitrarily rather, discretion in this regard is to be exercised by a court on the basis of principles, as have been enunciated in the aforesaid judgment.

16. Consequently, in view of the detailed discussion made herein above, this court finds merit in the present petition, accordingly same is allowed and order/judgment dated 4.5.2022, passed by the learned District Judge, Shimla in CMA No. 11-S/14 of 2022, is quashed and set-aside and order dated 12.4.2022, passed by the learned trial Court below is restored. Needless to say, observation/finding given in the instant judgment shall have

no bearing on the merit of the main case, which shall be decided by the court below on the basis of totality of facts and law. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Between:
STATE OF HIMACHAL PRADESH

.....APPELLANT

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

AND

HEM CHAND, SON OF SHRI SITA RAM, R/O SITA NIWAS NEAR BCS, PHASE-III, NEW SHIMLA, P.O. NEW SHIMLA, P.S. CHOTTA SHIMLA, DISTT. SHIMLA,H.P.

.....RESPONDENT

(BY MR. ROMESH VERMA, ADVOCATE)

CRIMINALAPPEAL
NO. 256of 2010
Reserved on: 01.09.2022
Decided on: 07.09.2022

Code of Criminal Procedure, 1973- Section 374**- Indian Penal Code, 1860-** Sections 279, 337, 338 and 304A- Rash and negligent driving- Ld. Trial Court acquitted the accused- Held- It is more than settled that while deciding the appeal against acquittal the Appellate Court should not ordinarily import its opinion or view on re-appreciation of the evidence unless the view taken by learned Trial Court is perverse- Findings of Ld. Trial Court not perverse- Appeal dismissed. (Para 15, 17)

Cases referred:

M.G Agarwal Vs. State of Maharashtra, AIR 1963 SC 200;
Rajesh Prasad Vs. State of Bihar and anr. (2022) 3SCC 471;

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

J U D G M E N T

By way of instant appeal, State has assailed the judgment of acquittal dated 08.09.2009, passed by learned Judicial Magistrate 1st Class, Arki, Tehsil Arki, Distt. Solan, H.P. in Criminal Case No. 64/2 of 2005.

2. Respondent was prosecuted for offences under Sections 279, 337, 338 and 304-A of Indian Penal Code. Allegations against the respondent were that on 21.01.2005, while driving Bus No.HP-07-5099, he acted so rashly and negligently that he lost control over the same causing bus to roll down in deep gorgeresulting into injuries to many occupants of the bus and death to four of them. It was specificallyalleged against the respondent that he continued to drive the vehicle despite the fact that the lights of the bus were not working due to snag.

3. Respondent denied the charge and claimed trial. Prosecution examined total twenty six witnesses. Respondent was examined under Section 313 of Cr.P.C. Respondent did not lead any defence evidence. Learned Trial Court after appreciating the prosecution evidence, acquitted the respondent, vide impugned judgement.

4. State has assailed the impugned judgment on the grounds that the findings returned by the learned Trial Court were based on surmises and conjectures. Learned Trial Court had appreciated the evidence in slipshod and perfunctory manner. Appellant has contended that the reasoning returned by the learned Trial Court is unreasonable. Thus, the predominant challenge to the impugned judgment is on the ground of mis-

appreciation of evidence. It has further been asserted that the facts proved on record clearly justified the application of doctrine of *res ipsa loquitur*.

5. Learned counsel for the respondent, on the other hand, has supported the impugned judgment, on the ground that the view taken by the learned Trial Court, by appreciating the evidence, was the only possible and reasonable view.

6. I have heard learned counsel for the appellant as well as learned counsel for the respondent and have also gone through the record.

7. Prosecution examined PW-1 Jattu Ram, PW-2 Bhim Singh, PW-4 Rajinder Singh, PW-5 Naresh Kumar, PW-8 Hem Raj, PW-9 Sant Ram, PW 10 Suresh Kumar, PW-11 Nek Chand, PW-12 Asha Kumari, PW-13 Chet Ram, PW-14 Pawan Kumar, PW-17 Joginder Singh and PW-24 Bittu, as witnesses to the occurrence. All these persons were stated to be the occupants of the bus.

8. PW-3 Ashok Kumar and PW-6 Suresh Chand, were examined to prove the photographs.

9. PW-7 Sohan Lal, was examined as an expert, who proved his mechanical examination report Ext.PW7/A.

10. PW-15 Dr. Abhilash Sood, PW-16 Dr. T.D. Tandon, PW-19 Dr. Pujan Jaswal and PW-20 Dr. Amarjit Singh, proved the MLCs of the injured occupants of the bus. PW-21 Dr. N.K. Verma, proved the postmortem report of deceased Mahavir, Suresh Chand and Sant Ram. PW-22 S.K Patial proved PMRs of Prakash Chand. PW-22-A HC Dev Raj, PW-23 HC Ranjit Singh and PW-25 S.I. Shankar, were the police officials. PW-26 B.D. Sharma, was examined as owner of the ill-fated bus.

11. To bring home the guilt against respondent, prosecution was under burden to prove that the respondent had driven Bus No. HP-07-5099, in a manner, so rash or negligent that resulted in the accident and

consequent injuries to some of the occupants of the vehicle and death of four of them.

12. The occupants of the bus examined as prosecution witnesses, as noted above, were the eye witnesses to the occurrence. They could provide the first hand information, as to how and in what manner, the accident took place. PW-1 Jattu Ram, PW-2 Bhim Singh, PW-4 Rajinder Singh, PW-5 Naresh Kumar, PW-13 Chet Ram, PW-14 Pawan Kumar and PW-24 Bittu stated on oath that there was no negligence on the part of the respondent. According to them,bus was being driven at normal speed. PW-10 Suresh Kumar, PW-11 Nek Chand, PW-12 Asha Kumari and PW-17 Joginder Singh, categorically stated that the accident had taken place, due to the fact that embankment ofroad gave way resulting the bus to roll down in gorge. PW-8 Hem Raj, in his examination-in-chief, stated that the lights of the bus, developed snag and driver was driving the bus in high speed, due to which, the accident took place. In his cross-examination, he stated that he did not remember whether the lights of the bus were on or off. He was also confronted with his previous statement under Section 161 of Cr.P.C. Another witness, PW-9 Sant Ram, in his examination–in-chief stated that the lights of the bus went off and driver kept driving the bus in dark with the help of torch. Conductor was holding the torch. The bus when reached near Nauni, it rolled down in the gorge.In cross-examination, this witness was confronted with his previous statement under Section 161 Cr.P.C. and certain discrepancies were pointed out. As per PW-7 Sohan Lal, there was no mechanical defect in the bus.

13. Three versions came forward from different eye witnesses examined by the prosecution. Majority of them did not state about the lights of the bus having developedsnag. According to them, the bus was being driven in a normal speed and there was no overt act noticed by them, on the part of the driver that could be termed to be rash and negligent. The second

version came that the bus had fallen from the road on account of the fact that embankment of the road had given way. Prosecution witnesses had also stated that it was raining for a couple of days. The third version was with respect to the driver, driving the bus despite snag, having been developed in the lights of the bus. Thus, there was no consistency in the prosecution evidence. In such situation, the benefit was liable to be given to the accused as the prosecution had failed to prove rash or negligent driving of the accused beyond all reasonable doubts. It was stated by not less than four witnesses that the embankment of road had given way causing the accident. Nothing has been proved on record to show the interest of these witnesses in acquittal of the accused. In fact, these witnesses themselves were the sufferers. Similarly, the other witnesses who did not support prosecution case also were not proved to be interested in acquittal of the accused. As regards PW-8 and PW-9, their statements also were not very convincing keeping in view their cross-examination. In light of the different versions coming forthwith, it was not safe to convict the accused on such shaky evidence.

14. The factum of injuries being suffered by some of the occupants and death of four persons due to accident was not denied, therefore, the evidence of the Medical Officers having issued MLCs or PMRs was only formal in nature. Such evidence could have relevance in case the rash and negligent driving on the part of the accused was proved.

15. It is more than settled that while deciding the appeal againstacquittal the Appellate Court should not ordinarily import its opinion or view on re-appreciation of the evidence unless the view taken by learned Trial Court is perverse. In ***M.G Agarwal*** *Vs.* ***State of Maharashtra, AIR 1963 SC 200***, the Constitution Bench of Hon'ble Supreme Court observed that the approach of High Court (Appellate Court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence

is not certainly weakened by the fact that the accused has been acquitted at the trial.

16. In ***Rajesh Prasad*** Vs. ***State of Bihar and anr. (2022) 3SCC 471***, a three judge Bench of Hon'ble Supreme Court held as under:-

> *"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, AIR 1934 PC 227(2) considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:*
>
> > *"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.*
> >
> > *"….But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses;(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."*

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley vs. State of U.P., AIR 1955 SC 807, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His Lordship then was) in Sanwat Singh vs. State of Rajasthan, AIR 1961 SC 715:

> *"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) 'substantial and compelling reasons', (ii) 'good and sufficiently cogent reasons', and (iii) 'strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."*

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

23. M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200 is the judgment of the Constitution Bench of this Court, speaking through

Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

24. In Shivaji Sahabrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793, Krishna Iyer, J., observed as follows:

> *"6.....In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."*

25. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

> *"7.....While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can thenand then only reappraise the evidence to arrive at its own conclusions."*

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

26. In Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110, this Court set out the following principles that would regulate

and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt

should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

27. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225 observed visàvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

> *"7. … While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then—and then only—reappraise the evidence to arrive at its own conclusions."*

28. This Court in Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible. This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions","glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Suchphraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30 . In Nepal Singh vs. State of Haryana– (2009) 12 SCC 351, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappreciation of the evidence."

17. Taking into consideration the above noted exposition of law, this Court does not find any material to disagree with the findings recorded by learned Trial Court. Such findingscannot be termed to be perverse. Learned Trial Court has based its findings on the evidence available on record. The view taken by learned Trial Court is reasonable and possible view.

18. In result, the appeal fails and judgment of acquittal dated 08.09.2010, passed by learned Judicial Magistrate 1st Class, Arki, Tehsil Arki, Distt. Solan, H.P., in Criminal Case No. 64/2 of 2005 acquitting the respondent, is affirmed.

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

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

Between:

STATE OF HIMACHAL PRADESH

...APPELLANT

(BY MR. J.S. GULERIA, DEPUTY ADVOCATE GENERAL)

AND

SHIV LAL @ CHAMPI,S/O SH. AMAR LAL, R/O VILLAGE BASSI SALAR, P.O SAI, TEHSIL BADDI,POLICE STATION BAROTIWALA, DISTRICT SOLAN, H.P.

...RESPONDENT

(BY MR. MUKUL SOOD,ADVOCATE, AS LEGAL AID COUNSEL)

CRIMINAL APPEAL
No. 152 of 2021
Reserved on: 30.8.2022
Decided on:13.9.2022

Code of Criminal Procedure, 1973- Section 378**- Protection of Children from Sexual Offences Act, 2012 –** Section 4- **Indian Penal Code, 1860-** Sections 363, 366 and 376 – Acquittal- Held:

A. Since the ingredients of the offences, for which the accused has been charge-sheeted, have not been proved, as such, no case made out to interfere with the impugned judgment- Appeal dismissed. (Para 43)

B. **Protection of Children from Sexual Offences Act, 2012 –** Section 33 – Held- The Protection of Children from Sexual Offences Act has been enacted by the legislature to protect the interest of child victims by including certain safeguards in it- Those safeguards were incorporated in the Act to protect the child victim as well as her family from exposure, as sometimes, the child victim, as well as their parents, do not prefer to go to the police station to report the crime- Reporting such crimes to the police are still considered to be stigmatic in the tradition bound conservative society of our country- That is why, certain duties have been cast upon the Special Courts to ensure that the identity of the child victim shall not be disclosed, at any time, during the course of investigation or trial- Directions issued. (Para 46, 50)

Cases referred:

Eera through Dr. Manjula Krippendorf vs. State (NCT of Delhi) and another, (2017) 15 SCC 133;

Pattu Rajan versus State of Tamil Nadu, (2019) 4 SCC 771;

This Criminal Appeal coming on for orders this day, ***Hon'ble Mr. Justice Virender Singh,*** *delivered the following:*

J U D G M E N T

State of Himachal Pradesh has preferred the present appeal under section 378 of the Code of Criminal Procedure (hereinafter referred to as CrPC') against the judgment, dated 20th November, 2020, passed by the learned Additional District & Sessions Judge, Fast Track Special Court Solan, District Solan, H.P. (hereinafter referred to as 'the trial Court').

2. By virtue of the judgment, dated 20th November, 2020 (hereinafter referred to as 'the impugned judgment'), respondent-Shiv Lal @ Champi (hereinafter referred to as 'the accused') has been acquitted from charges framed against him, for the commission of offences punishable under Sections

363, 366, 376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act').

3. Brief facts, as emerge from the report under Section 173 (2) of the CrPC, are summed up as under:

On 25th August, 2014, the complainant approached the In-charge, Police Post Kishangarh with the complaint that her daughter (name withheld) (hereinafter referred to as 'the child victim') had left the home without informing her. The efforts to trace the child victim were made but, her whereabouts could not be ascertained. The complainant had expressed her suspicion that the accused had enticed away the child victim. Lastly, she had stated that the age of the child victim was about 17 years and prayed that the action be taken. The said complaint was forwarded to SHO, Police Station Kasauli, District Solan, where the case under Sections 363 and 366A IPC was registered. Thereafter, the police machinery swung into motion.

4. As per the documentary evidence collected by the prosecution, the date of birth of the child victim was found to be 22nd February, 1997. Efforts to trace the child victim were made but, her whereabouts could not be ascertained. Thereafter, on 5th October, 2014, the child victim was found alongwith her new born baby at Dhakru Majra in the rented accommodation of the accused.

5. Thereafter, the statement of the child victim was recorded and Section 376 IPC and Section 4 of the POCSO Act were added in this case. The accused was arrested on 6th October, 2014. During the investigation, the DNA profiling of the child victim, accused and their new born baby was got conducted and the statement of the child victim was got recorded under Section 164 CrPC.

6. After the investigation, the police submitted the charge sheet against the accused under Sections 363, 366, 376 IPC and Section 4 of the POCSO Act.

7. After complying with the provisions of Section 207 CrPC, the learned trial Court found a *prima facie* case against the accused for commission of offences punishable under Sections 363, 366, 376 IPC read with Section 4 of the POCSO Act.

8. The accused was accordingly charge-sheeted.

9. When the charges, so framed, were put to the accused, he had pleaded not guilty and claimed to be tried. Since, the accused had not admitted his guilt, as such, the prosecution was directed to adduce the evidence. Consequently, the prosecution has examined as many as 12 witnesses.

10. After the closure of the evidence, the entire incriminating evidence, appearing against the accused, was put to him, in his statement recorded under Section 313 CrPC. The accused has denied the entire prosecution case and took the defence that he is innocent. However, the accused has not opted to adduce any evidence in his defence.

11. The learned trial Court, after hearing the arguments of the learned Public Prosecutor, as well as the learned defence counsel, has acquitted the accused from the charges framed against him vide the impugned judgment, dated 20th November, 2020.

12. Feeling aggrieved, the State has preferred the present appeal before this Court challenging the impugned judgment, *inter alia,* on the grounds that the learned trial Court has not considered the evidence in the right perspective and has wrongly discarded the testimony of the prosecution witnesses.

13. Highlighting the statement of the mother of the child victim (the complainant) and the fact that the child victim was found in the room of the

accused alongwith a baby in her lap, the main ground of attack by the appellant is that the complainant had specifically deposed that the child victim had left the house without telling anything whereupon, the missing report Ex. PW-1/B was lodged. According to the appellant, these facts have not rightly been considered by the learned trial Court in the present case.

14. Placing much reliance on the DNA report, it has been argued by Mr. J.S. Guleria, learned Deputy Advocate General, that the judgment of acquittal may kindly be set aside by convicting the accused, for the commission of offences, for which, he has been charge-sheeted in this case.

15. The prayer, so made by the learned Deputy Advocate General, has been opposed by Mr. Mukul Sood, learned counsel appearing for the accused, on the ground that there is no evidence on record to even connect the accused with the alleged crime, what to talk about proving the case by the prosecution beyond any shadow of doubt.

16. The contention of the learned Deputy Advocate General has also been opposed on the ground that there is nothing on the file to show that it was the accused, who had enticed away the child victim from her home.

17. Lastly, supporting the impugned judgment of acquittal, it has been argued that no conviction can be based solely on the DNA report, as the child victim has represented/misrepresented to the accused that she is major and her statement, on oath, has not even been controverted by the learned Public Prosecutor, by cross-examining the child victim.

18. We have heard the learned counsel for the parties and perused the record carefully.

19. PW-1 is the mother of the child victim. PW-2 is the owner of the house, from where, the child victim was recovered. PW-3 is the child victim. PW-4 Dr. Supriya, PW-5 Dr. C.L. Bhardwaj and PW-6 Dr. Ashok Handa are the Doctors, who had conducted the medico-legal examination of the child victim as well as the accused. Apart from this, PW-4 Dr. Supriya had also

collected the blood samples of the child victim, accused as well as their new born baby on the F.T.A. cards and handed over the same to the police for D.N.A. profiling.

20. PW-7 Suresh Kumar, Panchayat Secretary, had handed over the birth certificate of the child victim to the police and also supplied the abstract of the Parivar Register, according to which, the date of birth of the child victim is 22nd February, 1997.

21. PW-8 Rama Nand is the Head Teacher of the School where the child victim had studied up to 4th September, 2004. According to him, the date of birth of the child victim is 22nd February, 1997.

22. Rest of the witnesses are connected to the investigation of the case.

23. The accused, in the present case, has been charge- sheeted for the commission of offence punishable under Sections 363, 366, 376 IPC read with Section 4 of the POCSO Act.

24. It is no longer *res integra* that the Appellate Court should be slow in reversing the judgment of acquittal unless and until the findings are recorded that the approach adopted by the learned trial Court is "perverse" as with the acquittal of the accused, the presumption of innocence, which was in his favour has now doubled.

25. In view of the above, this Court now proceeds to discuss the evidence of the child victim as well as her mother as both of them had been cited as star witnesses by the prosecution to prove the charges framed against the accused, in this case.

26. The mother of the child victim had put into motion the criminal machinery by moving the complaint Ex. PW-1/A before the police, wherein, she has levelled the allegations that the child victim was enticed away by the accused, but, while appearing in the witness box, has diluted her stand against the accused by stating that she did not recollect the date, when she had lodged the complaint with the police. However, she has deposed that the

child victim was about 17½ years of age at that time. She has admitted her signatures over the complaint Ex. PW-1/A. When the child victim was recovered from the house of PW-2, she was carrying one baby in her lap and the child victim had disclosed to this witness that the baby was born out of the wedlock of the accused with her. In Police Station Kasauli, the custody of the child victim was handed over to this witness. Lastly, this witness had deposed that she did not know who had taken away the child victim.

27. Since the star witness of the prosecution, i.e. the complainant, has not supported the case, which she had set up in the complaint to the police, as such, the learned Public Prosecutor had been permitted to cross-examine this witness. Despite all the best efforts made by the learned Public Prosecutor, nothing material could be elicited from this witness. Interestingly, in the further cross-examination by the learned Public Prosecutor, she has moved a step further by disowning the contents of the complaint Ex. PW-1/A by stating that she did not know who had written these contents.

28. The child victim, when appeared in the witness box as PW-3, not only exonerated the accused from the allegations levelled against him, but, also damaged the case of the prosecution beyond any repair. According to her, she had joined the company of the accused voluntarily by requesting the accused to take her away, in order to solemnize marriage with her. Consequently, the accused reached at Patta and thereafter, they had gone to Baddi and stayed in a rented accommodation there.

29. The child victim had disclosed her relations with the accused to her mother, but her proposal to solemnize the marriage with the accused was turned down by her mother.

30. On 2nd October, 2014, she had given birth to a male child. She had disclosed her age as 17 ½ years and stated that now she is the mother of two children. She has owned the statement Ex. PW-3/A made before the Judicial Magistrate, recorded under Section 164 CrPC.

31. In her cross-examination by the learned defence counsel, the child witness has disclosed that the accused is from Scheduled Caste category and she is from General category. By reiterating the stand that she had joined the company of the accused voluntarily, she has admitted her relations with the accused and also exonerated him by stating that she had represented herself to be a major to the accused.

32. PW-2 witnessed the recovery of the child victim alongwith her baby from his room, which was allegedly rented out by him.

33. As stated above, the blood samples of the child victim, accused and their baby were collected by the prosecution during the investigation of the case. As per the report Ex. PA, the Expert has opined that the child victim is the biological mother whereas the accused is the biological father of the baby.

34. The accused, in the present case, has been charge-sheeted under Sections 363, 366 and 376 IPC. There is not even an iota of evidence on record to show that the accused was, in any way, instrumental in enticing away the accused from the custody of her parents. The child victim has categorically stated that she had voluntarily gone with the accused, in order to solemnize marriage with him. Apart from this, the stand of the child victim that she had represented herself to be major at the relevant time, is a fact which has rightly been considered by the learned trial Court.

35. The accused, in the present case, has also been charge-sheeted for the offence punishable under Section 4 of the POCSO Act. It has been argued on behalf of the appellant that the accused could not rebut the presumption, which is against him, as per the provisions of Sections 29 and 30 of the POCSO Act.

36. For the application of Sections 29 and 30 of the POCSO Act, it was the *sine quo non* for the prosecution to prove the guilt of the accused beyond any shadow of doubt. Mere framing the charge under Section 4 of the POCSO

Act is not sufficient to draw the presumption, as provided under Sections 29 and 30 of the POCSO Act against the accused.

37. In this case, it can be said that there is no evidence to connect the accused with the crime, for which, he has been charge-sheeted, in this case, as the mother of the child victim has disowned the contents of the complaint Ex. PW-1/A and she has successfully exonerated the accused by stating that she was not aware as to who had taken away the child victim. The child victim, whose date of birth has been proved from the documentary evidence as 22nd February, 1997, has also not supported the case of the prosecution. She has solemnized the marriage with the accused.

38. According to PW-5, the child victim had given birth to a male child on 2nd October, 2014.

39. The child victim when appeared in the witness box as PW-3 has introduced a new story, which is in contradiction to the prosecution case. She has deposed that he had joined the company of the accused, by referring him as her husband voluntarily. Not only this, she has also destroyed the case of the prosecution by deposing that she had called the accused and told him to take her in order to solemnize marriage with the child victim. Consequently, accused met him at Patta. Thereafter, they had gone to Baddi. She has given her age as 17½ years, when she had voluntarily joined the company of the accused.

40. Interestingly, when this witness has not supported the case of the prosecution, then neither any request has been made by the learned Public Prosecutor, in this case, to declare this witness as hostile nor the request has been made to cross-examine this witness. However, when this witness has been cross-examined by the learned defence counsel, she moved a step further by deposing that the missing report lodged by her mother was false and further exonerated the accused that she had disclosed to the accused that she was major.

41. There is no dispute with regard to the age of the child victim. There is not even a word in the depositions of PW-3 as well as her mother, from which, an inference could be drawn that child victim left the house at the instance or even the suggestion of the accused. Whatsoever act has been committed by the accused with the child victim, which has resulted into her pregnancy, those acts seem to be done under the bonafide belief that child victim is major. It is not the defence of the accused that the child victim was major, but, it has voluntarily been deposed by the child victim that she had represented herself to be major before the accused. The child victim had passed her matriculation examination. She is not illiterate, and the fact, that she had accompanied the accused voluntarily, is a fact which demonstrates her own desire to be the wife of the accused. Not only this, she has represented/ mis-represented before the accused that she has attained the majority.

42. In such a situation, merely on the basis of DNA report, no culpability of the accused can be said to be established, while holding so, the view of this Court is being guided by the decision of Hon'ble Supreme Court in a case titled as **Pattu Rajan versus State of Tamil Nadu, (2019) 4 Supreme Court Cases 771**. The relevant para 52 of the judgment is reproduced as under:-

> *"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether the contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the*

presence of other cogent and reliable evidence on record in favour of such party."

43. In view of the above, since the ingredients of the offences, for which the accused has been charge-sheeted, have not been proved in this case, as such, the learned Deputy Advocate General could not make out a case for interference in the impugned judgment. Hence, this Court is in full agreement with the conclusion drawn by the learned trial Court and the findings of the learned trial Court, from any stretch of imagination, cannot be said to be "perverse".

44. The appeal is accordingly dismissed. Bail bonds discharged.

45. Record be sent back.

46. Before parting with the judgment, this Court must record its deep concern about the manner, in which, the proceedings were conducted before the learned trial Court. The POCSO Act has been enacted by the legislature to protect the interest of child victims by including certain safeguards in it. Those safeguards were incorporated in the Act to protect the child victim as well as her family from exposure, as sometimes, the child victim, as well as their parents, do not prefer to go the police station and to report the crime. Reporting such crimes to the police are still considered to be stigmatic in the tradition bound conservative society of our country. That is why, certain duties have been cast upon the Special Courts to ensure that the identity of the child victim shall not be disclosed, at any time, during the course of investigation or trial. No doubt, a relaxation has been given where such disclosure is in the interest of the child. Section 33 of the Act contains those procedures and powers of the Special Courts, which are reproduced as under:-

"33. Procedure and powers of Special Court. -

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.-For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session."

47. Their Lordships of Hon'ble Supreme Court in a case titled as **Eera through Dr. Manjula Krippendorf versus State (NCT of Delhi) and another, (2017) 15 Supreme Court Cases 133,** have also reiterated the purpose of the POCSO Act and observed as under:

> ***"20. ... the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing childfriendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."***

48. When an enactment mandates that a certain procedure is to be followed during the trial, then it was obligatory upon the trial Court to follow the said procedure scrupulously. In this case, the said procedure has not

only been violated, but even in the judgment, the name of the mother of the child victim has duly been reflected. Perusal of the record shows that the proceedings, in this case, were not conducted in camera, which is mandated by Section 37 of the POCSO Act, which is reproduced as under:-

> ***"Trials to be conduced in camera.*** *-*
>
> *The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:*
>
> *Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974)."*

49. Perusal of the order sheets, passed in this case, right from 4th July, 2016, when the charges were framed against the accused till the arguments were heard, reveals that the proceedings were never conducted in "camera". Even, while recording the evidence of PW-1, who is complainant as well as mother of the child victim, and PW-3, the child victim, the mandatory provisions of Section 33(7) of the POCSO Act have not been complied with. Rather, in a casual manner, the complete address of the complainant as well as her daughter (child victim), displaying/demonstrating their identity, has been mentioned in their deposition.

50. In such a situation, this Court is constrained to issue the following directions:-

(i) Every effort should be made by the Special Judge(s), as well as, by the police, to ensure that during the course of investigation or trial, the identity of the child victim shall not be disclosed, unless it is in the interest of the child.

(ii) The trial of the case should be held in camera, as mandated by Section 37 of the POCSO Act.

(iii) While recording the statement(s), the Special Judge(s) shall ensure that the identity of the child victim, as well as the identity of his/her family, school, relatives or neighborhood or any other information by which his/her identity could be revealed, shall not be disclosed.

(iv) While recording the statement(s) of the child victim, his/her relatives, the Special Judge(s) would be at liberty to give a fictitious name(s) to them and before doing so, the Special Judge(s) is at liberty to satisfy itself about the identity of the child victim as well as the witnesses from the report under Section 173(2) of the Code of Criminal Procedure. Such satisfaction should be recorded in the proceedings of the case.

(v) As per Instructions No. HHC/Admn./ Instructions/2018-33, dated 12th July, 2018, issued by the High Court of Himachal Pradesh, all the judgments are to be uploaded on the website of the District Court(s). As such, the Special Judge(s), dealing with the cases under POCSO Act, are directed to ensure that the judgments, so rendered by them, do not contain the particulars, from which the identity, as mandated in terms of Section 33 (7) of the POCSO Act, of the child, could be ascertained.

(vi) It is expected from the Special Judge(s), dealing with the cases under POCSO Act, that they will strictly adhere to the provisions of the POCSO Act, in letter and spirit.

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

Between:-

PAPPUDEEN SON OF SHRI ALAFDEEN, VILLAGE KAMLA, POST OFFICE GANOTA, POLICE STATION CHOWARI, TEHSIL BHATTIYAT, DISTRICT CHAMBA.

....APPELLANT

(BY SH. N. S. CHANDEL, SR. ADVOCATE WITH SH. VINOD K. GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.... RESPONDENT

(SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 522 of 2008
Reserved on: 12.9.2022
Decided on:16.9.2022

Narcotic Drugs and Psychotropic Substances Act, 1985- Section 20- Appeal against conviction- 900 gm of charas- Representative samples- Held- There is nothing in the prosecution evidence that proper procedure was followed while drawing samples- There is not even any semblance of any procedure having been adopted for drawing a representative sample- This creates a serious doubt on the very legitimacy of the case of prosecution- To have credence, the sample had to be representative sample, of entire 900 Grams of substance, failing which it can be a case of recovery of only 25 gms. of charas or at the most 50 grams by including weight of second sample, having entirely different legal consequences- Sentence modified. (Para 15)

Cases referred:

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa AIR 1993 SC 1456;

Noor Aga v. State of Punjab (2008) 16 SCC 417;

Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgment dated 30.8.2008, passed by learned Special Judge, Chamba Division, District Chamba, H.P. in Sessions Trial No. 60 of 2007 along with sentence order dated 1.9.2008, whereby the appellant has been convicted for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (for short the Act), and has been sentenced to undergo rigorous imprisonment for a period of

two years and to pay a fine of Rs. 5000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.

2. The prosecution case in nut-shell was that on 23.2.2007, PW-11, SI, Abhay Singh along with PW-1 ASI Ramesh Kumar, PW-2, Constable Suneel Kumar, PW-3 SPO Darshan Singh, and PW-7 Salim Khan were present at Madhuwar in connection with patrolling duty and traffic checking. At about 6.10 P.M., a Maruti Van No. HP 57-1243 was stopped for checking. Appellant was driving the said vehicle and there was none else occupying the same. Charas was recovered, wrapped in white coloured polythene and kept in the dashboard of the vehicle. The charas was weighed and found to be 900 grams. Two samples of 25 grams each were drawn. The samples and also the bulk of charas were placed in separate cloth parcels and sealed with seal impressions 'T' & 'S'. Recovery and seizure memo Ext. PW-1/A was prepared. Facsimile of sample seals 'T' & 'S' were preserved as Ext. PW-1/B. Relevant columns of NCB form Ext. PW-11/A were filled by PW-11 SI Abhay Singh. Rukka Ext. PW-11/B was prepared and was sent to Police Station, Tissa for registration of case through PW-3, SPO Darshan Singh. A copy of Rukka was handed over to PW-2, Constable Suneel Kumar for submission to Superintendent of Police, Chamba. FIR Ext. PW-8/A was registered. Site plan Ext. PW-11/C was prepared. Appellant was formally arrested. The recovered contraband along with appellant was forwarded to the Police Station. SHO Swaru Ram conducted re-sealing proceedings. The contraband along with sample seals was deposited in the Malkhana at Police Station, Tissa. The samples of charas were sent for chemical analysis to SFSL, Junga and as per report Ext. PA, the same was found to be charas. Challan was prepared and presented in the Court.

3. Appellant was charged for commission of offence under Section 20 of the Act. Prosecution examined total 11 witnesses. PW-1, ASI Ramesh Kumar, PW-2, Constable Suneel Kumar, PW-3, SPO Darshan Singh, PW-7

Salim Khan were examined as spot witnesses. PW-11 SI Abhay Singh was examined as spot witness and the Investigating Officer. PW-4, Constable Om Parkash was examined to prove receipt of copy of Rukka Ext. PW-4/A and Special Report Ext. PW-4/B in the office of Additional Superintendent of Police Chamba. PW-5, Constable Tilak Raj deposed regarding re-sealing process conducted by SHO Swaru Ram. PW-6, Bansi Lal stated that the police had taken from him the weights and scale on 23.2.2007. PW-7 Salim Khan the alleged eye witness had turned hostile and did not support the case of prosecution. PW-8 HC Charan Singh proved the safe deposit of contraband in the Malkhana. PW-9 Kamlesh Kumar proved the safe transit and custody of the samples of contraband from Police Station to SFSL, Junga. PW-10, Constable Dev Raj was a formal witness and proved daily diary reports 10 and 7, as Ext. PW-10/A and Ext. PW-10/B.

4. Appellant was examined under Section 313 Cr.P.C. He did not choose to lead the defence evidence. On conclusion of trial, appellant was convicted for the offence under Section 20 of the Act and was sentenced, as noticed above.

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

6. Sh. N. S. Chandel, learned Senior Advocate representing the appellant contended that the samples sent for chemical analysis were not representative samples. In absence of samples being representative, the entire quantity, allegedly recovered by the police could not be said to be the charas.

7. PW-1 ASI Ramesh Kumar and PW-11 SI Abhay Singh categorically stated in their respective examination-in-chief that the charas recovered from Maruti Van No. HP57-1243 was in the shape of sticks. Neither PW-1 nor PW-11 clarified as to what was the number of the sticks. Thus, as per prosecution case, the contraband recovered from the vehicle, driven by the appellant was not a single mass.

8. Spot witnesses, PW-1, PW-2, PW-3 and PW-11, though stated that two samples of 25 grams each were drawn but none of these witnesses have stated that the entire bulk was made homogeneous and thereafter, the samples were drawn as representative samples. None of the spot witnesses had stated about the mode and manner in which the samples were drawn.

9. In the instant case, the entire bulk was branded as charas on the basis of report Ext. PA, rendered by SFSL, Junga. The scrutiny of such report reveals that the sample that was examined weighed 23.751 grams. To hold the sample to be representative of entire bulk, it had to be proved by the prosecution that the sample examined in fact was the true representative sample of entire bulk. This evidence in my considered view is clearly missing in the instant case.

10. NDPS Act was amended in the year 1989 and Section 52A was incorporated, which read as under:

> **"52A. Disposal of seized narcotic drugs and psychotropic substances.**
>
> (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.
>
> (2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic drugs, psychotropic substances, controlled substances or

conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

11. Evidently, the aforesaid provision was incorporated for safe custody and disposal of narcotic and psychotropic substances, so as to avoid their misuse. In the case in hand, the Investigating Officer had not chosen to comply with Section 52A of the Act, rather he had chosen to draw the samples on spot. The aforesaid provision was amended in 2014, nevertheless the contemporaneous provision contained in Section 52A on 8.5.2008 i.e. at the time of commission of offence, substantially carried the same mandate as amended Section 52A.

12. The Central Government in exercise of powers vested under sub-section (i) of Section 52 (A) of the Act, has issued standing order No.1 of 1989, prescribing the procedure to be followed while conducting seizure of the contraband. This standing order succeeds the provision of standing order No. 1 of 1988. Section 2 of the standing order No.1 of 1989 provides for general procedure of sampling and storage etc. as under: -

> STANDING ORDER No. 1/89 SECTION II - GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.
>
> 2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.
>
> 2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.
>
> 2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. **The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn**.
>
> 2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (i n duplicate) may be drawn.

2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. While drawing one sample (in duplicate) from a particular lot , it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug

sample/Test memo", to be sent to the chemical laboratory concerned.

3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotic s Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities . The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies may send samples of seized drugs to the Director/Deputy Director/ Assistant Director of their respective State Forensic Science Laboratory.

3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the Panchama. Original wrappers shall also be preserved for evidentiary purposes.

13. The sanctity of the Standing Order 1/89 came for consideration before the Supreme Court in ***Noor Aga*** v. ***State of Punjab (2008) 16 SCC 417***, wherein it was held as under:-

"89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier

> decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.
>
> "91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

14. If one goes through the Standing Order 1/89 and Section 52A (2) (c) of the NDPS Act, an apparent conflict arises as the former provides for sampling at the spot of seizure and sending the same to laboratory within 72 hours whereas the latter provides for sampling before a Magistrate. The said conflict has been dealt with by the Hon'ble Supreme Court elaborately in **Union of India (UOI) v. Mohanlal and Ors**. (2016) 3 SCC 379. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

> *"Seizure and sampling*
>
> *12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting*

seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the states or the central agencies in the matter of drawing sample. This is, therefore, an area that needs to be suitably addressed in the light of statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regards drawing of sample.

14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

"52-A.Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such

manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of

(a) certifying the correctness of the inventory,

(b) certifying photographs of such drugs or substances taken before the Magistrate as true, and

(c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government, therefore, will do well to re-examine the matter and take suitable steps in above direction."

15. There is nothing in the prosecution evidence that any of these procedures were followed while drawing samples. There is not even any semblance of any procedure having been adopted for drawing a representative sample. This creates a serious doubt on the very legitimacy of the case of prosecution. To have credence, the sample had to be representative sample, of entire 900 Grams of substance, failing which it can be a case of recovery of only 25 gms. of charas or at the most 50 grams by including weight of second sample, having entirely different legal consequences.

16. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

> "5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused

> has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

17. The Court considered it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

18. In ***Khek Ram*** Vs ***NCB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.
>
> 80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

19. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

> "23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

20. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

"16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

21. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

> "16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

22. Thus, from the entirety of evidence available on record, I am not convinced that the sample of 23.751 grams examined at SFSL, Junga was representative of entire bulk of substance and hence the appellant cannot be held to have been found in conscious possession of 900 grams of charas. The appellant can be held to in possession of 25 grams or at the most 50 grams of Charas by including the weight of other sample, which as per NDPS Act is small quantity.

23. Prior to amendment Act 16 of 2014, the punishment involving small quantity of charas under Section 20(b)(ii) (A) was rigorous imprisonment

for terms extending up to six months or time extending up to Rs. 10,000/- or with both.

24. Appellant is held guilty of offence under Section 20 of the Act for having been found in conscious possession of only small quantity of charas. The appellant remained in custody w.e.f. 23.2.2007 till 6.3.2007 and thereafter, he was released on bail. The appellant remained on bail during the entire period of the trial. His sentence was suspended by this Court vide order dated 3.10.2008. There is no complaint against the appellant that he misused the liberty of bail during the trial or after conviction. The present case pertains to the year 2007. A long period has elapsed thereafter. Appellant has already undergone the agony and pain firstly of undergoing the prolonged trial and thereafter the wait for final disposal of his appeal.

25. Keeping in view the entirety of facts and circumstances of the case, appellant is sentenced to imprisonment already undergone. However, the appellant is directed to deposit the fine amount before the learned trial Court within a period of four weeks from today, if not already deposited. The judgment and sentence order passed by learned trial court is accordingly modified.

26. The appeal is accordingly disposed of. Pending applications, if any, also stand disposed of. Records be sent back.

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

Between:

STATE OF HIMACHAL PRADESH

....APPELLANT

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATES GENERAL WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR THE STATE.)

AND

ASHWANI KUMAR SON OF LATE SH. GIAN CHAND, AGED 29 YEARS RESIDENT OF VILLAGE RAJOR, P.O. RANI TAL, POLICE STATION HARIPUR, DISTRICT KANGRA, H.P.

(MR. TARA SINGH CHAUHAN, ADVOCATE)

....RESPONDENT

CRIMINAL APPEAL
NO. 60 OF 2016
Decided on: 02.09.2022

Code of Criminal Procedure, 1973- Section 378- **Prevention of Corruption Act, 1988-** Sections 7 and 13(2)- Appeal against acquittal- Held- Prosecution failed to prove the demand of bribe- No illegality or infirmity can be said to have been committed by the Ld. Court below while acquitting the accused- Appeal dismissed. (Para 7, 12, 13)

Cases referred:

T.K. Ramesh Kumar v. State Tr. Police Inspector, Bangalore, 2015 (3) Scale 248;

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

JUDGMENT

Instant criminal appeal filed under Section 378 of Cr.PC, lays challenge to the judgment of acquittal dated 5.8.2015, passed by the learned Special Judge, Hamirpur, District Hamirpur, H.P., in Corruption Case No. 01 of 2014 (Regd. No. 03/2014), whereby learned court below acquitted the accused of the charges under Section 7 and 13 (2) of the Prevention of Corruption Act, 1988 (*in short the "Act"*), by extending him benefit of doubt.

2. Briefly stated facts of the case as emerge from the record are that complainant Prakash Chand made a written report to Dy.SP alleging therein that one Sh. Kultar Singh, Resident of Village Adarsh Nagar, Tehsil Nadaun, had given one application against him on 13.1.2013, in which the accused, the then police Sub-Inspector, PS Nadaun was appointed as Investigating Officer. He alleged that on 28.3.2013 at about 8:00pm, accused called him in the house of one Roshan Lal at Village Lahar and claimed that case has been

registered against him and he should get the anticipatory bail, otherwise he will put him behind the bars. Complainant alleged that on 4.4.2013, he was granted anticipatory bail by the court of Sessions Hamirpur. Complainant alleged that after his having granted anticipatory bail, accused repeatedly called him on one pretext or the other. He alleged that accused proclaimed that he has been booked under serious sections of law and case will prolong for four years and he will have to spend Rs.40,000/- to 50,000/-. Complainant alleged that accused told him that in case he wants favour, he should pay sum of Rs. 10,000/- as bribe. Complainant alleged that on 7.4.2013, accused gave a missed-call from his No. 9816028178, but he did not respond and as such, he sent home guard personnel to his house on 8.4.2013. He alleged that accused again made a telephone call on the landline No. 236241 at the house of the Pradhan asking about the whereabouts of the complainant and then made telephonic call on 98827 53433. He alleged that accused made a call on landline No. 236601, which was attended by aged lady employed by him at his house. Complainant alleged that on 9.4.2013, accused had asked him at Nadaun to arrange for the money and provide alternative cell number and as such, he gave contact number of his son. Complainant alleged that accused also gave telephonic call to his son on cell phone No. 94593-30201. Complainant alleged that on 18.4.2013, he alongwith his son had come to Nadaun on his bike and accused was sitting in the hut of Baba. Accused stopped him and threatened that he will get his anticipatory bail cancelled in case he does not pay the bribe money. On 23.4.2013, complainant addressed a written application to the DYSP SV & ACB, Hamirpur, making therein complaint of bribe being demanded by the accused. After receipt of the written communication, DYSP chalked out a plan to catch the accused red handed and requested Deputy Commissioner, Hamirpur to provide the independent witnesses, upon which Sh. Anupam Kumar, District Revenue Officer, Hamirpur and Sh. Totu Ram, Senior

Assistant DRDA Office Hamirpur were deputed. The pre-trap exercise was done and complainant was given currency of Rs. 8,000/- of the different denomination, which were treated with phenolphthalein powder and from the trap kit, sodium carbonate power was also made available. During pre-trap exercise, the solution of sodium carbonate power was prepared and Sh. Anumap Kumar DRO was asked to dip the right hand finger into the solution, but the colour of the water remained natural just like water. Thereafter. The treated currency notes were touched by Sh. Anupam Kumar with his right hand finger and then dipped the finger into solution of sodium carbonate and its colour turned pink. During the pre-trap exercise, the members of the trap party were made to understand the procedure to be followed by them in the event of money being recovered from the pocket of the accused. After completion of necessary formalities before laying the trap, police party sent the complainant alongwith sum of Rs. 8,000/- treated with phenolphthalein powder/sodium carbonate powder with the shadow witness Anupam Kumar. On 23.4.2013, trap party rushed towards the main gate of the DC Office and spreaded in different directions. Complainant alongwith independent witnesses entered the canteen of the DC office, where allegedly, the accused was in police uniform. As per the complainant, he and accused rushed towards the Gandhi Chowk and trap party followed them in the different directions and in front of the shop of Sh. Naresh Katna, complainant parkash Chand and accused talked with each others. Accused accepted something from the complainant and put the same in the left side of the pocket of his pant. On this, the complainant gave a signal to the shadow witness and then witnesses Inspector Sohan Lal, HC Jagdish chand, HHC Kamlesh Kumar and Constable Ram Pal reached the spot, who immediately confessed his mistake and took out the bribe money from the pocket of his pant and threw it on the road. Police party in presence of the independent witnesses prepared the solution of sodium carbonate and thereafter accused was asked to dip his left

hand fingers into the solution, on which colour of the solution turned into pink. Hand wash of the accused was taken separately in a nip and sealed with seal impression H and thereafter, Sh. Anupam Kumar, DRO, was asked to pick up the thrown treated currency notes from the road and its numbers matched with the numbers noted in pre-trap exercise memo. Currency notes of Rs. 8,000/- were put in an envelope and then in a parcel were sealed with seal Impression H. The accused was taken to the DC Office Canteen, where he was asked to change his costume. A glass was arranged and solution of sodium carbonate was prepared and its colour remained natural like water. Then left pocket of the pant of the accused was dipped in the solution and its colour turned pink. Thereafter, the solution as put in a separate nip and slip by inscribing "pocket wash" was affixed on the nip and the nip was put in a parcel and sealed with seal impression T. Pant of the accused was also sealed in a cloth parcel with seal impression X and taken into possession vide memos.

3. During investigation solution i.e. handwash of the accused and that of the pocket wash were got analyzed from the Deputy Director RFSL Mandi and the RFSL opined the traces of phenolphthalein powder and sodium carbonate in the contents of parcels P/1 and P/2. CDR of mobile No. 98160-28178 of the accused were obtained alongwith the prints of different dates. It was found that accused was in touch with the complainant. The mobile was found in the name of one Rajesh Kumar resident of Mahal Mataur, District Kangra, but it was established that accused used to operate such mobile. After completion of the investigation, police presented challan in the competent court of law, who being satisfied that prima facie case exists against the accused framed charges against him under Sections 7 and 13(2) of the Act, to which he pleaded not guilty and claimed trial.

4. Prosecution with a view to prove its case, examined as many as 26 witnesses and accused also produced three witnesses in his defence. In

his statement recorded under Section 313 Cr.PC., he denied the incriminating evidence put against him and claimed that he has been falsely implicated in the case by the complainant, against whom, he has registered case No. 29/13, in terms of order passed by the learned Chief Judicial Magistrate under Section 156(3) of the Cr.PC. He stated that in the statement recorded under Section 313 Cr.PC that preliminary inquiry of the said case was already conducted by the vigilance department and it was held that no cognizable offence is made out against the complainant and closure of the case was recommended. He stated that vigilance department was of the view that amount which was misappropriated was already deposited by the complainant and as such, complainant was time and again insisting him to close the case as vigilance department had already conducted inquiry and recommended for closure of the case and he should not try to go against the Vigilance Department, otherwise he will have to face the consequences, but he refused to oblige the complainant because as per the investigation, prima-facie case was fully made out against the complainant that he misappropriated amount of Rs. 52900/-.

5. Learned trial court on the basis of evidence collected on record held the accused not guilty of having committed offence punishable under Sections 7 and 13(2) of the Act and as such, acquitted him by giving the benefit of doubt. In the aforesaid background, State has approached this court in the instant proceedings, praying therein conviction of the accused after setting aside the judgment of acquittal and order of sentence recorded by the court below.

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

7. Having heard learned counsel for the parties and perused evidence, be it ocular or documentary, led on record by the respective parties vis-à-vis reasoning assigned in the judgment passed by the learned court

below, this Court is not persuaded to agree with Mr. Sudhir Bhatnagar, learned Additional Advocate General that court below has failed to appreciate the evidence in its right perspective, rather this court finds that court below has dealt with each and every aspect of the matter very meticulously, whereby it rightly acquitted the accused by extending benefit of doubt. It is not in dispute that complainant Parkash Chand expired during the trial that too before recording his statement, if any. Since at no point of time, prosecution was able to prove the demand of bribe, if any, by the accused, there was otherwise no reason for the court below to convict the accused under the aforesaid provisions of law. Though prosecution with a view to prove demand of bribe placed heavy reliance upon the statement made by PW2 Surender Singh, who while deposing before the court below testified that accused met him as well as his father in uniform and threatened his father to get anticipatory bail granted by the court cancelled. Most importantly, this witness deposed that his father talked with the accused secretly and on return, told him that accused had demanded Rs. 10,000/- as bribe for securing the anticipatory bail to him. It is quite apparent from the deposition made by the aforesaid witness that at no point of time, accused made demand of bribe, if any, from his father in his presence, rather he came to be know about the factum with regard to to demand of bribe by the accused from the subsequent disclosure made by his father to him and as such, learned trial court below rightly ignored version putforth by this witness being hearsay witness. Moreover, if the statement of this witness is perused in its entirety, it reveals that accused demanded sum of Rs. 10,000/- for securing anticipatory bail to his father. It is not understood that when accused was already on bail and the complainant was never arrested, where was the occasion for the accused to get the anticipatory bail in favour of the complainant. PW3 Smt. Chander Kali, who had allegedly received landline call from the accused, also not supported the case of the prosecution because she was unable to identify

the person, who had called the complainant. Otherwise also, it has nowhere come in the version of the aforesaid witness that person on telephone call demanded bribe from the complainant.

8. PW6 Roshan Lal, Pradhan though stated that accused had come to his house in the uniform, but there is nothing in the statement with regard to demand of bribe, if any, made by the accused. Similarly PW7 Naresh Kumar, owner of shop in front of which, money was alleged taken by the accused, also not supported the case of the prosecution and as such, he was declared hostile.

9. PW15 Constable Sumit Kumar though deposed that he saw the accused throwing the money, but he did not see the accused accepting bribe from the complainant

10. PW21 Totu Ram and PW24 Anupam Kumar, PW17 HC jagdish Kumar, PW18 HHC Kamlesh Kumar and others deposed that complainant Parkash Chand was told that money was settled to be given in the DC office canteen. They deposed that accused and deceased complainant had sat on the table in the DC Office canteen for some time, but money was not given to the accused by the complainant in the canteen. These witnesses deposed that accused came out of the canteen from the back door and proceeded towards Gandhi Chowk Main bazaar and handed over the bribe money to the accused in the market in broad day light. They also stated that there was hustle and bustle in that place, where accused being in the police uniform otherwise could not accept the bribe amount to the visibility of others. Aforesaid versions put forth by these witnesses came to be discarded by the court below for the reason that their versions appear to be unnatural because once as per them, complainant Prakash Chand had sat on the table in DC Office Canteen with the accused, where was the occasion for him to not to give the money to him in the canteen itself. Otherwise, it does not appear to be probable that person in uniform would accept the money in open instead of closed room i.e

canteen. Leaving everything aside, none of the prosecution witnesses stated something specific with regard to demand of bribe, which is mandatory to bring case under the ambit of Section 7 of the Act. If the important aspect of the demand of bribe alleged to have been made by the accused is not established, case of the prosecution is bound to fail. In the instant case, as has been taken note herein above, complainant could not appear in the witness box to make statement and as such, prosecution miserably failed to prove the demand. Though aforesaid lacuna was attempted to be filled up by the prosecution by bringing his son PW2 Surender Singh and PW3 Chanderkala in the witness box, but as has been discussed herein above, both the witnesses did not support the case of the prosecution as none of them had seen the accused demanding the bribe from the complainant, rather they acquired knowledge of demand of bribe by the accused from the complainant only, who never deposed such fact in the Court. Moreover, when complainant was not available for cross-examination, allegation, if any, made by him while giving application to the department with regard to demand of bribe by the accused is of no relevance and rightly came to be rejected.

11. Reliance is placed upon judgment passed by the Hon'ble Apex Court in ***T.K. Ramesh Kumar v. State Tr. Police Inspector, Bangalore***, 2015 (3) Scale 248 (Criminal Appeal No. 331 of 2015 arising out of SLP (crl) No. 3565 of 2012, dated 18.2.2015, wherein Hon'ble Apex Court relying upon its previous judgments reiterated that to bring case in the ambit of Section 7, it is incumbent upon the prosecution to prove the demand and in case same is not established, case of the prosecution is bound to fail. Relevant paras of the afore judgment read as under:

> " 8. With reference to the aforesaid legal rival contentions, we have heard the learned counsel for the parties at length with reference to the complaint, the oral evidence of PW-1 and PW-2 and Exhibits P-4 and P-

6 to examine the correctness of the findings recorded by the first appellate court on the charges framed against the appellant are proved or not. Further, on a careful perusal of the entire material evidence on record, particularly Exhibit P-1 and evidence of PW-1 and PW-2 on the question of demand of illegal gratification alleged to have been made by the appellant with the complainant and his father, as required under Section 7 of the Act to constitute an offence under Section 13(1)(d) of the Act, is required to be established by the prosecution which is mandatory as held by this Court in catena of decisions. In this regard we have examined the correctness of the finding of the trial court recorded in its judgment. The trial court placed strong reliance upon the evidence of the prosecution, namely, Exhibit P-1, the complainant and oral evidence of PW-1 to record a finding on the question of demand of illegal gratification made with the complainant by the appellant, we have noticed in the complaint Exhibit P-1, which reads as follows:

> "...On 18.10.2003 we have paid Rs. 125 for Katha extract charges and when we i.e., my father and me met Mr. Ramesh he further demanded a sum of Rs. 2000 to give Katha Extract. Lastly it was settled for Rs. 1500/-."

The above allegations made in the complaint by the complainant, Exhibit P-1 read with the evidence of PW-1, who is examined in the case by the prosecution, has stated that application dated 18.10.2003 for issuance of Katha Extract submitted by his father shown to him at the time of his deposition, further he has categorically admitted in his evidence that the same was submitted by them in the office on 18.10.2003, which is marked as Exhibit D-2 and further he has answered in the cross-examination that he does not know whether the said application is required to be placed before the Manager for his initial. Further, it is elicited from his evidence that the application, Exhibit D-2, it can be seen that there are two initials underneath dated 20th October is

written and further he has admitted in his evidence that he did not know whether the said application was forwarded to the accused on 21.10.2003 after signature of the Manager and Assistant Revenue Officer "A.R.O." The said evidence is very crucial to testify the veracity of the evidence of PW-1. If PW-1 is not definite in his evidence that the appellant had received the application of his father for issuing Khata extract in respect of his property on 21.10.2003, both the trial court as well as the first appellate court failed to evaluate and reappreciate the aforesaid important piece of evidence on record which is very material for the purpose of recording a finding on the important aspect of demand of illegal gratification alleged to have made by the appellant with the complainant and his father on 18.10.2003 which is mandatory to record the finding on the charge under Section 13(1)(d) of the Act. In our considered view, the said approach adopted both by the trial court and the appellate court is not only erroneous but also error in law and, therefore, the finding recorded on the above aspect of demand of illegal gratification made by the appellant with the complainant and his father cannot be sustained in law.

Therefore, submission of learned senior counsel that the finding on the charges against the appellant is erroneous for the reason that demand of illegal gratification by the appellant, as required under Section 7 of the Act, with the complainant and his father for issuing Katha Certificate of the property is not established by the prosecution. His submission is well founded. The same must be accepted. In this regard it would be appropriate for this Court to refer to the decision of this Court in the case of Mukut Bihari & Anr. vs. State of Rajasthan, (2012) 11 SCC 642, which reads thus:

> "11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act.

> Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person."

If this important aspect of demand alleged to have made by the appellant with the complainant and with his father is not established then the other evidence of PW-2, PW-3

and PW-4 cannot be accepted for convicting the appellant for the aforesaid charges levelled against him.

Further, as could be seen from the finding and reasons recorded in the impugned judgment by the appellate court, in our considered view, it has not reappreciated the evidence on record properly which is very important aspect of the matter, which we have noticed to set aside the concurrent finding of the appellate court on the charges in the impugned judgment as the learned Judge of the appellate court has failed to apply his mind properly to the charges, material evidence on record, particularly Exhibit P-1 and evidence of PW-1. As could be seen from Exhibit P-1 it is the case of complainant, PW-1 that the demand of illegal gratification from the complainant was made by the appellant in the presence of his father. He was a crucial witness to be examined in the case by the prosecution at the time of investigation, whose evidence is not recorded by the investigating officer. Not recording his statement by the Investigating Officer is fatal to the case of the prosecution for the reason that the evidence of PW-1 in the backdrop of the allegation made in the complaint and the material evidence elicited on behalf of the appellant makes it abundantly clear that there is material contradiction in the allegations made against the appellant in Exhibit P-1 and evidence of the PW-1, in his evidence.

9.In view of the above conclusion arrived at by us after careful perusal of the evidence on record and law on the important aspect of demand of illegal gratification made by the appellant must be proved and the concurrent findings recorded by the High Court, and the submission made by Mr. Rathupathy that there is minor discrepancy with regard to the averments made in the complaint and the evidence of PW-1 and the first charge framed by the learned Judge having regard to the nature of the allegation of illegal gratification, demand and acceptance of the same proved to be correct by the prosecution on the basis of phenolphthalein test to prove the acceptance of gratification money and recovery from the appellant, therefore, this Court need not interfere with the

impugned judgment and order of the High Court. Therefore, the submission made by learned counsel on behalf of the State cannot be accepted by us as there is material contradiction and it is not minor discrepancy with regard to the complaint and the evidence on record, as urged by him. Reliance has been placed upon the decision of this Court in the case of B. Jayaraj vs. State of A.P., (2014) 13 SCC 55, which reads thus:-

> "8.. there is no other evidence to prove that the accused had made any demand, the evidence of PW 1 and the contents of Ext.P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Sections 13(1)(d)(i) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established.
>
> (emphasis laid by this Court)"

12. Since in the case at hand, prosecution has miserably failed to prove the demand of bribe, if any, made by the accused, no illegality and

infirmity can be said to have been committed by the court below while acquitting the accused by extending benefit of doubt.

13. Consequently, in view of the detailed discussion made herein above, there appears to be no illegality and infirmity in the judgment of acquittal recorded by the court below, which appears to have been passed on proper appreciation of facts as well as and as such, same is upheld. Present appeal fails and dismissed accordingly, being devoid of any merits.

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

Between:-

BABU RAM S/O SONIYA RAM, RESIDENT OF VILLAGE KRISHNA VIHAR COLONY TARUWALA, PAONTA SAHIB, DISTRICT SIRMOUR, H.P. AGED ABOUT 35 YEARS.

....PETITIONER

(MS. SHTUTIKA, ADVOCATE)

AND

AMIT SHARMA, S/O LYAK RAM, RESIDENT OF VILLAGE BHANGATA, TEHSIL SHILLAI, DISTRICT SIRMOUR, H.P.

....RESPONDENT

(SH. SURINDER SAKLANI).

CRIMINAL MISC. PETITION(MAIN)
U/S 482 CR.P.C.
NO. 432 OF 2022
Reserved on: 21.9.2022
Decided on:30.9.2022

Code of Criminal Procedure, 1973- Section 311- Application under Section 311 Cr.P.C. to produce witness in defence was dismissed- Held- there was prima-facie substance in the plea of accused for the purpose of leading additional evidence in defence- Therefore, in the facts and circumstances of the case, the plea of accused was liable to be allowed- It would have not

caused prejudice to the complainant as the complainant would have got a chance to cross-examine the witnesses produced by the accused- Petition allowed. (Para 10)

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

O R D E R

By way of instant petition, petitioner has assailed the order dated 6.5.2022, passed by learned Judicial Magistrate, 1st Class, Shillai, District Sirmour, H.P. in case No. 69 of 2021, titled as Amit Sharma vs. Babu Ram.

2. Petitioner herein is the accused before learned trial Court in complaint filed against him by the respondent herein under Section 138 of the Negotiable Instruments Act. After closure of his defence evidence, petitioner herein/accused filed an application under Section 311 Cr.P.C. with a prayer to examine two witnesses named Bhagat Ram and Madan Singh. It was submitted in the application that the accused had already raised a defence that the complainant/respondent herein was engaged in business of 'Chit Fund' and had procured security cheques from various persons including the accused/petitioner herein. As per the petitioner herein/ accused, the witnesses sought to be examined by him were also the victims of respondent herein/complainant and would prove the factum of having handed over blank security cheques to the complainant. It was also submitted that the examination of such witnesses was necessary for the purposes of probalizing the defence of accused. Petitioner herein/ accused also maintained that he could not produce the witnesses earlier, as they were afraid of complainant.

3. The complainant/respondent herein contested the prayer of the accused by filing reply. The allegation of complainant engaged in business of 'Chit Fund' was specifically denied. It was submitted that the persons proposed to be examined as witnesses by accused had reasons to depose against the complainant as they were also accused in other cases, filed against

them before learned Judicial Magistrate, 1st Class, Paonta Sahib and learned Judicial Magistrate, 1st Class, Shillai.

4. Learned trial Court dismissed the application of the accused/petitioner herein vide impugned order on the ground that the accused had already availed opportunity to lead defence evidence and had closed the same. The act of accused in filing the application at belated stage has been termed to be an abuse of law. Another reason for which the application has been rejected is that accused was trying to fill up lacuna and hence, could not avail aid of Section 311 Cr.P.C.

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

6. Perusal of impugned order reveals that the grounds on which the application of the accused under Section 311 Cr.P.C. has been dismissed are firstly that the application was filed belatedly after closure of defence evidence and secondly, it amounted to fill up lacuna and covering up the incompetence of accused.

7. Section 311 Cr.P.C. vests the Court with jurisdiction to examine any person as a witness, if his evidence appears to it to be essential to the just decision of the case. The stage of inquiry or trial being immaterial. The Court is only to assess whether the examination of a witness or his evidence is essential to the just decision of the case.

8. Reverting to the facts of the case, accused had alleged that his proposed witnesses were to depose in respect of the practice adopted by complainant to obtain blank signed cheques from his costumers during the course of his business of 'Chit Fund'. Learned trial Court instead of assessing the necessity of examination of proposed witnesses of accused, proceeded to dismiss the application on such grounds, which are extraneous to the requirement of Section 311 Cr.P.C.

9. In reply to application under Section 311 Cr.P.C., the complainant had specifically alleged that the proposed witnesses of accused were themselves accused in another cases, which fact was sufficient to imply that the complainant had filed the complaint against such persons also. In any case, learned trial Court could have ascertained the details of the cases in which the proposed witnesses of accused were stated to be involved from the complainant.

10. Thus, there was prima-facie substance in the plea of accused for the purpose of leading additional evidence in defence. Therefore, in the facts and circumstances of the case, the plea of accused was liable to be allowed. It would have not caused prejudice to the complainant as the complainant would have got a chance to cross-examine the witnesses produced by the accused. In my considered view, the proposed defence evidence of accused is essential to the just decision of the case.

11. Resultantly, petition is allowed. The order dated 6.5.2022, passed by learned Judicial Magistrate, 1st Class, Shillai, District Sirmour, H.P. in case No. 69 of 2021, titled as Amit Sharma vs. Babu Ram is set aside. The application of accused herein/complainant filed under Section 311 Cr.P.C. before learned trial Court is ordered to be allowed. The petitioner herein/accused is allowed to examine witnesses named Bhagat Ram and Madan Singh under Section 311 Cr.P.C.

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

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

Between:-

1. M/S UNISON PHARMACEUTICALS THROUGH
MANAGING DIRECTOR/PARTNERS OF
M/S UNISON PHARMACEUTICALS, PLOT NO. 124,
EPIP, INDUSTRIAL AREA, JHARMAJRI BADDI,
SOLAN, H.P.
2. SH. VIJAY KUMAR UPPAL, PARTNER,

M/S UNISON PHARMACEUTICALS, PLOT NO. 124,
(HQ PALAMPUR KANGRA)
EPIP, INDUSTRIAL AREA, JHARMAJRI BADDI,
SOLAN, H.P.
3. SH. ANAND UPPAL, PARTNER
M/S UNISON PHARMACEUTICALS,
PLOT NO. 124 (HQ PALAMPUR KANGRA)
EPIP, INDUSTRIAL AREA, JHARMAJRI
BADDI, SOLAN, H.P.

…PETITIONERS
(BY SH. ANAND SHARMA, SR. ADVOCATE
WITH SH. KARAN SHARMA AND SH. NITIN
BHASIN, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH DRUG INSPECTOR, HEAD QUARTER
PALAMPUR, DISTRICT KANGRA, H.P.
2. MR. PREM NATH, SON OF JANG BAHADUR SINGH,
GENERAL MANAGING DIRECTOR,
M/S UNISON PHARMACEUTICALS,
PLOT NO. 124,EPIP, INDUSTRIAL AREA,
JHARMAJRI BADDI, SOLAN, H.P.
3. MR. ARUN KUMAR SIDHWANI,
MANUFACTURING CHEMIST, O/O
M/S UNISON PHARMACEUTICALS,
PLOT NO. 124, EPIP, INDUSTRIAL AREA,
JHARMAJRI BADDI,SOLAN, H.P.
4. MR. AMIT SHARMA, MANUFACTURING CHEMIST,
O/O M/S UNISON PHARMACEUTICALS,
PLOT NO. 124, EPIP, INDUSTRIAL AREA,
JHARMAJRI BADDI, SOLAN, H.P.
5. MR. RAVINDER SINGH, MANUFACTURING CHEMIST,
O/O M/S UNISON PHARMACEUTICALS,
PLOT NO. 124, EPIP, INDUSTRIAL AREA,
JHARMAJRI BADDI,SOLAN, H.P.
6. MR. RAKESH S. SHAH, MANUFACTURING CHEMIST,
M/S UNISON PHARMACEUTICALS,
PLOT NO. 124, EPIP, INDUSTRIAL AREA,
JHARMAJRI BADDI, SOLAN, H.P.

7. MR. BHASKAR MONDAL,
   PROP. M/S SUNSUI ASSOCIATES, 287,
   ULIPARA ROAD, W.NO. 15, P.O. AND
   P.S. BRUIPUR (BEHIND HOSPITAL)
   SOUTH 24, PARGANAS, WEST BENGAL.
8. MRS. MEERA CHAUHAN, PROP.
   CUM COMPETENT PERSON M/S
   CHAUHAN OPTICS AND HEARING AID,
   LAKKAR BAZAR, SHIMLA-1, H.P.
9. MR. HARISH KUMAR PATHANIA,
   PARTNER M/S EES AAR,
   MEDICAL AGENCY, NEAR TANDA,
   NAGROTA BAGWAN, KANGRA, H.P.
10. MR. KRISHAN SHARMA, PARTNER
    M/S EES AAR, MEDICAL AGENCY,
    NEAR TANDA, NAGROTA BAGWAN,
    KANGRA, H.P.
11. MR. MOHINDER SINGH CHAUDHARY
    S/O SH. HARI SINGH C/O EES AAR
    AGENCY NEAR RPGMC, TANDA,
    NAGROTA BAGWAN, KANGRA, H.P.

...RESPONDENTS

(BY SH. NARENDER THAKUR, DEPUTY
ADVOCATE GENERAL, FOR R-1).
(SH. JAGAN NATH, ADVOCATE, FOR
R-2 TO R-4).

(RESPONDENTS No.5 & 6 EX PARTE)

(MR. ANUJ NAG, ADVOCATE, FOR
R-7).

(MR. LAKSHAY THAKUR, ADVOCATE
FOR R-8 TO 11.

....RESPONDENTS.

CRIMINAL MISCELLANEOUS PETITION (MAIN)
NO. 50 OF 2019
Reserved on:25.8.2022
Decided on:01.09.2022

Drugs and Cosmetics Act, 1940- Section 18, 27- Petitioner sought the quashing of the proceedings pending before the Ld. Additional Chief Judicial

Magistrate being not maintainable- Held- Petitioner No. 1 cannot derive benefit under Section 34 of the Drugs and Cosmetics Act, 1940 as the said provision only protects the Directors of the Company or partners of the firm from prosecution- Petition disposed of. (Para 4)

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

O R D E R

By way of instant petition, petitioners have prayed for following relief:

> *"It is, therefore, respectfully submitted that taking account the aforesaid facts and circumstances, the present petition may kindly be allowed and the Case No. 1/2018 (215-II/2018), titled as State of Himachal Pradesh vs. M/s Unison Pharmaceuticals under Section 18(a)(i) read with Section 27(d) of Drugs and Cosmetics Act 1940 and Rules 1945 thereunder pending before the learned Additional Chief Judicial Magistrate, Kangra, qua the petitioners, to secure the ends of justice may kindly be quashed and set aside any any other relief as per the facts and circumstances of the case as this Hon'ble Court may deem fit may kindly be passed in the interest of justice."*

2. The grievance of the petitioners in nut-shell is that the complaint Annexure P-1 filed by the Drug Inspector before the learned Additional Chief Judicial Magistrate, Kangra is bad in law insofar as petitioners are concerned. It is submitted that petitioners No. 2 and 3 are partners of petitioner No.1 and the complaint Annexure P-1 is completely silent as to involvement of the petitioners in the commission of alleged offences under the Drugs and Cosmetics Act and the Rules framed thereunder. It has further been submitted that the partners of the firm can be held vicariously liable for offence, if any, committed by the firm in case the ingredients and requirements of Section 34 of the Drugs and Cosmetics Act are fulfilled.

3. Perusal of record reveals that the Drug Inspector has filed a complaint under Section 18 (a) (i) read with Section 27 (d) of the Drugs and

Cosmetics Act, 1940 on the allegation that a drug manufacturing by petitioner No.1 as per the report of Government Analyst was declared as "not of standard quality". However, the names of petitioners No. 2 and 3 do not find mention in the array of accused persons. Only petitioner No.1 alongwith ten others have been named as accused. In view of the non-impleadment of petitioners No. 2 and 3 as accused, the instant petition on their behalf is not maintainable being without any cause of action having arisen in their favour.

4. As regards, petitioner No.1, no benefit can be derived under Section 34 of the Drugs and Cosmetics Act, 1940. The said provision only protects the Directors of the Company or Partners of the Firm from prosecution under the Drugs and Cosmetics Act and the rules framed thereunder in case of fulfilment of requirements of said section. Petitioner No.1 cannot derive benefit thereunder. The complaint against petitioner No.1 cannot be said to be not maintainable. The merits of the case are to be decided during trial of the case. In exercise of jurisdiction under Section 482 of the Code of Criminal Procedure this Court will not venture into the merits of the allegations and counter-allegations levelled by the complainant and accused.

5. The petition is disposed of in above terms. It is, however, clarified that this order will not be a bar for petitioners No. 2 and 3 to avail appropriate legal remedy in case of their impleadment as accused in the complaint Annexure P-1 in future.

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

Between:-

PARAHLAD KUMAR ALIAS RAJ KUMAR
SON OF SH. BHOLU RAM, RESIDENT OF
VILLAGE DHARBHOL, P.S. NURPUR,
TEHSIL JAWALI, DISTRICT KANGRA, H.P.
AT PRESENT UNDERGOING RIGOROUS
IMPRISONMENT FOR 10 YEARS IN MODEL
CENTRAL JAIL, NAHAN, H.P.

…PETITIONER

(BY SH. R. L.CHAUDHARY, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH ITS PRINCIPAL
   SECRETARY (HOME) TO THE
   GOVERNMENT OF HIMACHAL PRADESH
   SHIMLA – 171 002.

2. DIRECTOR OF PRISONS &
   CORRECTIONAL SERVICES,
   HIMACHAL PRADESH, SHIMLA.

3. SUPERINTENDENT OF JAIL,
   MODEL CENTRAL JAIL, NAHAN,
   DISTRICT SIRMOUR, H.P.

…RESPONDENTS

(BY SH. DESH RAJ THAKUR, ADDITIONAL
ADVOCATE GENERAL, WITH MR. NARENDER
THAKUR, DEPUTY ADVOCATE GENERAL AND
MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL).

CRIMINAL MISCELLANEOUS PETITION (MAIN)
UNDER SECTION 482 CR.P.C.
NO. 756 OF 2019
Reserved on:05.09.2022
Decided on: 09.09.2022

Prisons Act, 1894- Sections 45, 52- Petitioner sought the quashing of proceedings pending against the petitioner under Section 52 of the Prisons Act, 1894 before the Ld. Chief Judicial Magistrate- Held- Petitioner cannot take benefit of the fact that he was punished under Section 46(1) of the Act- Superintendent of Jail in the impugned complaint has recorded that the infliction of any punishment by him under Prisons Act will not serve any purpose and require the trial before the Chief Judicial Magistrate under Section 52 of the Act- This prima-facie satisfies the requirement of Section 52 of the Act- Thus, the petitioner cannot be allowed to take any benefit of the factum of warning issued to him as recorded in the daily diary report dated 01.08.2019- Petition dismissed. (Para 10, 12)

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

O R D E R

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

> *"(i) That the complaint dated 30.08.2019 (Annexure P-2) filed by respondent No.3 against the petitioner under Section 52 of Prisons Act, 1894 and proceeding thereto pending before the learned Chief Judicial Magistrate, Sirmour District at Nahan, H.P. may kindly be quashed, since the same has been filed by respondent No.3 as counterblast just to save his skin and the skins of other conspirators when he came to know that on 07.08.2019 the wife of the petitioner has filed complaint to the higher authorities against the illegal acts of respondent No.3 and the wife of the petitioner has also filed Civil Writ Petition on 21.08.2019 before the Hon'ble High Court of Himachal Pradesh against the illegal action of respondent No.3."*

2. Petitioner is convict in more than one cases and is undergoing sentences of imprisonment imposed upon him. He is facing another complaint under Section 52 of the Prisons Act, 1894 (for short 'Act'), which has been forwarded by the Superintendent Jail, Model Central Jail, Nahan to learned Chief Judicial Magistrate, Sirmour District at Nahan alleging inter alia, jail offences committed by the petitioner.

3. A copy of impugned complaint is Annexure P-2. The extract of the said complaint relevant for disposal of this petition is extracted as under:-

> *"3. That on 1st August, 2019 at about 12.00 noon, when counting of prisoners was in progress, convict Prehlad Kumar objected to the procedure and used abusive language to the administration and duty sentry Sh. Tilak Raj, Warder. When he was brought in Munshikhana to produce before higher officer, there also he started mis-behaving and attacked on said sentry by breaking a piece of a wooden chair. The matter was inquired into by the*

Deputy Superintendent Jail in the evening in his office. The duty sentry was cautioned to observe restraint and patience and the convict was also warned to improve his behaviour. The convict didnot mend his behaviour, on the contrary i.e. started levelling false accusations and demanding his transfer to District Jail, Dharamshala or District Jail Chamba. That the overall conduct of convict Prehlad Kumar was not satisfactory as found mentioned in his History Ticket on 05/08/2011, 07/12/2013, 05/03/2014, 16/05/2014 (copy of History Ticket as Annexure 'D'), he is such an indisciplined person that on 05/08/2011, a SIM was recovered from his chappal, Mobile phone and a charger was recovered from his red coloured shoes and 50 grams charas was recovered from a packet of Kurkure brought by him as reported in his History Ticket by the Superintendent District Jail, Dharamshala, H.P. A criminal case was registered against the convict vide FIR No. 163/2011 u/s 20-61-85 of the ND&PS Act, P.S. Dharamshala and he was convicted by the learned Chief Judicial Magistrate, Kangra at Dharamshala on 28th February, 2013 and sentenced for rigorous imprisonment of six months and to pay fine of Rupees 1000/- and in default, simple imprisonment for one month.

4. That on 1st August, 2019 evening convict Prehlad Kumar refused to take meals and said that he is on Hunger strike but on 2nd August, 2019 he consumed tea and bread and accepted fruits from his family on 8th August, 2019.

5. He was referred to the Dr. Y.S. Parmar Medical College, Nahan for check-up and further management on 04/08/2019. Again on 14/08/2019 he was admitted in above Hospital and discharged on 16/08/2019 for managing the health of convict by way of force feeding if required for his survival. After starting the process of forced feeding to the prisoner, he gave up his hunger strike on evening of 23.08.2019. Medical Health Card/documents enclosed as Annexure 'E'.

6. That the convict PrehladKumar is guilty of an offence against Prison's discipline under Section 52 of Prisons Act,1894 read with H.P. Jail Manual Para 549 as he resorted to hunger strike with effect from 01/08/2019."

4. Petitioner has sought the quashing of aforesaid complaint on two grounds. Firstly, that the complaint is nothing, but a counter-blast to representation made by the wife of petitioner to various authorities against the illegal acts of Jail authorities and secondly, that the petitioner had alreadybeen warned on 01.08.2019 regarding his conduct and hence could not be tried and punished again.

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

6. The contents of complaint Annexure P-2 reveal that there are allegations of serious misconduct and jail offences committed by the petitioner on 01.08.2019. It is alleged against him that on 01.08.2019 when counting of prisoners was in progresspetitioner raised objection and used filthy language against the officials on duty. When he was brought to "Munshikhana" and produced before higher officer, there also he misbehaved and even attacked the sentry by breaking a piece of wooden chair. The petitioner was warned. The details of the history ticket of petitioner have also been narrated in the complaint. It has also been alleged that he indulged in hunger strike for his illegal demands and thus was guilty of an offence under Section 52 of the Prison's Act, 1894 read with para 549 of H.P. Jail Manual.

7. Another document on record i.e. daily diary report dated 01.08.2019 annexed as Annexure D-6, also reveals the same conduct of the petitioner and also the factum of warning extended to him.

8. On the strength of aforesaid warning, petitioner contends that the complaint under Section 52 of the Act is bad in law. He submits that once the warning was issued, no complaint could be filed against him.

9. Section 45 of the Act defines the prison offences. The allegations against the petitioner in the impugned complaint covers such offences especially as detailed in sub sections (1) to (3) of Section 45 of the Act. Section 46 of the Act provides for punishment of such offences. One of such

punishment is “formal warning”. The formal warning has been explained to mean a warning personally addressed to a prisoner by the Superintendent and recorded in the punishment-book and on the prisoner’s history-ticket. Section 52 of the Act provides that if any prisoner is guilty of any offence against prison discipline, which in the opinion of the Superintendent, is not adequately punishable by the infliction of any punishment which he has power under the Act to award, he may forward such prisoner to the Court of the District Magistrate or of any Magistrate of the first class having jurisdiction, together with a statement of the circumstances. On such complaint being forwarded, the Magistrate acquires jurisdiction to inquire into and try the charge so brought against the prisoner and upon conviction to sentence him to imprisonment which may extend to one year.

10. In the given facts of the case, petitioner cannot take benefit of the fact that he was punished under Section 46(1) of the Act. It is not his case that the warning was personally addressed to him by the Superintendent and recorded in the punishment-book and also prisoner’s history-ticket. Otherwise also, the Superintendent of Jail in the impugned complaint has recorded that the infliction of any punishment by him under Prisons Act will not serve any purpose and require the trial before the Chief Judicial Magistrate under Section 52 of the Act. This prima-facie satisfies the requirement of Section 52 of the Act. Thus, the petitioner cannot be allowed to take any benefit of the factum of warning issued to him as recorded in the daily diary report dated 01.08.2019.

11. Petitioner has also placed on record a complaint addressed by his wife to various officers against the jail authorities. This complaint is dated 7.8.2019. On the strength of this complaint, it has been contended on behalf of the petitioner that the impugned complaint is an afterthought and counter-blast to the complaint made by the wife of the petitioner.Perusal of the complaint submitted by the wife of the petitioner reveals counter allegations

with respect to incident of 01.08.2019. It is mentioned that the petitioner was mercilessly beaten on 01.08.2019 and had suffered countless injuries. His medical was not conducted. The petitioner apprehended threat to his life. The contents of aforesaid complaint made by the wife of the petitioner can be the defence of petitioner against the allegations levelled against him in the complaint under Section 52 of the Act.

12. In exercise of jurisdiction under Section 482 of Cr.P.C., this Court will not venture into the factual aspect of the matter. The truthfulness of the allegations and counter-allegations are to be proved after due inquiry or trial, as the case may be.

13. In view of the above discussion, there is no merit in the petition and the same is accordingly dismissed, so also the pending miscellaneous application(s) if any.

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

Between:-

AMIT SINGLA SON OF LATE SH. GYAN CHAND, RESIDENT OF HOUSE NUMBER 16, SECTOR 27 A CHANDIGARH.

....PETITIONER.

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATE WITH MR. PRANAY PRATAP SINGH AND MR. DEEPAK SHARMA, ADVOCATES.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH DIRECTOR GENERAL OF POLICE.

2. SH. RINJ LAL SON OF LATE SH. SAINK RAM, RESIDENT OF VILLAGE & POST OFFICE AND TEHSIL NICHAR, DISTRICT KINNAUR.

….RESPONDENTS.

(MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL FOR RESPONDENT NO.1.

MR. DALIP K. SHARMA, ADVOCATE, FOR RESPONDENT NO.2.)

CRIMINAL MISC. PETITION MAIN (ORIGINAL)
U/S 482 CRPC NO. 185 of 2020
Reserved on: 16.9.2022
Decided on:30.9.2022

Code of Criminal Procedure, 1973- Section 482- Quashing of F.I.R.- Held- There is no material on record to hold that the alleged damage to the properties of complainants was on account of any rash or negligent act of petitioner and also that petitioner had used the explosive material with the intention or knowledge to cause destruction of the properties of complainants- Criminal prosecution cannot be launched on mere assumptions and presumptions- Petition allowed. (Para 28, 29)

Cases referred:

Haryana and others vs. Bhajan Lal and Others, 1992 Supp (1) SCC 335;

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

O R D E R

By way of this petition, petitioner has prayed for following substantive relief:-

> *"It is, therefore, respectfully prayed that the present petition may kindly be allowed and the FIR bearing number 11/2019, lodged at Police Station Bhawanagar/Nichar, District Kinnaur, dated 18.02.2019 against the present petitioner and the subsequent proceedings pending before Ld. Chief Judicial Magistrate, Kinnaur bearing No. 44/2019 may kindly be quashed and set aside in the interest of justice and fair play."*

2. Brief facts necessary for adjudication of the petition are that the Executive Engineer, National Highway Division, HPPWD, Rampur Bushahr,

vide award letter dated 09.02.2018, had awarded the work of widening to two lanes with/without Geometrical Improvement in Km. 322/0 to 329/0 of NH-22 (New NH-05) in the State of Himachal Pradesh. Petitioner is Contractor by profession. The work awarded to petitioner was in District Kinnaur, Himachal Pradesh.

3. An FIR bearing No. 11, dated 18.02.2019, was registered at Police Station Bhawanagar, District Kinnaur, H.P., on the complaint of some of the residents of Village and Post Office Nichar, District Kinnaur, H.P. It was alleged in the complaint that the complainants were owners of orchards and agricultural lands near Nathpa. On 10.02.2019 and 11.02.2019, their orchards and fields were extensively damaged due to the blasting work carried out by respondent on the aforesaid dates. There were huge landslides and the complainants had been divested of their valuable orchards and lands. The reason for such damage was alleged to be negligence of Singla Company engaged in widening of National Highway. As per complainants, they had been requesting the contractor to carry out work carefully, but ignoring their requests, excessive and extensive blasting was carried out, resulting in loss to the complainants.

4. Investigation was carried out. Statements of the complainants and other persons, who had suffered losses on account of landslides were recorded under Section 161 of the Code of Criminal Procedure (for short "Cr.P.C.). In addition, evidence with respect to quantum of damages caused to the residents of the area was also collected and in that regard statement of Shri Roshan Lal, Tehsildar Bhawanagar, was also recorded under Section 161 of the Cr.P.C. Additionally, statement under Section 161 of the Cr.P.C., of Gian Chand, Assistant Engineer, National Highway was also recorded to the effect that the widening work of NH-5 was being carried out by Amit Singla (petitioner), in pursuance to the work awarded to him by the department. Blasting was being done. He also handed over to the investigating officer the

records with respect to the issuance of explosive material to the contractor w.e.f. 01.02.2019 to 28.02.2019. It was also recorded in the statement of Gian Chand that had the blasting not been done neither the road would have been blocked nor the land belonging to people had suffered damage. He further opined that the cause of damage appeared to be excessive blasting by the contractor.

5. Investigating agency also took into possession following documents:

(i) Report of Committee constituted to assess losses suffered by the residents of the area;

(ii) The valuation of fruit plants damaged due to landslides;

(iii) Proceedings of the meeting held on 07.12.2018 under the Chairmanship of SDO (Civil), Nichar at Bhawanagar, in respect to the damages suffered by the residents;

(iv) Extract of the register showing issuance of blasting material to the contractor;

(v) Report submitted by the Assistant Engineer, National Highway, Sub Division, HPPWD Nigulsari (at Solding) and;

vi) Permission granted by District Magistrate, Kinnaur on 11.09.2018, authorising use of explosive for the execution of road widening work.

6. On completion of investigation, the investigating agency presented report under Section 173 of the Code of Criminal Procedure (for short "Cr.P.C."), recommending prosecution against petitioner under Sections 336 and 427 of the IPC. It is alleged that petitioner used excessive explosive and thereby induced landslides causing damage to the properties of complainants.

7. I have heard Mr. Sharwan Dogra, learned Senior Advocate with Shri Pranay Pratap Singh, Advocate, for the petitioner and Mr. Desh Raj Thakur, learned Additional Advocate General for the respondent/State and have also gone through the record carefully.

8. Shri Sharwan Dogra, learned Senior Advocate has contended that there was no allegation that petitioner was present on spot at the time of accident. As per him, in absence of petitioner on spot, no act of rashness and negligence could be attributed to him as he was not directly responsible for the alleged damage. Shri Dogra further contended that there is no legal evidence on record to suggest even remote connection of petitioner with the alleged incident. On the strength of such submission, he further submitted that the cognizance taken by learned Chief Judicial Magistrate, Kinnaur at Reckong Peo, H.P. in Case No. 44 of 2019, is bad in law.

9. On the other hand, Shri Desh Raj Thakur, learned Additional Advocate General, has contended that there is sufficient material on record to proceed against the petitioner. He submitted that the petitioner was the contractor and overall Incharge of the work and he cannot evade his responsibility.

10. The perusal of the investigation record and report under Section 173 of the Cr.P.C. submitted by the investigating agency, reveal that the reliance has been placed on the facts disclosed by complainants and other residents of the area who have alleged damage to their orchards and fields.

11. From the statements of all the witnesses recorded under Section 161 Cr.P.C., it can be inferred that petitioner was awarded the work of widening the NH-5 between Km 322/0 to 329/0. Explosive was being used to blast the hard strata. According to damage sufferers, the damage to their properties was caused on account of landslides induced by excessive use of explosive.

12. Prosecution of petitioner is being done for offences under sections 336 and 427 IPC.

13. Section 336 of the IPC reads as under:-

> *"**336. Act endangering life or personal safety of others.**—Whoever does any act so rashly or*

negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both."

14. Section 427 of the IPC reads as under: -

*"**427. Mischief Causing Damage to the amount of fifty rupees.**-Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

15. Mischief has been defined as under:-

*"**425. Mischief.**-*Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief*".*"

16. It is settled that for trying a person for an offence, mere existence of prima facie material is sufficient. In other words, the material which can be looked into at the initial stage of prosecution is the evidence collected by the investigating agency. If on perusal of the evidence collected by the investigation agency, prima facie involvement of a person in the commission of offence is made out, he is liable for prosecution.

17. In State of ***Haryana and others vs. Bhajan Lal and Others, 1992 Supp (1) SCC 335***, following categories of cases were mentioned by way of illustrations wherein the High Court may exercise the powers under Section 226 of the Constitution or the inherent powers under Section 482 of the Cr.P.C. to prevent abuse of process of Court or otherwise to secure the ends of justice:-

"(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the ac- cused;

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) ***Where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused****;*

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

18. In order to assess the rival contentions in the instant case, the category-3 as noticed above needs to be kept in mind.

19. Thus, the question arises whether from the material placed on record by prosecution prima facie involvement of petitioner in commission of alleged offences is made our?

20. Prosecution does not allege that work on spot was being executed in presence of or under direct supervision of the petitioner. It is also not alleged that petitioner was present on spot on 10.2.2019 and/or 11.2.2019. Another factor which needs to be noticed is that the petitioner was engaged in execution of work authorised by the Executive Engineer, National Highway. There is also nothing on record to suggest that the work was not being executed in the manner it ought to have been.

21. Further, the material on record itself suggests that petitioner was authorised to use explosives for breaking the hard strata. District Magistrate Kinnaur had issued permission in this regard, which has been made part of report under section 173 Cr.P.C. In fact, the explosive material was being supplied to the petitioner by the department itself. The quantity of explosives issued to petitioner by the department was being recorded in the register maintained for the purpose, which has also been relied upon by the prosecution.

22. No evidence has been collected by the investigating agency to suggest that any complaint was made by NH authorities regarding use of more than required explosive by the petitioner. Similarly, prosecution has not relied upon any expert opinion so as to suggest at least prima facie that the cause of landslides was excessive use of explosives.

23. Except for the opinion rendered by the sufferers of damage to their properties and a vague statement of Shri Gian Chand , Assistant Engineer to the effect that damage appeared to be the result of excessive blasting there is no expert opinion to substantiate the allegations levelled by the prosecution. No evidence has been collected to prove the allegations of rashness and negligence on part of petitioner.

24. The commission of rash or negligent act is *sine qua non* for attracting section 336 IPC. To attract the mischief of rashness or negligence against a person, such act of omission or commission must be attributable to him which sans due and proper care or should be so reckless which is not expected from a prudent person in given circumstances. Further, to attract the criminal liability, there has to be some tangible material to infer such act of omission or commission.

25. The facts of the case do not suggest existence of any material sufficient to infer rashness or negligence on part of petitioner. As noticed above, there is no material on record to suggest that the there was excessive use of explosive or even if assumed to be so, was with the knowledge and consent of the petitioner. Similarly, there is nothing on record to deduce that the work was not being executed as per site conditions.

26. In addition to above the record also does not suggest that damage to the properties of complainants was direct result of a rash or negligent act of the petitioner or was the proximate and efficient cause of such damage without the intervention of another's negligence.

27. For attracting section 427 IPC it is necessary to attribute requisite intention or knowledge, to the accused, to cause destruction of any property or such change in any property or in the situation thereof as destroys or diminishes its value or utility. For attribution of requisite intention or knowledge there has to be collection of some tangible material. Once it is found that there is no material to suggest even prima facie that there was excessive use of explosive material or such use had triggered the landslides causing damage to the properties of complainants and further that even if such use was presumed, it was with the knowledge or consent of petitioner, there is no difficulty to hold that the evidence to infer requisite intention or knowledge is also clearly deficient.

28. Keeping in view the entirety of circumstances, I am of the considered view that the material on record is not sufficient to hold that the alleged damage to the properties of complainants was on account of any rash or negligent act of petitioner and also that petitioner had used the explosive material with the intention or knowledge to cause destruction of the properties of complainants or to cause such changes thereto so has to diminish its value or utility.

29. Criminal prosecution cannot be launched on mere assumptions and presumptions.

30. In view of the above discussion, the instant petition is allowed and the proceedings against the petitioner initiated in pursuance to FIR No. 11/2019, dated 18.02.2019, under Sections 336, and 427 of the IPC and consequent criminal proceedings pending before learned Chief Judicial Magistrate, Kinnaur at Reckong Peo, H.P., in Case No. 44/2019 are ordered to be quashed.

31. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Between:-

AMIT SINGLA SON OF LATE SH. GYAN CHAND, RESIDENT OF HOUSE NUMBER 16, SECTOR 27 A CHANDIGARH.

....PETITIONER.

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATE WITH MR. PRANAY PRATAP SINGH AND MR. DEEPAK SHARMA, ADVOCATES.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH DIRECTOR GENERAL OF POLICE.

2. SH. INDER DASS SON OF SH. SANGYA RAM, RESIDENT OF VILLAGE POOJE, POST OFFICE AND TEHSIL NICHAR, DISTRICT KINNAUR.

....RESPONDENTS.

(MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL FOR RESPONDENT NO.1.

MR. KUSH SHARMA, ADVOCATE, FOR RESPONDENT NO.2.)

CRIMINAL MISC. PETITION MAIN (ORIGINAL)
U/S 482 CRPC
NO. 190 of 2020
Reserved on:16.9.2022
Decided on: 30.9.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860-** Section 279, 304A- Quashing of F.I.R.- Held- Material on record is not sufficient to hold that the death of Ved Prakash was on account of any rash or negligent act of petitioner and also that his death was direct or proximate result of the alleged rash or negligent act of the petitioner- Petition allowed. (Para 24)

Cases referred:

Ambalal D. Bhatt vs. The State of Gujarat (1972)3 SCC 525;
Haryana and others vs. Bhajan Lal and Others, 1992 Supp (1) SCC 335;
Kurban Hussein Mohamedalli Rangawalla vs. State of Maharashtra, AIR 1965 SC 1616;

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

O R D E R

By way of this petition, petitioner has prayed for following substantive relief:-

> *"It is, therefore, respectfully prayed that the present petition may kindly be allowed and the FIR bearing*

number 22/2019, lodged at Police Station Bhawanagar/Nichar, District Kinnaur, dated 01.04.2019 against the present petitioner and the subsequent proceedings pending before Ld. Sessions Judge, Kinnaur bearing No. 62/2019 may kindly be quashed and set aside in the interest of justice and fair play."

2. Brief facts necessary for adjudication of the petition are that the Executive Engineer, National Highway Division, HPPWD, Rampur Bushehr, vide award letter dated 09.02.2018 had awarded, to the petitioner, the work of widening to two lanes with/without Geometrical Improvement in Km. 322/0 to 329/0 of NH-22 (New NH-05) in the State of Himachal Pradesh. Petitioner is Contractor by profession.

3. An FIR bearing No. 22, dated 01.04.2019, was registered at Police Station Bhawanagar, District Kinnaur, H.P. at 7.40 P.M., at the instance of one Inder Dass. It was recorded in the FIR that on 01.04.2019, complainant Inder Dass was on his way from Bhawanagar to Nichar in his personal car. He reached near place Latuksha at about 3.00 P.M and had to stop his vehicle as the widening work of the road by Amit Singla Company was in progress and many persons with their vehicles were waiting for road to open. A poclain machine was at work to clear the road for traffic. In the meanwhile, a person named Ved Prakash alighted from Vehicle No. HP-41A-0007, which was parked adjacent to the vehicle of the complainant, and after waiting for some time, Ved Prakash went towards poclain machine on the pretext that he would evaluate the situation. Ved Prakash reached near poclain machine. Dust was in the air and when the dust settled, it was noticed that operator of poclain machine was lifting Ved Prakash, who had fallen on ground and had received injury on stomach. Ved Prakash had become unconscious due to grievous injury. Ramesh Kumar, who was another occupant of the car from which Ved Prakash had alighted also came on spot. Ved Prakash was taken to Bhawanagar Hospital. It was alleged that

the accident had taken place due to negligence of the operator of poclain machine and the Supervisor of Amit Singla company.

4. Police carried out the investigation and found that Fateh Ram was operating the poclain machine at the time of accident and Sanjeev Kumar was supervising the work on behalf of the contractor. Police found that Fateh Ram did not possess licence to operate the poclain machine. In fact, one, Happy was the operator of the machine who had valid licence, but was not available on spot at the time of accident. It was also discovered during investigation that poclain machine belonged to one Narender Kumar, who had given the said machine on hire to Amit Singla for operation. As per terms of the agreement between Narender Kumar and Amit Singla, operator was to be provided by owner of the machine.

5. On completion of investigation, the investigating agency presented report under Section 173 of the Code of Criminal Procedure (for short "Cr.P.C."), recommending prosecution against Fateh Ram, Sanjeev Kumar and petitioner (Amit Singla) under Sections 336, 337, 304-A of the IPC and Sections 180 and 181 of the Motor Vehicles Act. It was alleged that firstly, poclain machine was being operated by a person who did not have licence to operate the machine and secondly no preventive steps had been taken on spot to stop the persons from approaching the area of operation of poclain machine.

6. I have heard Mr. Sharwan Dogra, Senior Advocate with Shri Pranay Pratap Singh, Advocate, for the petitioner and Mr. Desh Raj Thakur, learned Additional Advocate General for the respondent/State and have also gone through the record carefully.

7. Shri Sharwan Dogra, learned Senior Advocate has contended that admittedly petitioner was not present on spot at the time of accident. As per him, in absence of petitioner on spot, no act of rashness and negligence could be attributed to him as he was not directly responsible for the

unfortunate accident. Shri Dogra further contended that there is no legal evidence on record to suggest even remote connection of petitioner with the alleged incident. On the strength of such submission, he further submitted that the cognizance taken by learned Chief Judicial Magistrate, Kinnaur at Reckong Peo, H.P. in Case No. 61-2 of 2019, is bad in law.

8. On the other hand, Shri Desh Raj Thakur, learned Additional Advocate General, has contended that there is sufficient material on record to proceed against the petitioner. He submitted that the petitioner was the contractor and overall incharge of the work. It was for the petitioner to have provided adequate means to stop people going near the operating machine. He also contended that since the poclain machine was being allowed to be operated by a person not having licence, petitioner cannot evade his responsibility.

9. The perusal of the investigation record and report under Section 173 of the Cr.P.C., submitted by the investigating agency, reveal that the reliance has been placed on the facts disclosed by complainant Inder Das, Ramesh Kumar (co-occupant of vehicle No. HP-41A-0007 with deceased Ved Prakash), Shankar Singh (brother of deceased), Sher Singh (eye witness), Narender Kumar (owner of poclain machine) and Happy (licenced operator of poclain machine). In addition, the documents i.e. award letter issued by Executive Engineer National Highway in favour of Amit Singla, MLC and postmortem report of the deceased, agreement by virtue of which Narender Kumar had given the poclain machine on hire to Amit Singla, Photographs, mechanical report of the poclain machine etc., have been relied.

10. From the statements of all the eye witnesses recorded under Section 161 Cr.P.C., it can be inferred that the poclain machine was operating on the road near place Latuksha. The movement of vehicles had stopped on either side. Vehicle No. HP-41A-0007 had also stopped. Deceased had alighted from the vehicle and walked towards the poclain machine. The

machine was at work. The deceased Ved Prakash suffered injury on spot which proved fatal. What is alleged by all these witnesses is that had proper preventive steps been taken to restrict the movement of general public towards the area of operation of poclain machine, the accident would have been avoided. It was on account of negligence of the contractor and his staff that no such preventive measures were taken.

11. Further allegation of the prosecution is that accused Fateh Ram was allowed to operate the poclain machine, who was not having licence. The statements of Narender Kumar and Happy have been recorded under Section 161 of the Cr.P.C., to the effect that they had specifically instructed the Contractor and his staff to not to allow the operation of machine by anyone except Happy, who had licence to operate the machine.

12. It is not in dispute that the petitioner was not on spot at the time of accident. It is also not alleged against him that Fateh Ram was allowed to operate the machine with his consent or in other words, there is no material to suggest that petitioner was having knowledge about the operation of machine by a person not having licence. The material on record also suggest that the vehicular traffic had stopped due to operation of poclain machine for clearing the debris. It is, therefore, clearly inferable that whosoever was approaching the spot, at relevant time, was stopping the vehicle, noticing the ongoing work. Without going into the fact whether any sign boards etc., were placed on spot, evidently the magnitude of work was such that it was otherwise being noticed by passersby as suggested by the fact that vehicles on either side had stopped. Another factor which needs notice is that the petitioner was engaged in execution of work authorised by the Executive Engineer, National Highway. There is also nothing on record to suggest that the work was not being executed in the manner it ought to have been.

13. Now, in the aforesaid facts, the question arises whether the petitioner can be tried for offences under Sections 336, 337, 304-A of the IPC?

14. It is settled that for trying a person for an offence, mere existence of prima facie material is sufficient. In other words, the material which can be looked into at the initial stage of prosecution is the evidence collected by the investigating agency. If on perusal of the evidence collected by the investigation agency, prima facie involvement of a person in the commission of offence is made out, he is liable for prosecution.

15. In State of ***Haryana and others vs. Bhajan Lal and Others, 1992 Supp (1) SCC 335***, following categories of cases were mentioned by way of illustrations wherein the High Court may exercise the powers under Section 226 of the Constitution or the inherent powers under Section 482 of the Cr.P.C. to prevent abuse of process of Court or otherwise to secure the ends of justice:-

> *"(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the ac- cused;*
> *(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;*
> *(3)* ***Where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused****;*
> *(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;*
> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just*

conclusion that there is sufficient ground for proceeding against the accused;
(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;
(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

16. In order to assess the rival contentions in the instant case, the category-3 as noticed above needs to be kept in mind.

17. Section 336 of the IPC reads as under:-

> *"**336. Act endangering life or personal safety of others.***—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both."

18. Section 337 of the IPC reads as under: -

> *"**337. Causing hurt by act endangering life or personal safety of others***—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

18. Section 304-A of the IPC reads as under: -

> *"**304-A.** **Causing death by negligence.** --Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

19. The commission of rash or negligent act is *sine qua non* for attracting sections 336, 337 and 304-A IPC. To attract the mischief of rashness or negligence against a person, such act of omission or commission must be attributable to him which sans due and proper care or should be so reckless which is not expected from a prudent person in given circumstances. Further, to attract the criminal liability, there has to be some tangible material to infer such act of omission or commission.

20. The facts of the case do not suggest existence of any material sufficient to infer rashness or negligence on part of petitioner. As noticed above, there is no material on record to suggest that the machine was being operated by an unauthorised person with the consent or knowledge of the petitioner. Similarly, there is nothing on record to infer that as per site condition, work under execution was not ordinarily conspicuous to the passersby. Merely, because the witnesses have alleged that the proper sign board was not there will not be sufficient to attribute requisite rashness or negligence to the petitioner.

21. In addition to above the record also does not suggest that death of Ved Parkash was direct result of a rash or negligent act of the petitioner or was the proximate and efficient cause of his death without the intervention of another's negligence In ***Kurban Hussein Mohamedalli Rangawalla vs. State of Maharashtra,*** reported in ***AIR 1965 SC 1616***, the Hon'ble Supreme Court has held as under:-

> *"3. We shall first take up S. 304-A which runs thus :-*

"Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The main contention of the appellant is that he was not present when the fire broke out resulting in the death of seven workmen by burning and it cannot therefore be said that he caused the death of these seven persons by doing any rash or negligent act. The view taken by the Magistrate on the other hand which appears to have been accepted by the High Court was that as the appellant allowed the manufacture of wet paints in the same room where varnish and turpentine were stored and the fire resulted because of the proximity of the burners to the stored varnish and turpentine, he must be held responsible for the death of the seven workmen who were burnt in the fire. We are -however of opinion that this view of the Magistrate is not correct. The mere fact that the appellant allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it might be a negligent act, would not be enough to make the appellant responsible for the fire which broke out. The cause of the fire was not merely the presence of burners in the room in which varnish and turpentine were stored, though this circumstance was indirectly responsible for the fire which broke out. But what S. 304-A requires is causing of death by doing any rash or negligent act, and this means that death must be the direct or proximate result of the rash or negligent act. It appears that the direct or proximate cause of the fire which resulted in seven deaths was the act of Hatim. It seems to us clear that Hatim was apparently in a hurry and therefore he did not perhaps allow the rosin to cool down sufficiently and poured turpentine too quickly. The evidence of the expert is that the process of adding turpentine to melted rosin is a hazardous process and the proportion of froth would depend upon the quantity of turpentine added. The expert also stated that if turpentine is not slowly added to bitumen and rosin before it is cooled down to a certain temperature, such fire is likely to break out. It seems therefore that as turpentine was

being added at about closing time, Hatim was not as careful as he should have been and probably did not wait sufficiently for bitumen or rosin to cool down and added turpentine too quickly. The expert has stated that bitumen or rosin melts at 300 degree F and if turpentine is added at that temperature, it will catch fire. The flash point of turpentine varies from 76 to 110 degree F. Therefore the cooling must be brought down, according to the expert, to below 76 degree F to avoid fire. In any case even if that is not done, turpentine has to be added slowly so that there may not be too much frothing. Clearly therefore the fire broke out because bitumen or rosin was not allowed to cool down sufficiently and turpentine was added too quickly in view of the fact that the process was performed at closing time. It is clearly the negligence of Hatim which was the direct or proximate cause of the fire breaking out, though the fact that burners were kept in the same room in which turpentine, and vamish were stored was indirectly responsible for the fire breaking out and spreading so quickly. Even so in order that a person may be guilty under s. 304-A, the rash or negligent act should be the direct or proximate cause of the death. In the present case it was Hatim's act which was the direct and proximate cause of the fire breaking out with the consequence that seven persons were burnt to death; the act of the appellant in allowing turpentine and varnish being stored at a short distance was only an indirect factor in the breaking out of fire.

4. We may in this connection refer to Emperor v. Omkar Rampratap, 4 Bom LR 679, where Sir Lawrence Jenkins had to interpret S. 304-A and observed as follows --

"To impose criminal liability under S. 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the cause causans; it is not enough that it may have been the cause sine qua non." This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of S. 304-A. It is not necessary to refer to

other decisions, for as we have already said this view has been generally accepted. Therefore the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under S. 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was therefore in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence. The appellant must therefore be acquitted of the offence under S. 304-A."

22. The same reiteration of law has been made by the Hon'ble Supreme Court in ***Ambalal D. Bhatt versus The State of Gujarat*** reported in ***(1972)3 SCC 525*** which reads as under:-

"10. It appears to us that in a prosecution for an offence under Section 304A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death. If that were so, the acquittal of the appellant for contravention of the provisions of the Act and the Rules would itself have been an answer and we would have then examined to what extent additional evidence of his acquittal would have to be allowed, but since that is not the criteria, we have to determine whether the appellant's act in giving only one batch number to all the four lots manufactured on 12-11-62 in preparing batch No. 211105 was the cause of deaths and whether those deaths were a direct consequence of the appellants' act, that is, whether the appellant's act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another's negligence. As observed by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap (1902) 4 Bom LR 679 the act causing the deaths "must be the cause causans; It is not enough that it may have been

> the causa sine qua non". This view has been adopted by this Court in several decisions. In Kurban Hussein Moham-medali Rangwala v. State of Maharashtra , the accused who had manufactured wet paints without a licence was acquitted of the charge under Section 304A because it was held that the mere fact that he allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it would be a negligent act, would not be enough to make the accused responsible for the fire which broke out. The cause of the fire was not merely the presence of the burners within the room in which varnish and turpentine were stored though this circumstance was indirectly responsible for the fire which broke out, but was also due to the overflowing of froth out of the barrels. In Suieman Rahiman Mulani v. State of Maharashtra the accused who was driving a car only with a learner's licence without a trainer by his side, had injured a person. It was held that that by itself was not sufficient to warrant a conviction under Section 304A. It would be different if it can be established as in the case of Bhalchandra v. State of Maharashtra that deaths and injuries caused by the contravention of a prohibition in respect of the substances which are highly dangerous as in the case of explosives in a cracker factory which are considered to be of a highly hazardous and dangerous nature having sensitive composition where even friction or percussion could cause an explosion, that contravention would be the causa causans.”

23. From the above exposition, it is clear that to attract prosecution for offence under Section 304-A of the IPC, it has to be established at least prima facie that death was result of rash or negligent act or that any such act was proximate and sufficient to cause death. Similar principle will apply to attract prosecution for offences under Sections 336 and 337 of the IPC.

24. Keeping in view the entirety of circumstances, I am of the considered view that the material on record is not sufficient to hold that the death of Ved Prakash was on account of any rash or negligent act of petitioner and also that his death was direct or proximate result of the alleged rash or

negligent act of the petitioner. The mischief of Sections 180 and 181 of the Motor Vehicles Act will not apply against the petitioner in the given facts and circumstances of the case.

25. In view of the above discussion, the instant petition is allowed and the proceedings against the petitioner initiated in pursuance to FIR No. 22/2019, dated 01.04.2019, under Section 336, 337 and 304-A of the IPC and consequent cognizance order dated 11.09.2019 passed by learned Chief Judicial Magistrate, Kinnaur at Reckong Peo, H.P., in Case No. 61-2 of 2019 qua the petitioner are ordered to be quashed and set aside.

26. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Between:-

PREM DUTT SON OF SH. BABU RAM,
AGE 31 YEARS, RESIDENT OF VILLAGE,
LANA KHURD, P.O. THAKUR DWARA,
TEHSIL PACHHAD, DISTRICT SIRMOUR,
H.P.

...PETITIONER

(BY SH. ASHOK K TYAGI,ADVOCATE)

AND

STATE OF HIMACHAL PRADESH ...RESPONDENT.

(BY SH.DESH RAJ THAKUR,
ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
No. 1814 of 2022
Reserved on: 29.08.2022
Decided on: 31.08.2022

Code of Criminal Procedure, 1973- Section 439- **Protection of Children from Sexual Offences Act, 2012**- Section 6- **Indian Penal Code, 1860**- Sections 363, 366A and 376- Bail- Held- Pre-trial incarceration is not the rule- No past criminal history of the petitioner- Charges yet to be framed- Bail granted with conditions. (Para 12)

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

O R D E R

Petitioner is accused in case registered vide FIR No. 23 of 2021 dated 21.04.2021 at Police Station, Pachhad, District Sirmaur, H.P. under Sections 363, 366-A, 376of IPC and Section 6 of the POCSO Act, 2012.

2. The case has been registered against the petitioner on the basis of written complaint submitted by Smt.PushpaDevi, mother of the victim on 21.04.2021 at Police Station, Pachhad, District Sirmaur, H.P. It was alleged that the complainant had three children, the eldest was a daughter aged 17 years, younger to her, the victim was 16 years and youngest was the son. All three children were studying in GSSS, Rama. The petitioner had acquaintance with the husband of the complainant. In November, 2020, the petitioner had kidnapped her daughter (victim) and after three days had left her with them. On 17.4.2021, the complainant alighted with the victim from bus at Sarahan and victim fled after dodging her mother. The entire family with the help of others searched for the victim for many days, but could not trace her. Accordingly, on 21.4.2021 the complaint was lodged.

3. During investigation the petitioner was traced at Chirgaon on 31.10.2021 through his mobile phone location. Accordingly, the police recovered the victim from the company of the petitioner as they were staying in Chirgaon in the house of one Dev Raj. On medical examination of the victim, she was found pregnant. The fetus was aborted. Necessary samples were preserved. On DNA profiling, the victim and petitioner were found to be

biological parents of the fetus. The age of the victim was said to be 15 years 9 months and 13 days on the date of offence.

4. Petitioner was arrested on 06.11.2021, after initial police remand, he is in judicial custody.

5. By way of instant petition, a prayer has been made to release the petitioner on bail under Section 439 Cr.P.C. on the ground that the petitioner is innocent. In fact, the petitioner had married the victim, who according to petitioner, was major. Petitioner is stated to be permanent resident of Village Lana Khurd, P.O. Thakur Dwara, Tehsil Pachhad, District Sirmaur, H.P. Petitioner has undertaken to abide by the conditions as may be imposed against him.

6. I have heard Mr. Ashok K. Tyagi, learned counsel for the petitioner and Mr. Desh Raj Thakur, learned Additional Advocate General for the respondent and have also perused the contents of the status report.

7. Petitioner has annexed a copy of statement of victim recorded under Section 164 Cr.P.C. during investigation of the case. Copies of statements of the victim and her mother complainant recorded during the trial of the case, have also been placed on record.

8. Learned counsel for the petitioner has contended that there is no legal basis for determining the age of victim at 15 years 9 months. According to him, the victim is major. The basis of her age being 15 years 9 months, according to prosecution, is the entry in Aadhar Card as also the school record. It has been submitted that both these entries have been made at the instance of her parents, whereas, there is no authentic proof as to her date of birth. Learned counsel for the petitioner has drawn the attention of this Court to the statements made by the mother of the victim in the Court, wherein she stated that her marriage was solemnized prior to the year 2000. The victim was her eldest daughter and was born after about one year of the marriage.

On such basis, learned counsel for the petitioner submits that there is a serious dispute as to the age of the victim.

9. While deciding the bail application, this Court will not minutely scan the evidence collected by the Investigating Agency or the statements recorded before the learned trial Court, however, such material can always be looked into in order to assess the seriousness and gravity of allegations against the bail petitioner.

10. Coming to the facts of the case, the victim was recovered from the company of the petitioner after about six months. The victim has nowhere alleged that petitioner had used force or deceit or any other alike means to take her with him. POCSO Act does not impose any special prohibition for grant of bail in offence(s) committed under the Act. Rather, Section 31 thereof makes provisions of Code of Criminal Procedure including provisions as to bail and bonds applicable to the proceedings therein.

11. The Hon'ble Supreme Court in ***Cr. Appeal No. 1391 of 2022*** (Arising out of SLP (Crl.) No. 9317 of 2021) titled ***X (Minor)*** vs. ***The State of Jharkhand and another***, decided on 21.02.2022 refused to accept 'love affair' as relevant consideration for grant of bail in POCSO offences keeping in view the age of victim in that case which was only 13 years. In the instant case, however, there is a serious question mark on the age of the victim.

12. Petitioner is in custody since 06.11.2021. The trial is going to take some time before conclusion. The charges against petitioner are yet to be proved. Pre-trial incarceration is not the rule. No past criminal history has been attributed to the petitioner. Further detention of the petitioner in judicial custody will not serve any fruitful purpose.

13. Petitioner is permanent resident of Village Lana Khurd, P.O. Thakur Dwara, Tehsil Pachhad, District Sirmaur, H.P. and the Respondent-State has not expressed any apprehension regarding his fleeing from the course of justice and adversely affecting the trial. In any case, the petitioner

can be put to terms for the purposes of safe, secure and unobstructed completion of trial.

14. In the peculiar facts and circumstances of the case, the petition is allowed and the petitioner is ordered to be released on bail in case registered vide FIR No. 23 of 2021 dated 21.04.2021 at Police Station, Pachhad, District Sirmaur, H.P. under Sections 363, 366-A, 376 of IPC and Section 6 of the POCSO Act, on his furnishing personal bond in the sum of Rs.25,000/- (Rs. Twenty FiveThousand) with one surety in the like amount to the satisfaction of learned Additional Sessions Judge, Fast Track Special Court (POCSO), Sirmaur District at Nahan, 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 samein 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) That the petitioner shall not leave the territory of India without express leave of the Trial Court till completion of the trial.

15. Any observation made hereinabove shall not be taken asan expression of opinion on the merits of the case and the trial Court shalldecide the matter uninfluenced by any observation made hereinabove. The petition is disposed of accordingly.

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

Between:

VIKRAM, AGED ABOUT 21 YEARS, SON OF SH. VIRENDER, RESIDENT OF VILLAGE RUKHI, TEHSIL GOHANA, DISTRICT SONIPAT, HARYANA, PRESENTLY LODGED IN JAIL DISTRICT JAIL SHIMLA (KAITHU).

….PETITIONER

(MR. RAHUL JASWAL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

….RESPONDENT

(MR. SUDHIR BHATNAGAR AND MR. NARENDER GULERIA, ADDITIONAL ADVOCATES GENERAL, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR THE STATE.)

CRIMINAL MISC. PETITION (MAIN)
No.1866 of 2022
Decided on: 07.09.2022

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 and 29- Bail- 1.252 Kg. of charas- Held- Bail is not to be withheld as a punishment- Normal rule is of bail and not jail- Bail granted with conditions. (Para 7)

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 Vikram, who is behind the bars since 27.2.2022, has approached this court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail, in case FIR No. 50/22 dated

27.2.2022, registered at Police Station Boileuganj, District Shimla, Himachal Pradesh, under Sections 20 and 29 of the NDPS Act.

2. Pursuant to order dated 24.8.2022, respondent-state has filed the status report. ASI Suresh Kumar, PS West, Shimla, has also come present with the records. Records perused and returned.

3. Close scrutiny of record/status report reveals that on 27.2.2022, police party present at Totu bifurcation near Tara Devi, stopped bus bearing registration No. HR-68-A-9619 for checking. While luggage of the passengers of the bus was being checked, two persons sitting at seat Nos. 33 and 34 got perplexed and as such, police after having associated driver and conductor of the bus deemed it necessary to carry out personal search of the occupants of seats No. 33 and 34 as well as their luggage. Present bail petitioner was sitting at seat No.34 and there was one rucksack/bag on his lap. Though nothing was recovered from the rucksack of the present bail petitioner, but 1.252 kg of charas came to be recovered from the bag of occupant of seat No. 33 namely Nitin Kumar. Since both the petitioner and co-accused Nitin Kumar were sitting together at seats No. 33 and 34 and they both had gone to Matiana, present bail petitioner also came to be named in the FIR as detailed herein above. Since investigation in the case is complete and nothing remains to be recovered from the present bail petitioner, he has approached this Court in the instant proceedings, praying therein for grant of regular bail.

4. Mr. Narender Guleria, learned Additional Advocate General while fairly admitting factum with regard to filing of the challan in the competent court of law contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency. Mr. Guleria further submits that though nothing came to be recovered from the conscious possession of the present bail petitioner, but once it stands established that he alongwith co-accused Nitin, from whose bag, commercial quantity of

contraband came to be recovered had gone to Matiana for sale and purchase of charas, it cannot be said that he has been falsely implicated. Mr. Guleria, further submits that present bail petitioner had prior knowledge and intimation with regard to sale and purchase of the contraband by the co-accused Nitin from person namely Nikku Ram and as such, he has been rightly booked under Section 29 of the Ac. Lastly Mr. Guleria submits that in the event of petitioner's being enlarged on bail, he may not only flee from justice, but may indulge in such like activities again and as such, this court may dismiss the bail petition filed by the petitioner herein.

5. Having heard learned counsel for the parties and perused material available on this record, this Court finds that though present bail petitioner was travelling alongwith the co-accused Nitin Kumar in Haryana Rodways bus, but as per own case of the prosecution, commercial quantity of contraband came to be recovered from the bag of co-accused Nitin Kumar. It is not in dispute that no contraband ever came to be recovered from the person of the present bail petitioner as well as luggage of him. Bail petitioner has been named in the FIR for the reason that he was sitting at Sr. No. 34 with the co-accused Nitin Kumar from whose conscious possession, commercial quantity of contraband came to be recovered and both the accused were related to each other. Though, Mr. Guleria, learned Additional Advocate General argued that present bail petitioner had intimation/knowledge with regard to sale /purchase and possession of the contraband by the co-accused Nitin Kumar, but such fact needs to be proved in accordance with law. Mere travelling with co-accused, from whose conscious possession, contraband came to be recovered that too in a public transport vehicle i.e. bus, cannot be a ground to conclude the complicity, if any, of the co-passenger, especially when contraband came to be recovered from the bag of person sitting next to the seat of the present bail petitioner. No doubt, as per the investigation, petitioner and co-accused Nitin Kumar are

cousins, but such fact may not be sufficient to conclude the complicity of the bail petitioner in the alleged commission of the offence, rather to prove guilt, if any, of the present bail petitioner, prosecution is under obligation to lead cogent and convincing evidence to the effect that present bail petitioner had knowledge with regard to plan of the co-accused to buy contraband from the person namely Nikku Ram at Matiana. Though case at hand is to be decided by the court below in the totality of facts/evidence collected on record by the prosecution, but keeping in view the aforesaid glaring aspect of the matter, there appears to be no reason for this court to curtail the freedom of the bail petitioner for indefinite period, especially when he has already suffered for more than six months.

6. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time guilt, if any, of his/her is not proved in accordance with law and as such, this Court sees no reason to curtail the freedom of the bail petitioner indefinitely during trial. No doubt in the case at hand, rigors of Section 37 of the Act are attracted, but careful perusal of Section 37 of the Act, nowhere reveals that there is a complete bar/prohibition for the court to consider prayer for grant of regular bail in cases involving the commercial quantity, rather in such like cases, court after having afforded opportunity of being heard to the public prosecutor can always proceed to grant bail, in case it has reason to presume that the bail petitioner has been falsely implicated and in the event of his enlargement on bail, he may not flee from justice. 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.

7. 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.

8. 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."

9. 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."

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. 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).

12. 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.

13. 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.

14. 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.

15. 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.

16. The petitioner is permitted to produce copy of order downloaded from the High Court Website and the trial court shall not insist for certified

copy of the order, however, it may verify the order from the High Court website or otherwise.

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

Between:-
SH. BARKAT ALI SON OF SH. IMAM HUSSAIN,
RESIDENT OF VILLAGE AND POST OFFICE
KATOLA, TEHSIL SADAR, DISTRICT MANDI, H.P.

...PETITIONER

(BY MR.M.A. KHAN, SENIOR ADVOCATE
WITH MR. AZMAT HAYAT KHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

...RESPONDENT

(BY MR. ARVIND SHARMA, ADDL. ADVOCATE GENERAL)

CRIMINAL REVISION
NO. 25 OF 2013
Reserved on: 22.09.2022
Decided on: 30.09.2022

Code of Criminal Procedure, 1973- Appeal- Indian Penal Code, 1860- Section 379**- Indian Forest Act, 1927**- Sections 41 and 42- Petitioner has assailed the judgment of Ld. Sessions Judge whereby the judgment and sentence passed by Ld. Trial Court for the commission of offence under Section 379 IPC and Sections 41 and 42 of Indian Forest Act was affirmed- Held- Non-examination of the Investigating Officer- The prosecution carries a heavy burden to prove the guilt of accused beyond all reasonable doubts- It is the duty of the prosecution and especially of the I.O. of the case to satisfy the conscience of the Court by negating the chances of suspicion arising in the facts of the case- In the instant case, prosecution had failed to discharge the requisite burden- Material contradictions in the statement of witnesses- No effort made to associate independent witness- Appeal allowed. (Para 12, 15, 18, 19)

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

O R D E R

By way of instant petition, petitioner has assailed the judgment dated 16.11.2012 passed by learned Sessions Judge, Kullu, H.P. in Criminal Appeal No. 97 of 2012(27 of 11) whereby the judgment and sentence passed by learned Chief Judicial Magistrate, Lahaul&Spiti, Camp at Kullu on 01.04.2011 in case No. 193-I/2006 was affirmed.

2. The petitioner was charged for commission of offences under Section 379 IPC and Sections 41 and 42 of the Indian Forest Act. The allegation against the petitioner was that on 19.05.2006 he was illicitly transporting fourteen sleepers of Deodar wood without valid pass or permit and was apprehended at Forest Check Post, Larji at about 4.00 A.M. PW-3 Bansi Ram was posted as Block Officer (for short 'BO') at Forest Check Post, Larji. He had informed the Divisional Forest Officer (for short 'DFO'), Banjar, who further informed the police. An investigating team of police reached the spot. The vehicle bearing No. HP-02-0694 alongwith timber was seized vide memo Ext.PW-2/A. The timber was handed over to PW-3 Bansi Ram on sapurdari vide document Ext.PW-2/B. Rukka Ext. PW-5/A was prepared by HC Hari Ram and was sent to Police Station for registration of FIR through PW-1 C. Guddu Ram. FIR Ext. PW-5/B was registered. PW-3 prepared the assessment report of the value of seized timber vide Ext. PW-3/A. The petitioner was arrested and later released on bail. On completion of investigation, challan was presented in the Court.

3. Prosecution examined five witnesses to prove its case. PW-2 Lal Singh, Chowkidar and PW-4 Tikam Ram, Timber Watcher, were the persons who were on duty at Forest Check Post, Larji on the relevant day and had allegedly apprehended vehicle No. HP-02-0694 driven by petitioner at 4.00 A.M. and had found the illicit timber being transported in the said vehicle. PW-3 Bansi Ram was the B.O. posted at Forest Check Post, Larji. He informed the DFO, Banjar and had also valued the timber seized from the petitioner. PW-1 C. Guddu Ram had visited the spot alongwith HC Hari Singh to

investigate the matter. PW-5 ASI Chaman Lal proved the receipt of rukka and registration of FIR.

4. Petitioner was examined under Section 313 Cr.P.C. He did not choose to lead defence evidence. Learned Chief Judicial Magistrate, Lahaul&Spiti, Camp at Kullu acquitted the petitioner for offence under Section 379 IPC, but convicted him for commission of offence under Section 42 of the Indian Forest Act and sentenced him to undergo simple imprisonment forone month and to pay a fine of Rs.2000/-. In default of payment of fine, the petitioner was sentenced to further undergo simple imprisonment for 15 days.

5. Petitioner assailed the judgment and sentence passed by learned trial Court before learned Sessions Judge, Kullu, but remained unsuccessful. Learned Appellate Court affirmed the findings and sentence returned and imposed by the learned trial Court. State did not assail the acquittal of petitioner under Section 379 IPC.

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

7. As per the case of prosecution, the petitioner was illicitly transporting 14 sleepers of Deodar wood in Maruti Van No. HP-02-0694 and was apprehended on 19.05.2006 at about 4.00 A.M. by the officials of Forest Check Post, Larji. PW-3 Bansi Ram was the B.O. posted at Forest Check Post, Larji on 19.05.2006. He was examined as PW-3. It was stated by this witness that on 19.05.2006 at about 4.00 A.M. the vehicle No. HP-02-0694 came from the Banjar side. Chowkidar stopped the vehicle and checked the same. 14 illicit scants of Deodar were found. He informed the DFO, Banjar. The petitioner was the driver of the vehicle and could not produce any pass or permit. The DFO later informed the police. Investigating team of the police reached the spot. Timber was measured. Police seized the timber and handed over the same to DFO, Banjar. PW-3 on the same day evaluated the timber at Rs.24,610/- vide his report Ext.PW-3/A. The report was handed over to

the police. He also identified his signatures on document Ext. PW-2/B vide which the timber was handed over to PW-3 on sapurdari. He had also affixed seizure hammer on the timber and had taken facsimile of the same vide Ext. PW-3/B. In cross-examinationPW-3 stated that he had informed the DFO at 4.15 A.M. Police had reached at about 7.00 A.M. on their vehicle. Police stayed on spot till 2.00 P.M. There were shops and residential houses near the Forest Check Post, Larji. He also submitted that there was a petrol pump in front of Check Post which used to remain open around the clock. The vehicular traffic was frequent on the spot. He admitted that when the vehicle was apprehended many people had gathered on the spot. The documents were prepared with respect to handing over of vehicle on sapurdari to DFO. He denied the suggestion that vehicle No. HP-02-0694 was lying abandonedand a false case was planted against the petitioner. He also admitted that police had not make any effort to associate independent witnesses.

8. PW-2 Lal Singh was the Chowkidar, who had stopped the vehicle No. HP-02-0694 for checking at Forest Check Post, Larji. This witness also stated that vehicle was being driven by the petitioner and 14 scants of illicit timber were found in the vehicle. According to this witness, police had taken the vehicle and the timber in possession vide Ext. PW-2/A and further the timber was handed over on sapurdari to PW-3 Bansi Ram vide memo Ext. PW-2/B. In cross-examination, this witness admitted that there was a petrol pump in front of the Forest Check Post, Larji which remained open around the clock. There were school, bank and shops near to the check post. He further admitted that vehicular traffic remains constant on the spot. He feigned ignorance as to time of arrival of police. He also stated that no proceeding was conducted in his presence. According to this witness, his duty was till 8.00 A.M. whereafter he had gone to his residence. He further deposed that he had signed Ext. PW-2/A and Ext. PW-2/B at 6.00 A.M. on 19.5.2006. This

witness had also stated that no proceedings were conducted in his presence and he had left for his residence at 8.00 A.M.

9. PW-4 Tikam Ram stated that at 4.00 A.M. on 19.5.2006 he was on duty at Forest Check Post, Larji. Vehicle No. HP-02-0694 was stopped by him and the said vehicle was being driven by petitioner. 14 scants of Deodar were recovered from the vehicle. Block Officer was called on the spot. Petitioner could not produce any pass or permit. B.O. informed the DFO. Police came on spot and seized the van and timber vide Ext. PW-2/A. The timber was handed over to PW-3 Bansi Ram on sapurdari vide Ext. PW-2/B. In cross-examination, this witness stated that police had reached on spot at 6.00 A.M. and had taken about one and half hour for completing the proceedings. Petitioner was arrested by the police at 6.00 A.M. He also admitted that there are shops and market near the Forest Check Post. The shops were open at the relevant time.

10. Adverting to the statement of PW-1 C. Guddu Ram. This witness stated that an information was received at Police Station, Banjar from DFO at 9.00 A.M. on 19.5.2006. He alongwith H.C. Hari Singh left for the spot. PW-3 B.O. Bansi Ram handed over the vehicle No.HP-02-0694 and the illicit timber to the police. Petitioner was also found sitting near the vehicle and he could not produce the vehicle's documents as well as pass or permit in respect of the timber. Vehicle alongwith its key and the timber were taken in possession. Investigating Officer has prepared the rukka and handed over to him for being taken to the Police Station for registration of FIR. After registration of FIR, he had handed over the file to the I.O. on spot. In cross-examination, he deposed that he alongwith H.C. Hari Singh had reached the spot at about 10 A.M. He had left the spot with rukka at about 12.30 P.M. The factum of existence of petrol pump in front of the Forest Check Post was also admitted by this witness.

11. The statement of PW-5 is only to the effect that he had received rukka and FIR Ext. PW-5/B was registered on its basis.

12. From the statements of prosecution witnesses, it is clear that they had contradicted each other on material aspect. As per the prosecution case, the vehicle No. HP-02-0694 and timber was seized vide document Ext. PW-2/A. PW-2 Lal Singh and PW-4 Tikam Ram have signed Ext. PW-2/A as witnesses. As per PW-1, police had reached the spot at 10.00 A.M. Meaning thereby that documents Ext. PW-2/A and Ext.PW-2/B were prepared after arrival of the police on spot. PW-2 one of the witness to aforesaid documents had stated that he had signed the said documents at 6.00 A.M. PW-4 Tikam Ram stated that the police had reached the spot at 6.00 A.M. and had completed the proceedings within one and half hour. The petitioner was also stated to have been arrested at 6.00 A.M. by the police.

13. Learned trial Court as well as learned Appellate Court had brushed aside the above noticed contradictions being minor in nature and also on the ground that the human memory cannot be expected to work like video recorder. The discrepancies and contradictions, as noticed above, in the considered view of this Court, could not have been ignored. PW-2 and PW-4 were the forest officials, who had allegedly apprehended the vehicle with illicit timber. They were categoric in their examination-in-chief that both of them had stopped the vehicle at 4.00 A.M. at Check Post. Once they had not forgotten the time of apprehending the vehicle, it was unlikely that subsequent sequence of events would be forgotten by them. PW-2 and PW-4 were in unison in respect of the fact that the police had arrived at 6.00 A.M. PW-2 had no confusion in saying that he was on duty till 8.00 A.M. and thereafter had left for his residence.

14. The prosecution case is that the information was received at Police Station, Banjar from DFO at 9.00 A.M. FIR Ext. PW-5/B also reveals the same fact.

15. The above noted contradictions gains significance in light of the fact that Investigating Officer had not been examined during the trial. It is for the Investigating Officer to have explained the discrepancies in the statements of prosecution witnesses. Another fact which cannot be ignored is that there is nothing on record to show the whereabouts of the vehicle allegedly involved in the offence. Admittedly, the Investigating Officer had not placed on record any material to show the ownership of the vehicle. There was also no evidence to suggest as to in what capacity the petitioner was in possession of the vehicle. Again these facts were to be explained by the Investigating Officer. The vehicle No. HP-02-0694 was taken in possession by the police vide Ext. PW-2/A. What happened thereafter to the vehicle remained in realm of suspense. There is nothing on record of the trial Court that the vehicle was got released by any person during the pendency of the case or thereafter. In fact, there is absolutely no clue about the vehicle taken in possession by the police vide Ext.PW-2/A. This again had to be explained by the Investigating Officer.

16. Learned trial Court and learned Appellate Court both have ignored the implications arising out of non-examination of the Investigating Officer. Though such non-examination will not be fatal to the prosecution story in every case, but in the facts of instant case his non-examination has serious implications.

17. In cross-examination of prosecution witnesses, it was suggested on behalf of the petitioner that the vehicle No. HP-02-0694 was lying abandoned near the Forest Check Post and the case was planted. In view of such defence, it was all the more important for prosecution to have produced the Investigating Officer for answering material questions. Thus, an adverse inference for non-examination of Investigating Officer ought to have been drawn against the prosecution.

18. Needless to say that the prosecution carries a heavy burden to prove the guilt of accused beyond all reasonable doubts. It is the duty of the

prosecution and especially of the I.O. of the case to satisfy the conscience of the Court by negating the chances of suspicion arising in the facts of the case. In the instant case, prosecution had failed to discharge the requisite burden.

19. There is yet another aspect which cast a shadow of doubt on the prosecution story. All the prosecution witnesses have stated that there was a petrol pump in front of the Forest Check Post which remained open round the clock. In addition, there were shops and residences around. Even the people had gathered on the spot when the vehicle was apprehended and the police carried investigation. Why the independent witnesses were not associated again had to be explained by the I.O. It is evident from the statement of PW-1 that no effort was made to associate independent witnesses. Such association definitely would have afforded credence to the prosecution story.

20. When the B.O. had allegedly informed the DFO at 4.15 A.M., why the police was not informed immediately has also remained unexplained. DFO, Banjar was not even cited as a prosecution witness.

21. Petitioner alongwith vehicle and illicit timber was allegedly apprehended by forest officials at 4.00 A.M. Police arrived at the spot at 10.00 A.M. Police believed the version as given to them by the forest officials, no effort was made to seek independent corroboration.

22. Thus, there remained several unexplained discrepancies in the prosecution case and were sufficient to entertain a suspicion as to its authenticity. Once the doubts were created in the prosecution story, the benefit ought to have been given to the petitioner.

23. In view of the above discussion, the conviction of petitioner ordered by learned trial Court and affirmed by learned Appellate Court, cannot be sustained. Accordingly, the revision is allowed. Judgment dated 16.11.2012 passed by learned Sessions Judge, Kullu, H.P. in Criminal Appeal No. 97 of 2012(27 of 11) affirming judgment and sentence passed by learned Chief

Judicial Magistrate, Lahaul&Spiti, Camp at Kullu on 01.04.2011 in case No. 193-I/2006, are set-aside. Petitioner is acquitted of all the charges.

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

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

Between:-

M/S HETERO LABS LIMITED (UNIT II), VILLAGE KALYANPUR, CHAKKAN ROAD, TEHSIL BADDI, DISTRICT SOLAN, H.P. THROUGH AUTHORIZED SIGNATORY MADHUSUDHANA REDDY GUNTAKA S/O SH. VEERA REDDY GUNTAKA R/O HOUSE NO. 262, PHASE-III, HOUSING BOARD, BADDI, DISTRICT SOLAN, H.P.

....PETITIONER

(SH. N.S. CHANDEL, SR. ADVOCATE WITH SH. VINOD KUMAAR GUPTA, ADVOCATE)

AND

UNION OF INDIA, THROUGH DRUGS INSPECTOR, CENTRL DRUGS STANDARD CONTROL ORGANISATION, (C.D.S.C.O.) SUB ZONE, CONTAINER CORPORATION OF INDIA BUILDING, VILLAGE SHEETALPUR, BADDI, DISTT. SOLAN, H.P.

....RESPONDENT

(SH. BALRAM SHARMA, ASGI).

CRIMINAL REVISION
NO. 336 OF 2022
Reserved on: 23.9.2022
Decided on:30.09.2022

Code of Criminal Procedure, 1973- Criminal revision- **Drugs and Cosmetics Act, 1940**- Section 25- Ld. Trial Court rejected prayer to send the seized second sample lying in the custody of Court, for its analysis to Central Drugs Lab, Kolkata- Held- The report of Government Analyst becomes conclusive evidence of the facts stated therein, unless the person, from whom the sample

was taken or the person whose particulars were disclosed under Section 18-A of the Act, within 28 days of the receipt of a copy of the report notifies in writing the Inspector or the Court before which any proceeding in respect of the sample is pending that he intends to adduce evidence in controversion of the report- Petition allowed. (Para 8)

Cases referred:

Glaxosmithkline pharmaceuticals ltd & another vs. State of Madhya Pradesh 2011 (13) SCC 75;

Laborate Pharmaceuticals India Ltd vs. State of Tamil Nadu 2018 (15) SCC 93;

State of Haryana vs. Brij Lal Mittal & others 1998 (5) SCC 347;

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

O R D E R

By way of instant petition, petitioner has prayed for setting aside the order dated 15.6.2022, passed by learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, H.P. in Complaint No. 239/4 of 2022, whereby the prayer of the petitioner to send the seized second sample, lying in the custody of the Court, for its analysis to Central Drugs Laboratory, Kolkata has been rejected.

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

2.1 Petitioner is one of the accused in complaint case No. 239/4 of 2022, pending adjudication before learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, H.P.

2.2 The complaint has been filed by Union of India through Drug Inspector under Section 18 (a)(i) and (vi) read with Section 16 (i)(a), punishable under Section 27 (d) of The Drugs and Cosmetics Act, 1940 (for short, 'the Act').

2.3 It is alleged in the complaint as under:

(i) That on 15.3.2021, the Drug Inspector had drawn the drug samples of Azilsartan Medoxomil tables 80mg (Abel-80), manufactured by petitioner at its manufacturing Unit at Baddi, District Solan, H.P. under Section 23 of the Act from the

premises of M/s Lupin Limited, Zirakpur, Punjab. The spot reports were prepared at the time of sampling.

(ii) The sample was sent to Government Analyst, Regional Drugs Testing Laboratory, Chandigarh for its test and analysis on 15.3.2021.

(iii) The Government Analyst vide report dated 3.6.2021 declared the sample as not of standard quality.

(iv) One copy of Test Report dated 3.6.2021 was made available to the petitioner along with notice under Section 18 (b), 22(1)(cca) and 25 (3) of the Act on 17.6.2021. In addition, one sealed portion of sample was also handed over to the petitioner on the same day i.e. 17.6.2021.

(v) The petitioner got the controlled sample tested and found the same as per prescribed standard.

(vi) Petitioner communicated with Drug Inspector vide its letter dated 13.7.2021 and disclosed the result of test got conducted by it on controlled sample. Petitioner, however, opted not to challenge the FDA results.

2.4 During the pendency of the complaint, petitioner filed an application before learned Additional Chief Judicial Magistrate, Nalagarh under Section 25 (4) of the Act, making a prayer to send the second sample, lying in the custody of the Court for analysis to Central Drugs Laboratory, Kolkata.

2.5 The prayer for sending the second sample was made on following grounds:

(i) That a bare perusal of complaint did not disclose even a prima-facie case against the petitioner, therefore, framing of charge against the petitioner and consequent trial would be an exercise in futility and as such, petitioner was entitled for sending the seized sample by the Drugs Inspector for analysis by Central Drugs Laboratory, Kolkata. (ii) Petitioner further had placed reliance on the analysis of the Control Sample, CDSCO (Portion of Withdrawn Sample) and Hub Sample (received from Lupin Hub) and as per analytical research all the samples were found complying with the specifications.

(iii) It was further submitted that in view of satisfactory product development report, R&D stability data along with stability data of marked batch, coupled with analytical results of above noted samples, the dissolution result report in Form-13 by Government Analyst might be due to moisture absorption/improper integration of peak or analytical error/calculation error/instrumental error etc.

2.6 Learned Additional Chief Judicial Magistrate, Nalagarh rejected the prayer of the petitioner on the ground that the petitioner vide its letter dated 13.7.2021, addressed to Drugs Inspector had clearly mentioned that the petitioner did not intend to challenge the FDA results and had initiated the batch recall as per FDA instructions.

2.7 Thus, the learned trial Court inferred that the petitioner had forfeited the claim to challenge the Government Analyst Report.

2.8 It was further held that the petitioner could have challenged the report of Government Analyst within 28 days from its receipt and on such basis, the application filed by the petitioner on 13.4.2022 before the learned trial Court was held to be highly belated.

3. Petitioner has assailed the impugned order dated 15.6.2022 on the grounds that it had not given up its right to challenge the Government Analyst Report. As per petitioner, its communication dated 13.7.2021 to the Drugs Inspector was in fact a notification under Section 25 (3) of the Act and, therefore, the petitioner was well within its right to invoke the remedy under Section 25 (4) of the Act, by making a prayer, before learned trial Court to send the seized sample for testing by Central Drugs Laboratory, Kolkata. Petitioner further contends that it had never admitted the report of Government Analyst to be correct, as the communication dated 13.7.2021, if read as a whole, would clearly spell out the intent of the petitioner. As a matter of fact, the petitioner had clearly communicated the factum of tests got conducted by it of Control Sample, CDSCO Sample and Hub Sample. As per

contention of petitioner, merely because the petitioner had communicated its wish not to challenge the FDA results at that stage cannot be construed to be an act of giving up of its right under Section 25 (3) and (4) of the Act.

4. Per contra, respondent has contested the plea of petitioner. It has been contended by way of reply filed on behalf of the respondent that once the petitioner had given up its right to challenge the FDA results and had initiated the batch recall on the instructions of FDA, petitioner had forfeited its right to challenge the Government Analyst Report subsequently. As per respondent, the communication dated 13.7.2021 of the petitioner, did not convey the requisite notification under Section 25 (3) of the Act.

5. I have heard Mr. N. S. Chandel, learned Senior Advocate for the petitioner and Mr. Balram Sharma, learned Assistant Solicitor General of India for the respondent and have also gone through the record carefully.

6. The factual aspect of the matter is more or less admitted by the parties. The sample was drawn on 15.3.2021 from Lupin Limited. Petitioner was the manufacturer of the drugs, for which the sample was drawn. The sample was sent to the Government Analyst on 15.3.2021. The report of the Government Analyst was received by the Drugs Inspector on 3.6.2021. A Copy of such report was supplied to the petitioner on 17.6.2021.

7. It is also not in dispute that petitioner had sent a communication dated 13.7.2021 to the Drugs Inspector. The question for adjudication is whether the communication dated 13.7.2021, sent by petitioner to Drugs Inspector was a notification under Section 25 (3) of the Act?

8. Section 25 of Drugs and Cosmetics Act reads as under:-

> *"**25 Reports of Government Analysts**. —*
> *(1) The Government Analyst to whom a sample of any drug 116 [or cosmetic] has been submitted for test or analysis under sub-section (4) of section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.*

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken 117 [and another copy to the person, if any, whose name, address and other particulars have been disclosed under section 18A], and shall retain the third copy for use in any prosecution in respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken 118 [or the person whose name, address and other particulars have been disclosed under section 18A] has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused: cause the sample of the drug 116 [or cosmetic] produced before the Magistrate under sub-section (4) of section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under sub-section (4) shall be paid by the complainant or accused as the Court shall direct."

Thus, the report of Government Analyst becomes conclusive evidence of the facts stated therein, unless the person, from whom the sample was taken or the person whose particulars were disclosed under Section 18-A of the Act, within 28 days of the receipt of a copy of the report notifies in writing the Inspector or the Court before which any proceeding in respect of

the sample is pending that he intends to adduce evidence in controversion of the report.

9. Reverting to the facts of the present case, according to the petitioner the contents of its communication dated 13.7.2021 amounted to notifying its intent to adduce evidence in controversion of the report. Respondent controverted such assertion on the ground that the petitioner had unequivocally given up its right to challenge the FDA reports and consequently had forfeited its right to avail remedy under Section 25 (4) of the Act.

10. To appreciate the rival contentions, it is apt to notice the relevant extracts from the communication dated 13.7.2021 as under: -

> *"After receipt of communication from Central Drugs Standard Control Organization (Baddi), we have performed the genuineness study of the complaint sample received form CDSCO Baddi and control sample & concluded that product is genuine &manufactured at hetero Labs Ltd. Unit II, Baddi. Batch records analytical documents & other batch related documents has been received and found satisfactory. All in process & analytical results of said batch found well within predetermined specifications. In addition to above, we have analyzed the control sample, complaint sample (sample received from GDSCO, Baddi) of same product/batch Azilasartan Medoxomil Tablets 80mg (Lupin Abel 80/Batch No. QZ210101). As per analytical results, all samples i.e. control sample & complaint sample (CDSCO sample) are complying with specification (reported as below). Analytical results of control sample and CDSCO sample enclosed in* ***Annexure B****:*

Batch No.: QZ210101 **Results dissolution (By HPLC)** **Limit: NLT 75% (D) of the labeled amount of Azilsartan Medoxomil should dissolved in 45 minutes**		
-	Control sample	Complaint sample (CDSCO sample
Tablet1	96.0%	95.9%

Tablet 2	99.0%	95.4%
Tablet 3	95.7%	94.8%
Tablet 4	98.5%	101.7%
Tablet 5	96.4%	96.0%
Tablet 6	99.8%	95.0%
Average:	97.6%	96.5%

Based on documents review, analytical results of control sample & complaint sample (CDSCO sample) we confirm that there is no quality issue in the said batch associated with dissolution results of the batch."

"*Considering the above explanation and dissolution results of control sample & complaint sample (CDSCO sample) mentioned above, we confirm that there is no quality issue in the said batch. Further in this regard, we do not want to challenge the FDA results and initiated the batch recall as per FDA instruction*."

10. It is revealed from the communication dated 13.7.2021 that the petitioner had got Control Sample, CDSCO (Portion of Withdrawn Sample) and Hub Sample (received from Lupin Hub) tested and as per reports received on such tests, those samples were found to be within the prescribed standard. This fact undoubtedly was communicated to the Drugs Inspector. It is on the basis this part of the communication that the petitioner submits to have notified its intent to adduce evidence to controvert the report of Government Analyst.

11. Another aspect of the matter is revealed from the contents of aforesaid communication, whereby petitioner had stated that it did not want to challenge the FDA results and had initiated the batch recall on the instructions of FDA. Simultaneously, petitioner had written that based on the action taken and dissolution results of control sample and CDSCO sample, the product was in compliance of product specification and as per petitioner, the failure encountered might be due to moisture/ analytical/instrumental error.

12. What is provided by Section 25 (3) is only the notification of intent to adduce evidence to controvert the report of Government Analyst. Such notification is to be made within 28 days on the receipt of Government Analyst's report. Once such option is exercised by either the person from whom sample was taken or the person whose particulars were disclosed under Section 18A of the Act, he becomes entitled to exercise right under sub-section (4) of Section 25 of the Act. Section 25(4) of the Act provides that if the sample had already not been tested or analyzed in Central Drugs Laboratory and the person has notified his intention under sub-Section (3) of Section 25 of the Act, the Court is empowered either on its own motion or in its discretion on the request of either complaint or the accused to cause the sample of the drug produced before the Magistrate under sub-Section (4) of Section 23 to be sent for test or analysis to Central Drugs Laboratory.

13. A comprehensive reading of communication dated 13.7.2021 cannot be construed as an act of petitioner to give up its right under Section 25 (4) of the Act. The communication was within 28 days of the receipt of sample by the petitioner. Petitioner had got the controlled and CDSCO samples tested with sufficient promptitude and had found them to be as per prescribed standards and thus was in possession of some evidence to controvert the report of Government Analyst. In the considered view of this Court, communication dated 13.7.2021 was sufficient compliance of sub-Section (3) of Section 25 of the Act at the end of the petitioner. Petitioner had never communicated that in case of prosecution being launched against it, the same would not be contested or the petitioner would confess the charges framed against him. The decision of the petitioner not to challenge FDA results and to recall the batch on the instructions of FDA cannot be taken to be an admission of guilt on his part, for the reasons that in the same breath, the petitioner had reiterated its belief on the sample got tested by the

petitioner and its apprehension about the results of analysis conducted by the Government Analyst being due to moisture/ analytical/ instrumental error.

14. The right under Section 25 (4) of the Act is valuable and indefeasible right, which cannot be easily taken away. In criminal prosecution, the right to defend oneself is an absolute and unbridled right. Reference can be made to ***Laborate Pharmaceuticals India Limited*** vs. ***State of Tamil Nadu*** reported in***2018 (15) SCC 93***, wherein Hon'ble Supreme Court has observed as under:-

> *"All the aforesaid facts would go to show that the valuable right of the appellant to have the sample analysed in the Central Laboratory has been denied by a series of defaults committed by the prosecution; firstly, in not sending to the appellant-manufacturer part of the sample as required under Section 23(4) (iii) of the Act; and secondly, on the part of the Court in taking cognizance of the complaint on 4th March, 2015 though the same was filed on 28th November, 2012. The delay on both counts is not attributable to the appellants and, therefore, the consequences thereof cannot work adversely to the interest of the appellants. As the valuable right of the accused for re-analysis vested under the Act appears to have been violated and having regard to the possible shelf life of the drug we are of the view that as on date the prosecution, if allowed to continue, would be a lame prosecution*".

15. Learned Assistant Solicitor General of India, on the other hand, has placed strong reliance on the judgments passed by Hon'ble Supreme Court in ***State of Haryana vs. Brij Lal Mittal &others*** reported in ***1998 (5) SCC 347*** and ***Glaxosmithkline pharmaceuticals limited & another vs. State of Madhya Pradesh*** reported in ***2011 (13) SCC 75*** to lay stress on its contention that the right, if any, existing in favour of petitioner had been waived off by it.

16. The reliance on above referred judgments may not help the cause of respondent for the reasons that those were passed in the specific fact

situations prevailing in those cases. The marked distinction being that in both the above referred cases, admittedly the opportunity as provided in sub-Section (3) of Section 25 of the Act was not availed within 28 days from the receipt of report of Government Analyst, whereas in the facts of the case in hand the communication dated 13.7.2021 was issued within 28 days of the receipt of report.

17. In view of above discussion, the impugned order dated 15.6.2022, passed by learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, H.P. in Complaint No. 239/4 of 2022, cannot be sustained. The learned Additional Chief Judicial Magistrate has clearly erred in not appreciating in right perspective the severable relation between sub-Section (3) and sub-Section (4) of Section 25 of the Act.

18. Resultantly, the petition is allowed. The impugned order dated 15.6.2022 is set side. Application of the petitioner under Section 25 (4) of the Act filed before learned trial Court is ordered to be allowed. The seized sample, lying in custody of learned trial Court is ordered to be sent to Central Drugs Laboratory Kolkata at the cost of petitioner forthwith, so as to obtain the report from such laboratory before the date of expiry of the sample.

19. Petition is accordingly disposed of. Pending applications, if any, also stand disposed of.

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

Between:

PRAKASH CHAND SHARMA, SON OF SH. LACHHI RAM, R/O VILLAGE BAMNOL, PO SARI, TEHSIL CHOPAL, DISTRICT SHIMLA, H.P. AGED ABOUT 40 YEARS.

.....PETITIONER

(BY MR. NEEL KAMAL SHARMA, ADVOCATE)

AND

SMT. KRISHNA, W/O SH. ROOP RAM, R/O VILLAGE DRABALA (JHAGERH) PO DRABALA, TEHSIL RAJGARH, DISTRICT SIRMOUR, H.P.

.....RESPONDENT

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

CRIMINAL REVISION PETITION
NO. 237of 2022
Reserved on:21.9.2022
Decided on:28.9.2022

Code of Criminal Procedure, 1973- Criminal revision- Ld. Trial Court did not allow the prayer of complainant seeking one more opportunity for producing evidence- Held- Complainant remained casual and negligent towards prosecuting his complaint- Complainant obtained adjournments without showing any plausible reason- Complainant cannot be allowed any premium for his negligent- No fault in the impugned order- Revision dismissed. (Para 6)

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

O R D E R

By way of instant petition, a prayer has been made to set aside order dated 26.04.2022, passed by learned Judicial Magistrate First Class, Chopal, District Shimla, H.P., in case No. 81-3 of 2016, titled as Prakash Chand Vs. Krishna and further seeking one more opportunity for producing and examining the complainant's witnesses.

2. Petitioner has filed a complaint under Section 138 of Negotiable Instrument Act, 1881 against respondent, which is pending adjudication before learned Judicial Magistrate First Class, Chopal, District Shimla, H.P. as case No. 81-3 of 2016.Vide impugned order dated 26.04.2022, further opportunity to the complainant to lead evidence has been closed.

3. It has been averred in the petition that complaint was listed for complainant's evidence on 08.01.2019, but the witnesses could not be examined and thereafter case was listed many times for the same purposes, but witnesses could not be examined for one or the other reason. After relaxation of COVID guidelines, the matter was listed on 11.03.2022 and was adjourned to 12.04.2022 for examination of complainant's witnesses. On 12.04.2022, the case was again adjourned to 26.04.2022 for examining the complainant's witnesses, subject to payment of cost of Rs. 500/-.On 26.04.2022, again complainant's witnesses were not present and his evidence was accordingly closed. The impugned order has been assailed as illegal and perverse. It is submitted that a grave injustice has been caused to the petitioner as he will suffer loss of Rs. 4,10,000/- which the respondent had taken from him as loan. It has also been contended that for substantial period the witnesses could not be examined on account of COVID Pandemic.

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

5. The "zimini" orders passed by learned Trial Court from time to time have been placed on record.The notice of accusation was put to the accused/respondent on 13.09.2019. The matter was adjourned to 06.11.2019 for recording of complainant's witnesses. Since, no witness of the complainant including the complainant was present on the said date, the matter was adjourned to 13.01.2020. Probably, the matter was not taken up on the adjourned date and was listed on 10.02.2020. Again on said date, no witness of the complainant was present.The matter was further listed on 13.03.2020 and complainant still did not examine any of his witnesses. Thereafter, the matter appears to have been adjourned from time to time on account of COVID restrictions. The matter again came to be listed for complainant's witnesses on 24.02.2022, on which date, the matter was adjourned to 11.03.2022 for recording complainant's evidence. On 11.03.2022 again

complainant's witnesses were not examined and case was adjourned to 12.04.2022. Learned Trial Court specifically recorded in the order dated 11.03.2022 that last opportunity was being afforded to the complainant to examine his witnesses. On 12.04.2022, complainant neither appeared himself nor examined any witness. Learned Trial Court again showed indulgence and adjourned the matter to 26.04.2022, subject to cost of Rs. 500/-. On 26.04.2022, again neither complainant appeared nor his witnesses were produced which resulted in passing of impugned order.

6. The above noticed chequered record is clearly evident of the casual and negligent approach of complainant towards prosecuting his complaint. Learned Trial Court has recorded that since 06.11.2019, complainant had not only failed to examine his witnesses but had also not been putting his personal appearance before the Court. It appears that the laxity shown by the learned Trial Court has been misused by the petitioner/complainant. The "zimini" orders reveal that the adjournments were being obtained on behalf of the complainant from time to time without showing any plausible reason. Even on 26.04.2022, it was submitted on behalf of the complainant that the complainant was having some urgent work at home. Petitioner/complainant cannot be allowed any premium for his negligent behavior. In the given facts and circumstances of the case, impugned order was most appropriate order to be passed, therefore, no fault can found with such order.

7. Resultantly, the impugned order dated 26.04.2022, passed by learned Judicial Magistrate Ist Class, Chopal District Shimla, H.P.,is affirmed and petition is accordingly dismissed with no order as to costs.

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

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

Between:-

1. SH I.N. GANDHI S/O SH. K.L. GANDHI, R/O 505/10, BEGUM BAGH, MEERUT U.P. PARTNER IN M/S AUGUST REMEDIES, VILLAGE OGLI, TEHSIL NAHAN, KALA AMB, DISTRICT SIRMOUR, H.P.

2. SH. SAJAY TANEJA, S/O M.L. TANEJA, R/O FLAT NO. 60, PLOT NO. 13 B. PALM SHUBH LAXMI CGHS, SECTOR-6, DWARKA, NEW DELHI PARTNER IN M/S AUGUST REMEDIES, VILLAGE OGLI, TEHSIL NAHAN, KALA AMB, DISTRICT SIRMOUR, H.P.

3. SH. DALJEET SINGH, S/O LATE GURMUKH SINGH, R/O 1118, II FLOOR, DR. MUKHERJEE NAGAR, DELHI PARTNER IN M/S AUGUST REMEDIES, VILLAGE OGLI, EHSIL NAHAN, KALA AMB, DISTRICT SIRMOUR, H.P.

4. SH. ARVIND ARORA, S/O SH. JAGDISH RAJ ARORA, R/O 1/5/81, SECTOR-16, ROHINI, NEW DELHI, PARTNER IN M/S AUGUST REMEDIES, VILLAGE OGLI, TEHSIL NAHAN, KALA AMB, DISTRICT SIRMOUR, H.P.

…PETITIONERS

(BY MR. PARVEEN CHANDEL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH DRUG INSPECTOR, HEAD QUARTERS, NAHAN, HP

2. THE STATE DRUGS CONTROLLER-CUM-CONTROLLING AUTHORITY HP BADDI-173205

……RESPONDENTS

3. M/S AUGUST REMEDIES, THROUGH ITS PARTNER ARVIND ARORA VILLAGE OGLI, TEHSIL NAHAN, KALA AMB, DISTRICT SIRMOUR, H.P.

4. ASHOK KUMAR TYAGI, S/O SH. S.S. TYAGI,
R/O B/W 53, D, SHALIMAR BAGH, DELHI-88
PARTNER IN M/S AUGUST REMEDIES, VILLAGE
OGLI, TEHSIL NAHAN, KALA AMB, DISTRICT
SIRMOUR, H.P.

..PROFORMA RESPONDENTS

(MR. DESH RAJ THAKUR ADDITIONAL ADVOCATE GENERAL AND MR. NARENDER THAKUR DEPUTY ADVOCATE GENERAL FOR R-1 AND R-2)

PROFORMA RESPONDENTS NO.3 & 4 EX-PARTE.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC
No. 230 OF 2015
Reserved on:09.09.2022
Decided on: 15.09.2022

Code of Criminal Procedure, 1973- Section 482- **Drugs and Cosmetics Act, 1940**- Sections 18, 27- Quashing of complaint and proceedings under Drugs and Cosmetics Act, 1940- Proceedings against Respondent No. 4 already quashed- Held- Requirement of Section 34 of the Act not fulfilled- Noticeably, petitioners herein have been impleaded as accused in the complaint on the basis of same material, as was sought to be used against respondent No.4- In view of this also, different parameters cannot be applied for respondent No.4 and petitioners- No reason to differ with earlier findings- Petition allowed. (Para 15)

Cases referred:

State of Haryana vs. Brij Lal Mittal and Others, (1998) 5 SCC 343;

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

O R D E R

By way of instant petition, a prayer has been made to quash the proceeding pending before learned Chief Judicial Magistrate, Sirmour at

Nahan, bearing complaint No. 05/03 of 2013, titled as State of H.P. through Drugs Inspector versus Ashok Kumar Tyagi and others, as against the petitioners.

2. Petitioners alongwith respondent No.4 are partners of the firm M/s August Remedies (respondent No.3). The said firm is engaged in manufacturing of drugs. The Drug Inspector had taken samples of 13 drugs manufactured by respondent No.3. Out of these, 2 samples were declared "not of standard quality" by Government analyst, CTL Kandaghat, District Solan, H.P. The Drugs Inspector after obtaining prosecution sanction, instituted a complaint before learned Chief Judicial Magistrate, Sirmour at Nahan under Section 18(a) (i) read with section 27 (d) of the Drugs and Cosmetics Act, 1940 (for short the Act). Besides respondent No.3, petitioners and respondent No.4 were impleaded as accused.

3. Petitioners have sought quashing of aforesaid complaint as against them on the grounds firstly that the prosecution as against them was not permissible in view of the provision of Section 34 of the Act. It is contended on behalf of the petitioners that from the bare perusal of contents of complaint and the documents annexed therewith, it is not made out that the petitioners were incharge of respondent-firm and were also responsible for conduct of its day to day business, secondly, the Test Analysis Report of Government analyst was not admissible in evidence, as full protocol of test was not furnished, thirdly the drug in question was not treated or analysed as per the validation provisions of second schedule of the Act, fourthly, drug inspector had not followed the correct procedure of sampling and despatch and lastly the samples were not stored to remain in same state/condition, as that of when they were acquired.

4. Respondents No. 1 and 2 have contested the prayer of petitioners by filing written reply. It is submitted that petitioners and respondent No.4, at the time of commission of offence, were incharge of and also were responsible

for conduct of business of respondent No.3-firm. They were having knowledge of the commission of the offence. The drug inspector, after inquiry had found that petitioners and respondent No.4 were incharge of and responsible for conduct of business of the firm. Regarding the other grounds of challenge, it was submitted that the complaint could not be quashed on such grounds, as those involved triable issues and were required to be decided during trial.

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

6. The normal rule in the cases involving criminal liability is against vicarious liability, i.e., no one can be held criminally liable for an act of another. This rule, however, is subject to exception on account of specific provision being made in the statute extending liability to others. Section 34 of the Act is one such provision which binds the Directors of the Company or partners of the firms for the criminal acts of the company or the firm as the case may be, on fulfillment of conditions prescribed therein. The conditions are explicitly clear that for making the Directors or partners liable vicariously, the Directors or partners should be in charge of the company/firm and should also be responsible to company/firm for conduct of the business of the company/firm. Further such liability is also attracted; if it is proved that the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any Director, Manager, Secretary or other Officer of the company.

7. Contents of para 9 of the impugned complaint has been relied upon by respondents No. 1 and 2 to support their contention that the petitioners and respondent No.4 were incharge of the firm and were also responsible for its business. Para 9 of the complaint reads as under:-

> ***"That on Dated 24.12.2012, the complainant visited the premises of the firm to enquire about the person who at the time of offence was in charge of, and was responsible to the company for the conduct of the***

> ***business of the company, where Accused 1 & 5 were present. It was disclosed by the accused No. 1 & 5 that they were the partners of the firm along with other four partners. A spot memo in this regard was prepared on the spot (attached as annexure P88). A photocopy of the partnership-cum-induction deed (attached as annexure P89 to 94) signed by both the accused present was also handed over by the accused to the complainant. It is, therefore, clear that all the five accused were in charge of and was responsible to the company for the conduct of the business of the company at the time of the manufacturing both the batches of the drug in question."***

8. Thus, the Drug Inspector relied upon the disclosure made by respondent No.4 and petitioner No.4 evidenced by spot memo prepared on 24.12.2012 and also the partnership and induction deed handed over to him during investigation.

9. The spot memo dated 24.12.2012 only relates to disclosure made by petitioner No.4 and respondent No.4 to the effect that they alongwith petitioners No. 1 to 3 were partners of respondent No.3-firm. The partnership-cum- induction deed also reveals the same factum.

10. The question arises, whether the contents of para 9 of the complaint coupled with the spot memo dated 24.12.2012 and partnership-cum-induction deed are sufficient to draw inference that the petitioners and respondent No.4 were in charge of the firm and also responsible to the firm for its business? The answer, in my considered opinion, is "no" for the reasons detailed hereafter.

11. ***In State of Haryana vs. Brij Lal Mittal and Others***, reported in ***(1998) 5 Supreme Court Cases 343***, the Hon'ble Supreme Court held as under:-

"Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three respondents were being prosecuted as directors of the manufactures with the aid of Section 34(1) of the Act which reads as under:

"34. Offences by companies- (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business."

12. Adverting to the facts of the case, what can be inferred from paragraph 9 of the complaint, spot memo dated 24.12.2012 and the partnership-cum-induction deed that the petitioners and respondent No.4

were the partners of respondent No.3-firm. Only proof of being partners of firm, is not sufficient to prosecute the partners for offence under the Act. It has to be prima facie shown that the partners were in charge of the firm and were also responsible to firm for its business, at the time of commission of offence. The material from which such inference can be drawn is clearly missing in the instant case.

13. Respondent No.4 had earlier approached this Court for quashing the complaint against him on substantially identical grounds which have been raised by the petitioners in the instant petition. The petition filed by respondent No.4 was allowed by a Co-ordinate Bench of this Court on 22nd April, 2015 as CRMMO No. 29 of 2014. The complaint as against respondent No. 4 was quashed. The Co-ordinate Bench of this Court after taking notice of various judicial precedents observed as under:-

> ***"On the strength of the aforesaid judgments of the Hon'ble Supreme Court, it can safely be concluded that it is the prime responsibility of the complainant to make specific averments with respect to the accused being at the relevant time incharge as also responsible for the conduct of the business. But then, the mere fact that one happens to be a partner of the firm would not in itself be sufficient to make him liable, because there is no deemed liability of such partner. The averment assumes importance because it is the basis and essential averment which persuades the Magistrate to issue the process against the partner. Thus, if this basic averment is missing, the Magistrate is legally justified in not issuing process."***

14. After considering all the attending facts and circumstances of the case, the petition filed by respondent No.4 was allowed by holding that the requirements of Section 34 were not fulfilled.

15. Noticeably, petitioners herein have been impleaded as accused in the complaint on the basis of same material, as was sought to be used against

respondent No.4. In view of this also, different parameters cannot be applied for respondent No.4 and petitioners. There is nothing on record to show that the judgment passed by a Co-ordinate Bench of this Court on 22.04.2015 in Cr.MMO No. 29 of 2014 has been set aside or modified. It being so, the said judgment having attained finality, the reasons and findings recorded therein will apply with all force in the case of petitioners also. This Court does not find any reason to differ with such findings.

16. In view of above discussion, this petition is allowed and accordingly the complaint No. 05/03 of 2013 titled as State of H.P. versus Ashok Kumar Tyagi and others pending before learned Chief Judicial Magistrate, Sirmour at Nahan insofar as the petitioners are concerned is hereby quashed. Accordingly, the petition is disposed of, so also pending application(s), if any.

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

Between:

1. SHRI VIRENDER KUMAR, AGED 28 YEARS, S/O SH. RAM SINGH, R/O RANSAL NGARWIN BALDWARA, MANDI,HIMACHAL PRADESH (HUSBAND).
2. SHRI RAM SINGH, AGED 60 YEARS, S/O SH. DILA RAM, R/O RANSAL NGARWIN BALDWARA, MANDI, HIMACHAL PRADESH (FATHER-IN-LAW)
3. SMT. NIRMALA DEVI, AGED 58 YEARS, W/O SHRI RAM SINGH, R/O RANSAL NGARWIN BALDWARA, MANDI, HIMACHAL PRADESH (MOTHER-IN-LAW)
4. SMT. REETA KUMARI, W/O SH. VINOD KUMAR, R/O VILLAGE KOT, TEHSIL BALDWARA, MANDI, HMACHAL PRADESH 9 SISTER-IN-LAW)

.....PETITIONERS

(BY MR. C.N. SINGH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH

2.SMT. KUSUM LATA, W/O SH. VIRENDER KUMAR, R/O RANSAL NGARWIN BALDWARA,MANDI, HIMACHAL PRADESH.

.....RESPONDENTS

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL FOR R-1;
MR.NEERAJ K.SHARMA,ADVOCATE,FOR R-2.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 Cr.P.C
No. 660 of 2019
Reserved on: 05.09.2022
Decided on: 15.09.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 498A, 323, 506/34- Quashing of F.I.R.- Held- Serious triable issues have arisen and are required to be gone into and considered at the time of trial- F.I.R. cannot be quashed- Petition dismissed. (Para 16)

Cases referred:

Kaptain Singh Vs. State of Uttar Pradesh and Others (2021)9 SCC 35;

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

O R D E R

By way of instant petition, a prayer has been made to quash FIR No.37/2019, dated 09.9.2019, under Sections 498-A, 323 and 506 read with Section 34 of IPC, registered at Women Police Station at Bhiuli, District Mandi, H.P. and all subsequent criminal proceedings.

2. Petitioner No. 1 and respondent No. 2 are husband and wife. Petitioners No. 2 and 3 are father and mother of petitioner No. 1, respectively. Petitioner No. 4 is his married sister.

3. The marriage between petitioner and respondent No. 2 was solemnized on 08.05.2018. Petitioner was employed in Merchant Navy. On

11.06.2018, petitioner left his native village to join his duties. Petitioner came back on 19.08.2019 after availing leave. In the meantime, on 11.02.2019, a son was born to respondent No.2.

4. On 05.09.2019, respondent No. 2 filed a complaint before the Gram Panchayat alleging harassment at the hands of petitioners No.1 to 4 for dowry. It was also alleged that on 29.08.2019, respondent was beaten by petitioner No.1. On 06.09.2019, a compromise was recorded between petitioner No. 1 and respondent No. 2 before Gram Panchayat.

5. On 09.09.2019, respondent No. 2 made a complaint to the police, on the basis of which, FIR No. 37/2019 was recorded on the same day at Women Police Station Bhiuli, District Mandi, H.P., under Sections 498-A, 323 and 506 read with Section 34 of IPC. It was alleged in the FIR that petitioner No. 1 and his family members had started making demands of dowry from the parents of the complainant. At the time of marriage, a scooty was given to petitioner No. 1. As per complainant, her parents were not in a position to meet the demands of petitioner No.1 and his family members. It was further alleged that on 07.09.2019, petitioner No. 1 had given beatings to complainant. She was medically examined at Civil Hospital, Baldwara. She reported the matter to the police, but no cognizance was taken. Finally, the FIR No. 37/2019 was registered, when complainant approached the Superintendent of Police, Mandi.

6. The case set-up by the petitioners is that the allegations levelled by respondent No.2 in FIR No. 37/2019 are wrong, false and baseless. Respondent No. 2 is stated to have filed an application for maintenance under Section 125 of Cr.P.C for herself as well as minor child. It is alleged that FIR No. 37/2019 is actuated with malice in order to humiliate and harass the petitioners. The purpose of respondent No. 2 was to stop petitioner No.1 from attending his duties. The allegations regarding demand of dowry were stated to be vague. No details and particulars were mentioned regarding such

demand. It is further alleged that from the bare reading of the contents of FIR, basic ingredients of Sections 498-A, 323 and 506 read with Section 34 of IPC,were not made out. The action of respondent No. 2 has been mentioned as abuse of process of law.

7. Respondent No. 1 filed reply and submitted the factual details which led to the registration of FIR No. 37/2019. It was further submitted that investigation was carried out. As per MLC issued by Civil Hospital Baldwara, simple injuries were found on the person of respondent No. 2. The investigation was stated to be complete and challan was also stated to be pending for scrutiny before Law Officer. As per respondent No. 1, a *prima facie* case, was made out against petitioners after investigation.

8. Respondent No. 2 also filed her separate reply. She reiterated the allegations of dowry demand as well as harassment and physical assault against the petitioners. It was also submitted that petitioner No.1 wanted to get divorce and to leave the country thereafter. It was further submitted that the police had filed the report under Section 173 of Cr.P.C before the Court of competent jurisdiction, on this score also, dismissal of petition was sought.

9. I have heard learned counsel for the parties and have also gone through the status report.

10. The entire thrust of learned counsel for the petitioners was to contend that FIR No. 37/2019, dated 09.09.2019 was nothing but abuse of process of law. The allegations therein were vague. No specific instance or particular was provided in respect of alleged demand for dowry. It was further contended that from the bare perusal of the contents of FIR, no case was made out against the petitioners and the same is required to be quashed.

11. From the replies filed on behalf of the respondents, it is abundantly clear that the investigation was conducted in FIR No. 37/2019 and challan has been filed in the Court. This fact has not been denied or rebutted by the petitioners.

12. It is evident that petitioners have not placed on record any material collected by the investigating agency. Thus, it is not known as toon what material the investigating agency has based its findings and filed the challan. As per respondent No.2, the challan filed by the police is pending before the Court. That being so, the cognizance must have been taken by the Court of competent jurisdiction. There is no whisper in the petition regarding such development. There is no challenge to the findings recorded by the police in its challan presented before the Court. No challenge has been made even to the cognizance order passed by the Court of competent jurisdiction.

13. Though, a prayer has been made to quash FIR No. 37/2019 and subsequent proceedings, but the petition is completely silent, as to what are the subsequent proceedings. As noticed above, it has become clear from the response of the respondents that the investigation has been completed and challan has been filed in the Court and the Court is seized of the matter.

14. In above noted circumstances, the contents of FIR No. 37/2019 loses much significance. The FIR is not meant to have all the details. It is only recording of information in respect of commission of cognizable offence. In case, a cognizable offence is made out from the facts disclosed to the police, it has no option but to register the FIR. Thus, the contents of FIR can be only skeleton narration of facts. It is only after the investigation that the police arrives at some conclusion as to existence of a case against the accused or otherwise.

15. Since, investigation record and cognizance order are neither before this Court nor has been challenged, the petitioners cannot succeed in the petition. In ***Kaptain Singh Vs. State of Uttar Pradesh and Others (2021)9 SCC 35***, the Apex Court has held as under:-

> *"9.1 At the outset, it is required to be noted that in the present case the High Court in exercise of powers under Section 482 Cr.P.C. has quashed the criminal proceedings for the*

offences under Sections 147, 148, 149, 406, 329 and 386 of IPC. It is required to be noted that when the HighCourt in exercise of powers under Section 482 Cr.P.C. quashed the criminal proceedings, by the time the Investigating Officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the incident place and after taking statement of the independent witnesses and even statement of the accused persons, has filed the charge-sheet before the Learned Magistrate for the offences under Sections 147, 148, 149, 406, 329 and 386 of IPC and even the learned Magistrate also took the cognizance. From the impugned judgment and order passed by the High Court, it does not appear that the High Court took into consideration the material collected during the investigation/inquiry and even the statements recorded. If the petition under Section 482 Cr.P.C. was at the stage of FIR in that case the allegations in the FIR/Complaint only are required to be considered and whether a cognizable offence is disclosed or not is required to be considered. However, thereafter when the statements are recorded, evidence is collected and the charge-sheet is filed after conclusion of the investigation/inquiry the matter stands on different footing and the Court is required to consider the material/evidence collected during the investigation. Even at this stage also, as observed and held by this Court in catena of decisions, the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducting the trial. As held by this Court in the case of Dineshbhai Chandubhai Patel (Supra) in order to examine as to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the Investigating agency nor can exercise the powers like an Appellate Court. It is further observed and held that question is required to be examined keeping in view, the contents of FIR and prima facie material, if any, requiring no proof. At such stage, the High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is further observed it is more so, when the material relied on is disputed. It is further observed that in such a situation, it becomes the job of the Investigating Authority at such stage to probe and then of the Court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

9.2 In the case of Dhruvaram Murlidhar Sonar (Supra) after considering the decisions of this Court in Bhajan Lal (Supra), it is held by this Court that exercise of powers under Section 482 Cr.P.C. to quash the proceedings is an exception and not a rule. It is further observed that inherent jurisdiction under Section 482 Cr.P.C. though wide is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in section itself. It is further observed that appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 Cr.P.C. Similar view has been expressed by this Court in the case of Arvind Khanna (Supra), Managipet (Supra) and in the case of XYZ (Supra), referred to hereinabove.

9.3 Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C.

10. The High Court has failed to appreciate and consider the fact that there are very serious triable issues/allegations which are required to be gone into and considered at the time of trial. The High Court has lost sight of crucial aspects which have emerged during the course of the investigation. The High Court has failed to appreciate and consider the fact that the document i.e. a joint notarized affidavit of Mamta Gupta – Accused No.2 and Munni Devi under which according to Accused no.2 - Ms. Mamta Gupta, Rs.25 lakhs was paid and the possession was transferred to her itself is seriously disputed. It is required to be noted that in the registered agreement to sell dated 27.10.2010, the sale consideration is stated to be Rs.25 lakhs and with no reference to payment of Rs.25 lakhs to Ms. Munni Devi and no reference to handing over the possession. However, in the joint notarized affidavit of the same date i.e., 27.10.2010 sale consideration is stated to be Rs.35 lakhs out of which Rs.25 lakhs is alleged to have been paid and there is a reference to transfer of possession to Accused No.2. Whether Rs.25 lakhs has been paid or not the accused have to establish during the trial, because the accused are relying upon the said document and payment of Rs.25 lakhs as mentioned in the joint notarized affidavit dated 27.10.2010. It is also required to be considered

that the first agreement to sell in which Rs.25 lakhs is stated to be sale consideration and there is reference to the payment of Rs.10 lakhs by cheques. It is a registered document. The aforesaid are all triable issues/allegations which are required to be considered at the time of trial. The High Court has failed to notice and/or consider the material collected during the investigation."

16. In light of the above noted dictum the FIR in question cannot be quashed at this stage especially in absence of any material collected by investigating agency and also in absence of any challenge to the cognizance order. Further, the filing of challan suggests that serious triable issues have arisen and are required to be gone into and considered at the time of trial.

17. In view of above discussion, there is no merit in the petition and the same is accordingly dismissed.

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

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

Between

1. RAVI BALA W/O SHRI KRISHAN BALDEV CHADHA
   R/O 4647-A, GURUNANAK WARA KHALSA COLLEGE
   PUTLI GHAR, AMRITSAR (PUNJAB)

2. SMT. MUKESH @ MUKUL W/O SHRI JAG MOHAN SINGH
   R/O H.NO.948, SECTOR 8 HID FLATS RANJEET AVENUE
   AMRITSAR PUNJAB AT PRESENT RESIDING WITH HER PARENTS AT
   4647-A, GURUNANAK WARA KHALSA COLLEGE, PUTLI GHAR
   AMRITSAR (PUNJAB)(DELETED)

.....PETITIONERS

(BY SH. R.D. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH SECRETARY (HOME) TO THE

GOVERNMENT OF HIMACHAL PRADESH

2. PALLAVI CHADDA WIFE OF SHRI GOURISH CHADHA, R/O VILLAGE & P.O. 53 MILE YOL ROAD RAJHIYANA,TEHSIL NAGROTA BHAGWAN DISTRICT KANGRA HIMACHAL PRADESH

....RESPONDENTS

(BY SH. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL FOR R-1)

(BY SHRI AMAN SOOD, ADVOCATE, FOR R-2)

2. CRMPs NO.2168 & 2488 OF 2022 in CRMMO No.323 of 2015

Between

GOURISH CHADHA
2/O SHRI KRISHAN BALDEV CHADHA
R/O 4647-A, GURUNANAK WARA KHALSA COLLEGE
PUTLI GHAR,
AMRITSAR (PUNJAB)

...PETITIONER

AND

1. STATE OF H.P.
THROUGH PRINCIPAL SECRETARY (HOME)
TO THE GOVERNMENT OF H.P.
SHIMLA-2

2. MRS. PALLAVI CHADHA
D/O JANAKRAJ KUMAR
R/O 53 MILES, TEHSIL NAGROTA BHAGWAN
DISTRICT KANGRA, H.P.

...RESPONDENTS

CRIMINAL MISC. PETITIONS
NO.2167 OF 2022 & 2487 OF 2022
IN CRIMINAL MISC. PETITION (MAIN) U/S 482 CRPC NO.273 OF 2014
Decided on: 20.09.2022

Code of Criminal Procedure, 1973- Section 482- Releasing of passport- Passport of petitioners have been deposited with S.H.O. at the concerned Police Station in compliance of condition imposed- Held- Passports ordered to be released on furnishing solvent surety in the sum of Rs.2.00 lac with conditions. (Para 18, 20)

Cases referred:

B.P. Mohan Rao v. State of Karnataka and others, (2020) 20 SCC 591;
Jinofer Kawasji Bhujwala v. State of Gujarat, (2020) 6 SCC 298;
M. Ravindran v. Intelligence Oficer, Directorate of Revenue Intelligence, (2021) 2 SCC 485;
P. Chidambaram v. Central Bureau of Investigation, (2020) 13 SCC 337;
Parvez Noordin Lokhandwalla v. State of Maharashtra and another, (2020) 10 SCC 77;
Pramod Kumar Saxena v. Union of India and others, (2008) 9 SCC 685;
Satish Chandra Verma v. Union of India, (2019) 2 SCT 741;
Shyam Sahni v. Arjun Prakash and others, (2020) 16 SCC 788;
Suresh Nanda v. Central Bureau of Investigation, (2008) 3 SCC 674;

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

O R D E R

Petitioners Ravi Bala (in CRMMO No.273 of 2014) and Gourish Chadha (in CRMMO No.323 of 2015) have filed **Cr.MP No.2167 of 2022 (by Petitioner Ravi Bala)** and **Cr.MP No.2168 of 2022 (by Petitioner Gourish Chadha)**, for release of the Passport of Ravi Bala with permission to go to the United States of America (USA) and for release of the passport of Gourish Chadha to process his application to go to USA. Whereas, **Cr.MP No.2487 of 2022 (by Petitioner Ravi Bala)** and **Cr.MP No.2488 of 2022 (by Petitioner Gourish Chadha)** have been filed for amendment of the condition, with prayer to delete the condition directing to deposit the Passports, imposed upon the petitioners at the time of granting them bail by this High Court on 10.3.2015 in **Cr.MP(M) No.73 of 2015,** filed by petitioner Ravi Bala and **Cr.MP(M) No.113 of 2015**, filed by petitioner Gourish Chadha.

2. Passports of petitioners have been deposited with the SHO of the concerned Police Station, in compliance of condition imposed upon the petitioners, vide order dated 10.3.2015, passed in Cr.MP(M) No.73 of 2015 and Cr.MP(M) No.113 of 2015.

3. Prayer for modification of condition with respect to Passports has been made, on the basis of judgment of the Supreme Court in ***Suresh Nanda v. Central Bureau of Investigation*, (2008) 3 SCC 674**, wherein it has been held as under:

> "18. In our opinion, even the Court cannot impound a passport. Though, no doubt, Section 104 Cr.P.C. states that the Court may, if it thinks fit, impound any document or thing produced before it, in our opinion, this provision will only enable the Court to impound any document or thing other than a passport. This is because impounding a "passport" is provided for in Section 10(3) of the Passports Act. The Passports Act is a special law while the Cr.P.C. is a general law. It is well settled that the special law prevails over the general law vide *G.P. Singh's Principles of Statutory Interpretation* (9th Edn., p.133). This principle is expressed in the maxim *generalia specialibus non derogant*. Hence, impounding of a passport cannot be done by the Court under Section 104 Cr.P.C. though it can impound any other document or thing."

4. Perusal of copy of order dated 10.3.2015, passed in Cr.MP(M) No.73 of 2015 and Cr.MP(M) No.113 of 2015, placed on record, clearly depicts that Passports of the petitioners have neither been impounded nor have been ordered to be impounded by the Court, but a condition has been imposed, at the time of granting bail, to deposit the Passports with SHO of the Police Station concerned, with another condition that the petitioners shall not leave India without permission of the Court.

5. In present case, Court has not ordered for seizure or impounding of the Passports but has imposed condition of depositing the Passports with

the SHO of the Police Station concerned, which amounts to surrendering the Passports and it, at no stretch of imagination, can be said impounding or seizure of the Passports.

6. In ***Shyam Sahni v. Arjun Prakash and others*****, (2020) 16 SCC 788,** where a condition, directing to surrender Passport, imposed by learned Single Judge and interfered by Division Bench, was subject matter of consideration, the Supreme Court upheld the condition directing to surrender the Passport by observing as under:

> "27. Since repeated undertakings were filed and the same were not complied with, learned Single Judge directed respondent No.1 to surrender his passport. The said order was passed to ensure the presence of the first respondent and compliance of the order of the Court. It cannot be said that the learned Single Judge exceeded the jurisdiction or committed an error in ordering surrender of the passport. In order to ensure the presence of the parties in the contempt proceedings, the Court is empowered to pass appropriate orders including the surrender of passport. While dealing with child custody matter, in *David Jude vs. Hannah Grace Jude*, (2003) 10 SCC 767, the Supreme Court directed Union of India to cancel the passport of contemnor No.1 and to take necessary steps to secure the presence of contemnor No.1 with the child in India and to ensure her appearance before the Court on the date of hearing.
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> 28. It is pointed out that the Division Bench proceeded as if the learned Single Judge has ordered impounding of the passport of respondent No.1; whereas, the learned Single Judge has only directed respondent No.1 to deposit his passport in the Court. As discussed earlier, the purpose of directing respondent No.1 to surrender his passport was only to ensure the presence of respondent No.1 who was filing repeated undertakings before the Court but was not complying with the same. In our view, the Division Bench was not right in setting aside the order of the learned Single Judge in directing respondent No.1 to deposit his

> passport before the Court and the judgment of the Division Bench cannot be sustained. In order to ensure the presence of respondent No.1 and to ensure further progress of the trial, the order of the learned Single Judge directing respondent No.1 to deposit his passport before the Court stands confirmed.
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> ....
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> 30. The impugned order of the Division Bench dated 01.08.2018 passed by the High Court of Delhi at New Delhi in FAO (OS) No.210 of 2017 is set aside and this appeal is allowed. In order to ensure the presence of respondent No.1 and to ensure further progress of the trial, the order of the learned Single Judge directing respondent No.1 to deposit his passport before the Court stands confirmed. The learned Single Judge is requested to take up the civil suit being CS (OS) No.1134 of 2008 and continue with the trial and dispose the same expeditiously preferably within a period of nine months. No costs."

7. In plethora of like cases, reported in ***Pramod Kumar Saxena v. Union of India and others,*** **(2008) 9 SCC 685;** ***Jinofer Kawasji Bhujwala v. State of Gujarat*****, (2020) 6 SCC 298;** ***P. Chidambaram v. Central Bureau of Investigation,*** **(2020) 13 SCC 337;** and ***M. Ravindran v. Intelligence Oficer, Directorate of Revenue Intelligence,*** **(2021) 2 SCC 485,** the Supreme Court has either upheld or has imposed condition of surrendering Passport in order to ensure presence of parties in the proceedings by confirming that Court is empowered to pass appropriate order to ensure presence of a person, including condition of surrender of Passport.

8. There is difference between 'surrender of passport' in the Court or before the Investigating Officer and 'impounding of passport'. Direction to

surrender the Passport, on the direction of Court, in the Court or with the Investigating Officer, does not amount to impounding of Passport. Therefore, condition as to surrender/deposit of the Passport in the Court or with the police can always be imposed by the Court in appropriate cases as a condition to ensure presence of a person in the Court proceedings or during investigation.

9. In view of above discussion, I do not find any merit in the prayer made in Cr.MPs No.2487 of 2022 and 2488 of 2022, for deletion of condition imposed upon the petitioners to deposit their Passports with the SHO of the Police Station concerned.

10. It has been submitted that 70 years old Ravi Bala, petitioner in **Cr.MP No.2167 of 2022,** is permanent resident of the United States but had come to Amritsar (Punjab) in India for marriage of her son Gourish and her daughter Mukesh @ Mukul and during that time FIR in present case was registered against her whether she was enlarged on bail by this Court, vide order dated 10.3.2015, passed in Cr.MP(M) No.73 of 2015 and since then, because of condition imposed, at the time of granting bail, not to leave India and to deposit the Passport, she is in India for the last about 8 years.

11. It has been further claimed that petitioner Ravi Bala is suffering from Type-III Cirrhosis of liver, which is a disease of serious nature and requires early treatment. Krishan Baldev Chadha, husband of Ravi Bala, is Green Card holder of United States and he remains in United States most of the time and at present he is 80 years old and, at this stage, company of husband and wife for each other is important, more particularly when wife is suffering from the disease which requires treatment and further that petitioner, being permanent resident of United States, can get benefits of specialized treatment in the said country as well as of Medical Insurance granted to the citizens of that country but the petitioner could not go to United States because of impounding of Passport and for want of permission to leave

India. Copy of reports of Ultrasound and FibroScan of liver have also been placed on record.

12. Petitioner Gourish Chadha has filed **Cr.MP No.2168 of 2022**, with prayer for release of the Passport, on the ground that his sister and brother-in-law are permanent resident of United States and the petitioner is interested to go to said country and his sister, intending to help him, has processed his application for necessary permission and for which Passport of the petitioner is a necessary document to be submitted alongwith other documents, with further submission that in case there is delay in processing the application, the matter will be closed and, thereafter, it will take number of years to process the matter again.

13. In ***Satish Chandra Verma v. Union of India,*** **(2019) 2 SCT 741,** the Supreme Court has observed that freedom to go abroad has much social value and represents the basic human right of great significance.

14. In ***Parvez Noordin Lokhandwalla v. State of Maharashtra and another,*** **(2020) 10 SCC 77,** the Supreme Court permitted a person, who was an Indian Citizen and was holding an Indian Passport and was residing in the United States since 1985 and was holder of Green Card and was likely to face invalidation of Green Card, if was not permitted to travel United States, with following observations:

> "18. This Court also discussed the scope of the discretion of the court to impose "any condition" on the grant of bail and observed (*Sumit Mehta v. State of NCT of Delhi*, (2013) 15 SCC 570 : (2014) 6 SCC (Cri) 560)
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> > "15. The words "any condition" used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the

> pragmatic sense and should not defeat the order of grant of bail."

19. In *Barun Chandra Thakur v. Ryan Augustine Pinto*, 2019 SCC OnLine SC 1899, this Court restored a condition mandating that the respondent seek prior permission from a competent court for travel abroad. The condition, which was originally imposed by the High Court while granting anticipatory bail was subsequently deleted by it. This Court made the following observations with respect to imposing restrictions on the accused's right to travel:

> "9. ....There could be no gainsaying to that the right to travel abroad is a valuable one and an integral part of the right to personal liberty. Equally, however, the pre-condition of securing prior permission before travelling abroad is a crucial ingredient which undoubtedly was engrafted as a condition for the grant of anticipatory-bail in this case. ......At best, the condition for seeking permission before travelling abroad could have been regulated, not deleted altogether.
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> 20. This Court has passed multiple orders previously allowing an accused enlarged on bail to travel abroad. In *Ganpati Ramnath v State of Bihar*, 2017 SCC OnLine SC 1998, this Court allowed an accused-applicant to travel abroad for medical treatment, modifying its earlier bail order, noting that the applicant had travelled abroad on the ground of medical necessity on six occasions with the permission of the court and had returned. In *K. Mohammed v The State of Kerala*, 2020 SCC OnLine SC 860, this Court allowed the accused-appellant to travel abroad to meet in the exigencies of a family situation. In *Tarun Trikha v State of West Bengal*, 2015 SCC OnLine SC

> 1879, this Court allowed the accused-petitioner to travel to Indonesia in connection with his employment and to return once the work was completed. In *Pitam Pradhan v State of* AP, 2014 SCC OnLine SC 1795,this Court while granting anticipatory bail, permitted the petitioner to travel abroad noting that his job required him to travel abroad at frequent intervals and may lose his employment if he were not permitted to travel abroad."

15. In ***B.P. Mohan Rao v. State of Karnataka and others,*** **(2020) 20 SCC 591,** the appellant therein, who was an accused under Section 498-A of the Indian Penal Code, was permitted to leave India, for treatment in Australia, for a temporary period, on executing bonds to the satisfaction of the trial Court with direction to come back to India within four months from the date on which he leaves India.

16. Learned Additional Advocate General has opposed the submissions of the learned counsel for the petitioners and has submitted that treatment of petitioner Ravi Bala is also available in India and further that after having permission to visit the United States, petitioner Gourish Chadha may leave India for fleeing from justice. It has further been submitted that, in any case, if permission is to be granted to the petitioners to leave India, then they may be permitted for doing so for specific period with direction to report to the Investigating Officer on their return and deposit the Passports again with the Investigating Officer, as also ordered by the Supreme Court in ***Parvez Noordin Lokhandwalla's*** case. He has further submitted that petitioners shall also be directed to deposit substantial amount as security in the trial Court for release of their Passports, as was directed by the Supreme Court in ***B.P. Mohan Rao's*** case.

17. Learned counsel for the petitioners has submitted that though petitioner Ravi Bala is Green Card holder of the United States, however, her son Gourish Chadha is resident of India and they are having immoveable

property in India and, therefore, they are having permanent roots in India, and that they are also ready to abide by any condition that may be imposed by the Court for release of the Passports and for permission to leave India to petitioner Ravi Bala.

18. Considering the entire facts and the circumstances and pronouncements of the Supreme Court, referred supra, Passport of petitioner Ravi Bala is ordered to be released on furnishing solvent surety in the sum of `2,00,000/- to the satisfaction of the Registrar Judicial of this Court or the Trial Court, as the case may be, wherever the Passport is lying, and she is permitted to leave India to visit USA with direction that the petitioner shall come back to India within six months from the date on which she would leave India and shall deposit her Passport with the authority from where the same shall be released to her within two weeks on her return to India.

19. During her visit to the United States, petitioner Ravi Bala shall ensure her representation, either in person or through counsel, as and if warranted, by the concerned Court for adjudication of the matter in the Trial Court.

20. The Passport of petitioner Gourish Chadha is also ordered to be released to him, on furnishing surety in the sum of `2,00,000/- to the satisfaction of the Registrar (Judicial) of this Court or the Trial Court, as the case may be, wherever the Passport is lying, for the purpose of processing the application for going to United States. After the processing of the application for going to United States is complete, petitioner Gourish Chadha shall immediately deposit back the Passport with the authority from where it shall be released.

21. CRMP No.2487 of 2022 in CRMMO No.273 of 2014 and CRMP No.2488 of 2022 in CRMMO No.323 of 2015 are dismissed; and CRMP No.2167 of 2022 in CRMMO 273 of 2014 and CRMP No.2168 of 2022 in CRMMO No.323 of 2015, are allowed in the aforesaid terms.

The parties are permitted to use/produce copy of this order, downloaded from the High Court Website, before the authorities concerned and the said authorities shall not insist for production of certified copy, but, if required, passing of order may be verified from the website of the High Court.

The applications stand disposed of.

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

Between:-
RAJENDAR SINGH
S/O SHRI MEHAR SINGH,
RESIDENT OF VILLAGE BUTHAN,
P.O. LOHARLI, TEHSIL BARSAR,
DISTRICT HAMIRPUR, H.P.

....PETITIONER

(BY MR. AJAY SHARMA, SENIOR ADVOCATE WITH MR. AJAY KUMAR THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (PERSONNEL) TO THE GOVERNMENT OF HIMACHAL PRADESH SHIMLA-171002.

2. DIRECTOR SAINIK WELFARE, HIMACHAL PRADESH, SAINIK BHAWAN, HAMIRPUR, DISTRICT HAMIRPUR, H.P. THROUGH ITS DIRECTOR.

3. THE SUB-REGIONAL EMPLOYMENT OFFICER, EX-SERVICEMEN EMPLOYMENT CELL, HAMIRPUR, DISTRICT HAMIRPUR, H.P.

4. UNION OF INDIA THROUGH SECRETARY,

MINISTRY OF LABOUR & EMPLOYMENT,
GOVERNMENT OF INDIA, NEW DELHI.

5. THE DIRECTOR GENERAL OF EMPLOYMENT
& TRAINING, GOVERNMENT OF INDIA,
NEW DELHI. 110065.

..RESPONDENTS

(MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, MR. VINOD THAKUR, MR. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERALS, MR. BHUPINDER THAKUR, MR. YUDHVIR SINGH THAKUR, DEPUTY ADVOCATE GENERALS AND MR. RAJAT CHAUHAN, LAW OFFICER FOR R-1 TO R-3.
MR. SHASHI SHIRSHOO, CENTRAL GOVERNMENT STANDING COUNSEL FOR R-4 AND R-5)

CIVIL WRIT PETITION
No. 4925 OF 2021
Reserved on: 24.8.2022
Decided on: 14.09.2022

Constitution of India, 1950- Article 226- **H.P. Department of Personnel JOA(IT) Class III (Non-Gazetted) Ministerial Service Common Recruitment and Promotion Rules, 2017**- Rule 2(b)- Rejection of the candidature of the petitioner for the post of JOA- Held- Petitioner is not having the requisite qualification, as such, he is not entitled for the relief as claimed- Petition dismissed. (Para 23)

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

O R D E R

Petitioner Rajinder Singh has sought the indulgence of this Court by way of the present writ petition filed under Article 226 of the Constitution of India.

2. By virtue of the present writ petition, petitioner Rajinder Singh has sought the following relief:-

i) That impugned act of the respondents No.1 to 3 in orally rejecting the candidature of the petitioner for the post of Junior Office Assistant

and then taking no decision on the representation of the petitioner, in law, amounts to executive inaction and same may very kindly be quashed and set aside with directions to respondents No.1 to 3 to consider the candidature of the petitioner and recommend his name to the Government for the post of Junior Office Assistant and allotting the Department in the State of H.P."

3. The above mentioned relief has been sought on the ground that he is an ex-serviceman and during his service, a certificate, Annexure P-1, was awarded to him by the Government of India.

4. In the certificate, Annexure P-1, the Army authorities had granted a Trade Proficiency Certificate in Trade, described as "Clerk S.D." which is described as equivalent to Civil Trade, Clerk General, Typist, Diarist, Enquiry Clerk, Record Clerk, Assistant Office, Accounts Clerk, as per the National Council of Training for Vocational Training/National Apprentice Certificate. It has also been mentioned in the Certificate, Annexure P-1, that the certificate, Annexure P-1 shall be treated at par with the certificate issued by N.C.V.T/N.C.T.V.T, in view of the equation for employment purposes by all States and Central Government Departments. The qualification of the petitioner in the certificate Annexure P-1, has been mentioned as 10+1.

5. After superannuating from the army, the petitioner has also passed a Diploma in Computer applications from HIMTEC Education System, which, according to him, has been recognized by the Government of Himachal Pradesh. Thereafter, the petitioner got himself enrolled in the Sub-Regional Employment Office, Ex-servicemen Cell.

6. The State of Himachal Pradesh has decided to fill up 2000 posts of Junior Office Assistants (JOA) (IT) on contract basis. About 400 posts were reserved for the ex-servicemen, which were allocated to the Sainik Welfare Department, Himachal Pradesh to be filled-up from amongst the eligible ex-servicemen, as per the procedure prescribed.

7. Vide Notification dated 25.08.2020 (Annexure P-3), the Himachal Pradesh Department of Personnel Junior Office Assistant (IT) Class III (Non-Gazetted) Ministerial Service Common Recruitment & Promotion Rules, 2017 were amended.

8. Highlighting Rule 2(b) of the amended Rules of 2020, It has been pleaded that the essential qualification for the post, for which, the petitioner has applied, is 10+2 from a recognized Board of School Education/University or Matriculate from Board of School Education with one/two year's diploma certificate from Industrial Training Institute (ITI) in Information Technology (IT) and Information Technology Enabled Sectors (ITES), as notified by the Directorate General of Employment & Training, Government of India, from time to time.

9. Since the name of the petitioner was registered with the ex-servicemen cell, as such, the call letter (Annexure P-4) was issued, directing him to appear before the Ex-servicemen Employment Cell, on 20.03.2021, at 9.30 a.m. The said call was made for the submissions of the documents, so that the same could be verified.

10. Consequently, the petitioner appeared, where he has been told that his qualification is not as per the Rules, as such, he is not eligible.

11. The petitioner has also submitted the written representation Annexure P-4, in this regard and also visited the office of respondents No. 2 and 3 number of times, but, no heed was paid by the respondents.

12. Reiterating the stand that he is having the requisite qualifications, for the post, for which, he has applied, it has been prayed that his right to be considered has wrongly been rejected by the respondents.

13. On the basis of the above facts, a prayer has been made to allow the writ petition by granting the relief as claimed therein.

14. The writ petition has been contested by the respondents.

15. Respondents No. 2 and 3, in their reply, have taken the stand that as per the Rules, governing the post in question, the eligible candidate must have passed 10+2 examination from the Board of School Education/University or Matriculation from recognized Board of School Education with one/two year's Diploma/Certificate from an Industrial Training Institute (ITI) in Information Technology (IT) and Information Technology Enabled Sector (ITES).

16. The qualification of the petitioner has been stated to be matriculate, having Trade Proficiency Certificate Annexure P-1, as well as, Diploma in Computer Application from Private Institute, situated at Bangana, Distt Una, H.P.

17. Hence, it has been pleaded that the petitioner is not possessing the requisite qualification for being considered for the post of JOA (IT).

18. Respondents No. 4 and 5, in their separate reply, have taken the plea that certificate Annexure P-1 was issued by the authority under the Craftsman/Apprenticeship Training Scheme, which is stated to be the apex organization for development and co-ordination at national level, for the programmes relating to the vocational training for the Army people. All the grounds taken in the writ petition are stated to be baseless.

19. We have heard learned counsel for the parties and have also gone through the record of the case.

20. Vide Notification (Annexure P-3), the Governor, Himachal Pradesh has amended the Rules, known as 'Himachal Pradesh Department of Personnel Junior Office Assistant (IT) Class III (Non-Gazetted) Ministerial Service Common Recruitment & Promotion Rules, 2017' by exercising the powers conferred by proviso to Article 309 of the Constitution of India. The qualification for the JOA (IT) has been mentioned in Rule 2(b) of the amended Rules, 2020, which is reproduced as under:-

> *2. In Annexure-A to the Himachal Pradesh, Department of Personnel, Junior Office Assistant (Information Technology), Class-III (Non-*

Gazetted) Ministerial Services, Common Recruitment and Promotion Rules, 2017 (hereinafter referred to as the "said rules"):-

(a) ……..

(b) For the existing provisions against Col. No.7, the following shall be substituted, namely:-

"(a) ESSENTIAL QUALIFICATION (S):

(i) Should have passed 10+2 Examination from a recognized Board of School Education/ University.

OR

Matriculation from recognized Board of School Education with one/two year's Diploma/Certificate from Industrial Training Institute (ITI) in Information Technology (IT) & Information Technology Enabled Sectors (ITES) as notified by Director General of Employment & Training (Govt. of India) from time to time or three years Diploma in Computer Engineering/. Computer Science/TT from a Polytechnic as approved by All India Council for Technical Education (AICTE):

(ii) Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi.

Provided that visually impaired persons selected/ recruited under 1% quota will be exempted from acquiring Diploma in Computer Science/Computer Application/Information Technology and passing of typing test instead they shall be imparted necessary basic training including computer training course by the Department concerned through Composite Regional Centre (CRC), Sundernagar or National Institute for the Visually Handicapped (NIVH), Dehradun or Composite Training Centre (CTC), Ludhiana. They shall have to complete the above training for which three chances will be afforded. If the incumbent fails to qualify the same his/ her services shall be terminated. However, the incumbents already in the service shall be afforded sufficient number of chances to complete the aforesaid training:

Provided further that differently abled persons who are otherwise qualified to hold clerical post as certified being unable

to type, by the Medical Board, may be exempted from passing the typing test.

***Explanation**:- The term, "differently abled persons" does not cover visually impaired persons or persons who are hearing impaired but cover only those whose physical disability/ deformity permanently prevents them from typing.*

The above criteria for grant of exemption from passing the typing test shall also be applicable to the Skill Test Norms on Computers.

(b) DESIRABLE QUALIFICATION(S):

Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh."

21. Petitioner has passed 10+1 examination. By virtue of certificate Annexure P-1, a Diploma in the trade Clerk (S.D.) was awarded to him, which is stated to be equivalent to civil trade Clerk General, Typist, Diarist, Enquiry Clerk, Record Clerk, Assistant Office, Accounts Clerk as per the National Council of Training for Vocational Trades. Learned counsel appearing for the petitioner could not satisfy the conscious of this Court as to how, the qualification, as mentioned in Annexure P-1 is equivalent to “one/two year’s Diploma/Certificate from an Industrial Training Institute (ITI) in Information Technology (IT) & Information Technology Enabled Sectors (ITES), as notified by Director General of Employment & Training (Govt. of India), from time to time, or three years Diploma in Computer Engineering/Computer Science/IT from a Polytechnic, as approved by All India Council for Technical Education (AICTE).

22. Another document, which has been relied upon by the learned counsel for the petitioner to demonstrate that he has also obtained the Diploma in Computer Applications is Annexure P-2. The said certificate was issued by one HIMTEK Computer Education System, which, admittedly, does not fall within the definition of “Industrial Training Institute” (ITI).

23. There is no ambiguity in the Rules. Once the Rules have been framed by the statutory authority, which has been authorized to lay down the minimum qualification for appointment of a person as JOA (IT), it would not be permissible for this Court, under Article 226 of the Constitution of India, to tinker with the qualification, as prescribed by the Rules or expand the ambit of the prescribed qualification, by including the Diploma(s) Annexure P-1 and Annexure P-2 heavily relied upon by the petitioner. Since the petitioner is not having the requisite qualification, as such, he is not entitled for the relief, as claimed, in the present writ petition.

24. In view of the discussion made above, there is no merit in the petition and the same is accordingly dismissed. Pending application(s), if any, also stands disposed of.

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

Between:-

SATISH KUMAR SON OF SH. DESH RAJ, RESIDENT OF VILLAGE BADAHIN, POST OFFICE KOT, TEHSIL BALDWARA, DISTRICT MANDI, H.P.

.....PETITIONER.

AND

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

2. DIRECTOR OF ELEMENTARY EDUCATION, H.P., SHIMLA.

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, MANDI, HIMACHAL PRADESH.

4. NATIONAL COUNCIL FOR TEACHERS EDUCATION (NCTE).

5. ROOP LAL, S/O SH. MAST RAM, R/O VILLAGE MOTI, PO SOLDHA, TEHSIL SADAR, DISTT. BILASPUR, H.P.

6. SHASHI PAL, S/O SH. DHANI RAM, R/O VILLAGE GRROR, PO SOLDHA, TEHSIL SADAR, DISTT. BILASPUR, HP.

7. PREM LAL, S/O SH. GHANTHA RAM, R/O VILLAGE BAGGA, PO KANDHAR, TEHSIL ARKI, DISTT. SOLAN,H.P.

8. ASHWANI KUMAR, S/O SH. MUNSHI RAM SHARMA, R/O VILLAGE SANAN, PO DOMEHAR, TEHSIL ARKI, DISTT. SOLAN,HP.

9. JITENDER KUMAR S/O SH. BIHARI LAL, R/O VILLAGE DEOTHI, PO THAILA, TEHSIL SUNNI, DISTT. SHIMLA, H.P.

10. KARAM CHAND, S/O SH. BACHAL LAL, R/O VILLAGE BELHI, PO SWARGHAT, TEHSIL NALAGARH, DISTT. SOLAN, H.P.

11. DEEPAK SHARMA, S/O LATE SH. DHANI RAM, R/O VILLAGE SUKHER, PO & TEHSIL BALDWARA, DISTT. MANDI, H.P.

12. SOM DUTT, S/O SH. PARAM DEV, R/O VILLAGE CHATTER RIDDLA, PO NAROLA, TEHSIL BALDWARA, DITT. MANDI, H.P.

13. BIAS DEV, S/O SH. NALWATRU RAM, R/O VILLAGE BUSHILER, PO GARMA, TEHSIL BALH, DISTT. MANDI, H.P.

14. GEETA NAND, S/O SH. ROSHAN LAL, R/O VILLAGE DOH, PO REWALSAR, DISTT. MANDI, H.P.

15. DHARAM CHAND, S/O SH. SHYAM DEV, R/O VILLAGE SAMOH, PO GAHAR, TEHSIL SARKAGHAT, DISTT. MANDI, H.P.

16. RAJESH KUMAR, S/O SH. HARI RAM, R/O VILLAGE MAJHWAN, PO KALKHAR, TEHSIL SARKAGHAT, DISTT. MANDI, H.P.

17. HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR, H.P.

18. YASHPAL SHARMA, S/O BHAJNA NAND SHARMA, R/O VILLAGE KHALENTOO, TEHSIL SHIMLA, DARBHOG (202), SHIMLA, HP-171012.

19. PAWAN KUMAR S/O SH. NARAYAN DUTT, R/O VILLAGE BAAG, PO DEOLA, TEHSIL SUNNI, DISTRICT SHIMLA, H.P.

20. DINESH KUMAR S/O SH. MOHAN LAL, R/O VILLAGE BHALANA, PO LANA-CHETTA, TEHSIL NOHRADHAR, DISTRICT SIRMOUR,HP-173104.

21. VIRENDER SINGH S/O SH. BABU RAM, R/O VILLAGE BHENU, PO PARARA, TEHSIL DADAHU, DISTRICT SIRMOUR, HP-173001.

22. KESHAV DEV, S/O SH. SOM DUTT, R/O VILLAGE CHANALOG, PO DINGER, TEHSIL PACHHAD, DISTRICT SIRMOUR, HP-173001.

23. DEV PARKASH, S/O SH. ISHWAR DUTT SHARMA, R/O VILLAGE KOTLA MONGAN, PO KATHOLI BHARAN, TEHSIL RAJGARH, DISTRICT SIRMOUR, HP-173101.
24. ASHWANI KUMAR, S/O SH. MANOHAR LAL, AGED 32 YEARS, R/O VILLAGE CHALAILA, PO SIDHPUR, TEHSIL DHARAMPUR, DISTT. MANDI, HP (ROLL NO.81300280).

25. RAVI KR. SHARMA, S/O SH. BABU RAM, AGED 34 YEARS, R/O VILLAGE BANLI, PO SEWRA CHANDI, TEHSIL ARKI, DISTT. SOLAN, HP (ROLL No.813005090).

26. AMIT KUMAR S/O SH. KRISHAN CHAND, AGED 37 YEARS, R/O VILLAGE BALAKROPI, PO & TEHSIL JOGINDERNAGAR, DISTT. MANDI, HP (ROLL NO.813003229).

27. DHARMENDER KUMAR, S/O SH. PITAMBER DUTT, AGED 33 YEARS, R/O GORTHI NICHAI (152) KOT BEJA, TEHSIL KASAULI, DISTT. SOLAN, HP (ROLL No.813005323).

28. MANOJ KUMAR S/O SH. RADHE SHYAM, AGED 26 YEARS, R/O VILLAGE SAURI, BADDI, DISTT. SOLAN, HP (ROLL NO.813004988).

29. AJAY SHARMA S/O SH. DEVI CHAND, AGED 27 YEARS, R/O VILLAGE MATWAR, PO JALARI, TEHSIL NADAUN, DISTT. HAMIRPUR, HP (ROLL NO. 813001047).

30. VIRENDER SINGH S/O SH. KEWAL RAM, AGED 41 YEARS, R/O SATRUBARH, SHAWAG, SHIMLA, HP (ROLL NO.813003492).

31. HIRA LAL SHARMA, S/O SH. KHEM RAJ, RESIDENT OF VILLAGE KAMMAND, POST OFFICE DOHAD, TEHSIL ANI, DISTRICT KULLU, HIMACHAL PRADESH.

32. ARUN SHARMA, S/O SH. SOM DUTT, RESIDENT OF VILLAGE NAHARPAB, POST OFFICE CHURWADHAR, TEHSIL RAJGARH, DISTRICT SIRMOUR, HIMACHAL PRADESH.

33. SATISH KUMAR, S/O SH. DINESHWAR SHARMA, RESIDENT OF VILLAGE PEOTHA, POST OFFICE SHALAGHAT, TEHSIL ARKI, DISTRICT SOLAN, HIMACHAL PRADESH.

34. VIKAS KUMAR, S/O SH. SATISH KUMAR, RESIDENT OF VILLAGE DUDBAHLI, POST OFFICE JAHU, TEHSIL NANKHARI, DISTRICT SHIMLA, HIMACHAL PRADESH.

35. ANIL KUMAR, S/O SH. JAGDISH, RESIDENT OF VILLAGE BATOL, POST OFFICE SAHARAN, TEHSIL PACHHAD, DISTRICT SIRMOUR, HIMACHAL PRADESH.

36. OM PRAKASH, S/O SH. CHAMAN LAL, RESIDENT OF VILLAGE BAHLIDHAR, POST OFFICE & TEHSIL THUNAG, DISTRICT MANDI, HIMACHAL PRADESH.

37. VIKASH SHARMA, S/O SH. VIRENDER SINGH, RESIDENT OF VILLAGE NAHARPAB, POST OFFICE CHURWADHAR, TEHSIL RAJGARH, DISTRICT SIRMOUR, H.P.

38. PROMILA KUMARI, D/O SH. BHIM SINGH, RESIDENT OF VILLAGE BHATLONBHUJOND, TEHSIL RAJGARH, DISTRICT SIRMOUR, HIMACHAL PRADESH.

39. RAHUL SHARMA, S/O SH. LAIQ RAM, RESIDENT OF VPO PABAN, TEHSIL CHOPAL, DISTRICT SHIMLA, H.P.

40. PARMESH KUMAR SHARMA, S/O SH. LAL SINGH, RESIDENT OF VPO PABAN, TEHSIL CHOPAL, DISTRICT SHIMLA, HIMACHAL PRADESH.

41. TIKA RAM S/O SH. CHET RAM, RESIDENT OF VPO BHATGARH, TEHSIL RENUKJI, DISTRICT SIRMOUR, H.P.

42. SUNIL KUMAR, S/O SH. JAGAR RAM, RESIDENT OF VILLAGE THANDIDHAR, TEHSIL RAJGARH, DISTRICT SIRMOUR, HIMACHAL PRADESH.

43. SUMAN DEVI, W/O SH. LAIQ RAM, RESIDENT OF VILLAGE GADLI, POST OFFICE BHARANA, TEHSIL THEOG, DISTRICT SHIMLA, HIMACHAL PRADESH.

44. BALAK RAM, S/O SH. JALAM SINGH, RESIDENT OF VILLAGE KUHA, POST OFFICE BAROT, TEHSIL SANGRAH, DISTRICT SIRMOUR, HIMACHAL PRADESH.

45. NAMIT KAPATIA, S/O SH. RAM KUMAR, RESIDENT OF VPO DHALWARI, TEHSIL AMB, DISTRICT UNA, H.P.

46. MANOJ KUMAR, S/O SH. MOHINDER KUMAR, RESIDENT OF VILLAGE KINDDER, POST OFFICE BEHLI, TEHSIL NIHRI, DISTRICT MANDI, HIMACHAL PRADESH.

47. RAMESH, S/O SH. CHAIN LAL, RESIDENT OF VILLAGE J ADERA, TEHSIL & DISTRICT CHAMBA, H.P.

48. SURYA PRAKASH, S/O SH. VED PRAKASH, RESIDENT OF VPO KHANIYARA, TEHSIL DHARAMSHALA, DISTRICT KANGRA, HIMACHAL PRADESH.

49. CHANDER SHEKHAR, S/O SH. OM PRAKASH, RESIDENT OF VILLAGE CHALOG, POST OFFICE BAROG, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

50. AKSHAY KUMAR, S/O SH. DEVENDER, RESIDENT OF VILLAGE NEHRA, POST OFFICE RAJHANA, TEHSIL & DISTRICT SHIMLA, HIMACHAL PRADESH.

51. ANU KUMARI, S/O SH. JARU RAM, RESIDENT OF VILLAGE JAAR, POST OFFICE KARHOTA, TEHSIL BHORANJ, DISTRICT HAMIRPUR, HIMACHAL PRADESH.

52. AMAR NATH, S/O SH. SADH RAM, RESIDENT OF VILLAGE JABLI, POST OFFICE PATRIGHAT, TEHSIL BALDWARA, DISTRICT MANDI, HIMACHAL PRADESH.

53. MAMTA, D/O SH. GURUDEV, RESIDENT OF VILLAGE NANDLA, POST OFFICE JANGLA, TEHSIL CHIRGAON, DISTRICT SHIMLA, HIMACHAL PRADESH.

54. RIMA, D/O SH. CHAMAN LAL, RESIDENT OF VILLAGE JARKOT, POST OFFICE LAROT, TEHSIL CHIRGAON, DISTRICT SHIMLA, HIMACHAL PRADESH.

55. JYOTI, D/O SH. PURAN DUTT, RESIDENT OF VPO BAROG, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

56. RAVINDER SINGH, S/O SH. DHARAM SINGH, RESIDENT OF VILLAGE UNCHATIKKAR, POST OFFICE BARAH, TEHSIL SANGRAH, DISTRICT SIRMOUR, H.P.

57. ANKUSH SHARMA, S/O SH. SURESH KUMAR, RESIDENT OF VILLAGE KOHLUIN, POST OFFICE SANAHI, TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P.

58. JAGMOHAN, S/O SH. SHYAM LAL, RESIDENT OF VILLAGE JANI, POST OFFICE RAMNI, TEHSIL NICHAR, DISTRICT KINNAUR, HIMACHAL PRADESH.

59. SONU RAM, S/O SH. BANISHU RAM, RESIDENT OF VILLAGE CHHAPRITHA, POST OFFICE BHADIYUN KOTHI, TEHSIL & DISTRICT CHAMBA, HIMACHAL PRADESH.

60. SANJAY KUMAR, S/O SH. SHER SINGH, RESIDENT OF VPO SAKOUT, TEHSIL & DISTRICT KANGRA, H.P.

61. AJEET KUMAR, S/O SH. KIKAR RAM, RESIDENT OF VILLAGE LOHANI, POST OFFICECHANWHTA, TEHSIL BHARMOUR, DISTRICT CHAMBA, HIMACHAL PRADESH.

62. RAJ KUMAR THAKUR, S/O SH. RELU RAM, RESIDENT OF LORAN HOUSE NO. 267, WARD NO.7, KULLU, DISTRICT KULLU, HIMACHAL PRADESH.

63. NITISH BHARDWAJ, S/O SH. LEELA NAND BHARDWAJ, RESIDENT OF VILLAGE JATHAI, POST OFFICE CHEOT, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

64. SNEHA THAKUR, D/O SH. DEVI SINGH, RESIDENT OF VILLAGE GADIARA, POST OFFICE BHUTI, TEHSIL & DISTRICT KULLU, HIMACHAL PRADESH.

65. AMAN SHARMA, S/O SH. JAGDISH CHAND SHARMA, RESIDENT OF VILLAGE CHALAILA, POST OFFICE SIDHPUR, TEHSIL DHARAMPUR, DISTRICT MANDI, H.P.

66. ASHISH SHARMA, S/O SH. NARENDER SINGH, RESIDENT OF VILLAGE THUND, POST OFFICE SATALAI, TEHSIL JUNGA, DISTRICT SHIMLA, HIMACHAL PRADESH.

67. PAWAN KUMAR, S/O SH. PARAS, RESIDENT OF VILLAGE BHADROHLU, POST OFFICE MALOH, TEHSIL SUNDERNAGAR, DISTRICT MANDI, HIMACHAL PRADESH.

68. MANOJ KUMAR, S/O SH. MEHAR CHAND, RESIDENT OF VILLAGE BANJAN, POST OFFICE MANGOO, TEHSIL ARKI, DISTRICT SOLAN, HIMACHAL PRADESH.

69. RAKESH SHARMA, S/O SH. KALTU RAM, RESIDENT OF VILLAGE PANJOR, POST OFFICE HALKAN, TEHSIL

SHILLAI, DISTRICT SIRMOUR, HIMACHAL PRADESH.

70. AJAY SHARMA, S/O SH. KESHVANAND, RESIDENT OF VILLAGE RUMNJA CHINAR, POST OFFICE CHALANA, TEHSIL DADAHU, DISTRICT SIRMOUR, HIMACHAL PRADESH.

……RESPONDENTS.

2. CIVIL WRIT PETITION NO.3132 OF 2019.

ANKUR RAINA, S/O SHRI TRILOK CHAND RAINA, R/O WARD NO.4, NAGAR PANCHAYAT, NADAUN, POST OFFICE & TEHSIL NADAUN, DISTRICT HAMIRPUR, H.P.

…..PETITIONER.

AND

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

2. DIRECTOR, ELEMENTARY EDUCATION,H.P., SHIMLA.

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, HAMIRPUR, H.P.

4. NATIONAL COUNCIL FOR TEACHERS EDUCATION, G-7, SECTOR 10, DWARKA, DELHI-110075.

…..RESPONDENTS.

3. CIVIL WRIT PETITION NO.3597 OF 2019.

SATISH KUMAR, SON OF SH. DESH RAJ, RESIDENT OF VILLAGE BADAHIN, POST OFFICE KOT, TEHSIL BALDWARA, DISTRICT MANDI, H.P.

….PETITIONER.

AND

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

2. DIRECTOR OF ELEMENTARY EDUCATION, H.P., SHIMLA.

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, MANDI, HIMACHAL PRADESH.

4. NATIONAL COUNCIL FOR TEACHERS EDUCATION (NCTE)

.....RESPONDENTS.

4. CIVIL WRIT PETITION NO. 4420 OF 2019.

1. SMT. REETA DEVI, AGED 30 YEARS, W/O SHRI NARESH KUMAR, RESIDENT OF VILLAGE KHARIYAN, POST OFFICE- KALOL, TEHSIL JHANDUTTA, DISTRICT BILASPUR, H.P.

2. SHRI RAVINDER KUMAR, AGED 39 YEARS, S/O SHRI SAILI RAM, RESIDENT OF VILLAGE SERI, POST OFFICE KILAD, TEHSIL & DISTRICT CHAMBA, (H.P.).

.....PETITIONERS.

AND

1. STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA 171002 (H.P.).

2. DIRECTOR, ELEMENTARY EDUCATION, LALPANI, SHIMLA-171001 (H.P.).

3. HIMACHAL PRADESH STAFF SELECTION COMMISSION, HAMIRPUR, DISTRICT HAMIRPUR (H.P.), THROUGH ITS SECRETARY.

4. NATIONAL COUNCIL FOR TEACHERS EDUCATION (NCTE).

.....RESPONDENTS.

5. SH. RAVINDER SINGH, S/O LATE SH. KHARKU RAM, RESIDENT OF V. & P.O. DEVI DHAR, TEHSIL CHIRGAON, DISTRICT SHIMLA (H.P.).

.....PROFORMA RESPONDENT.

5. CIVIL WRIT PETITION NO.2305 OF 2020.

I. VISHAL SINGH, SON OF SH. BALDEV SINGH, RESIDENT OF VILLAGE AND POST OFFICE SATAUN, TEHSIL KAMRAU, DISTRICT SIRMAUR, H.P.

2. SATISH KUMAR, SON OF SH. LAYAK SINGH, RESIDENT OF VILLAGE KANTI MASHWA, TEHSIL KAMRAU, DISTRICT SIRMAUR, H.P.

3. VINOD KUMAR SON OF LATE SH. HIRDA RAM, RESIDENT OF VILLAGE AND POST OFFICE KOTI DHIMAN, TEHSIL RENUKA DISTRICT SIRMAUR, H.P.

....PETITIONERS.

AND

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

2. DIRECTOR OF ELEMENTARY EDUCATION, H.P., SHIMLA.

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, SIRMAUR, HIMACHAL PRADESH.

4. HIMACHAL PRADESH STAFF SELECTION BOARD, BOARD HAMIRPUR, DISTRICT HAMIRPUR, H.P., THROUGH ITS SECRETARY.

.....RESPONDENTS.

6. CIVIL WRIT PETITION NO.2306 OF 2020.

I. SUNITA WIFE OF VINOD TOMAR RESIDENT OF VILLAGE KOTI DHIMAN TEHSIL RENUKA, DISTRICT SIRMAUR, H.P.
II. MANJU CHAUHAN WIFE OF SH. VIKRAM SINGH, RESIDENT OF VILLAGE AND POST OFFICE SHILLAI, TEHSIL SHILLAI, DISTRICT SIRMAUR.
III. RAJENDER SINGH SON OF SH. HIRA SINGH, RESIDENT OF VILLAGE KAMOTA, POST OFFICE KANDO-BHATNAL, TEHSIL SHILLAI, DISTRICT SIRMAUR, H.P.

....PETITIONERS.

AND

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

2. DIRECTOR OF ELEMENTARY EDUCATION, H.P., SHIMLA.

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, SIRMAUR, HIMACHAL PRADESH.

4. HIMACHAL PRADESH STAFF SELECTION BOARD, BOARD HAMIRPUR, DISTRICT HAMIRPUR, H.P., THROUGH ITS SECRETARY.

.....RESPONDENTS.

7. CIVIL WRIT PETITION(ORIGINAL APPLICATION) NO.7311 OF 2020.

1. JAGJEET RANA, S/O SH. OM PRAKASH, R/O VILLAGE DHANOT, P.O. ADHWANI, TEHSIL JWALAMUKHI, DISTRICT KANGRA, (HP).

2. SANJEEV KUMAR, S/O SH. RAMESH CHAND, R/O VILLAGE & P.O. CHANOUR, TEHSIL DADA SIBA, DISTRICT KANGRA (HP).

3. GAURAV SHARMA, S/O SH. RAMESH CHAND, R/O VILLAGE & P.O. CHANOUR, TEHSIL DADA SIBA, DISTRICT KANGRA, (HP).

4. VISHAL SHARMA, S/O LATE SH. BIPAN KUMAR, R/O VILLAGE KOTLA, P.O. JALARI, TEHSIL NADAUN, DISTRICT HAMIRPUR (HP).

5. SATISH KUMAR, S/O SH. DESH RAJ, R/O VILLAGE DADIHIN, P.O. KOT, TEHSIL BALDWARA, DISTRICT MANDI, (HP).

....PETITIONERS.

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (EDUCATION) TO THE GOVERNMENT OF HP, SHIMLA-02 (HP).

2. DIRECTOR, ELEMENTARY EDUCATION, LALPANI, SHIMLA-01 (HP).

3. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, HAMIRPUR, DISTRICT HAMIRPUR, H.P.

4. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, KANGRA AT DHARAMSHALA (HP).

5. DEPUTY DIRECTOR, ELEMENTARY EDUCATION, MANDI, DISTRICT MANDI,H.P.

.....RESPONDENTS.

MR. DEVENDER K. SHARMA, MR. BHUVNESH SHARMA, Mr. RAMAKANT SHARMA AND MR. ADARSH K. VASHISTA, ADVOCATES, FOR THE PETITIONER(S) IN THE RESPECTIVE PETITIONS.

MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MR. VINOD THAKUR, ADDITIONAL ADVOCATE GENERAL, MR. YUDHBIR SINGH THAKUR, DEPUTY ADVOCATE GENERAL AND MR. RAJAT CHAUHAN, LAW OFFICER, FOR THE RESPONDENTS-STATE.

MR. B.NANDAN VASHISTH, ADVOCATE, FOR THE RESPONDENT -NCTE.

MR. SURENDER KUMAR SHARMA, MR. NEERAJ KUMAR SHASHWAT, MR. VISHWA BHUSHAN, MR.AJEET SINGH SAKLANI, MR. MUKESH SHARMA, MR. ANIL BANSAL, AND MR. SANDEEP CHAUHAN, ADVOCATES, FOR THE PRIVATE RESPONDENTS, IN THE RESPECTIVE PETITIONS.

MR. ANGREZ KAPOOR AND MR. SANJEEV KUMAR MOTTA, ADVOCATES, FOR THE RESPONDENT-HPSSC IN THE RESPECTIVE PETITIONS.

CIVIL WRIT PETITION
No.1773 OF 2020
ALONG WITH CIVIL WRIT PETITION NOS.3132, 3597, 4420 OF 2019, 2305,2306 OF 2020 AND CIVIL WRIT PETITION (ORIGINAL APPLICATION) NOS. 7311 OF 2020

Reserved on: 25.08.2022
Decided on:21.09.2022

Constitution of India, 1950- Article 226- **Right to Education Act, 2009**- Sections 23, 29, 35- Petitioners have qualified B.Ed. and have sought a direction to the respondents to fill-up the posts of "Shastri Teachers" as per NCTE norms- Held- It is the NCTE alone that has been notified an "academic authority" for the purpose of sub-section (1) of Section 23 as well as sub-section (1) of Section 29 of the RTE Act and, therefore, in terms of sub-section (1) of Section 23, it is the NCTE alone which has authority to prescribe minimum eligibility qualification for appointment as a teacher- But, then such qualifications have to be laid down by the NCTE by following the procedure as laid down under the NCTE Act, more particularly, Sections 3, 12 and 12A thereof and in case the procedure is not followed, then the instructions cannot be issued by the NCTE so as to bind the State Government- Petition dismissed. (Para 62, 63)

Cases referred:

Babu Verghese & Ors. vs. Bar Council of Kerala & Ors. (1999) 3 SCC 422;
Deep Chand vs. State of Rajasthan AIR 1961 SC 1527;
Nazir Ahmad vs. King Emperor, AIR 1936 Privy Council 253;
Ram Sharan Maurya and others vs. State of U.P. and others AIR 2021 SC 954;
Rao Shiv Bahadur Singh and another vs. State of Vindh-P. AIR 1954 SC 322;
State of Jharkhand and others vs. Ambay Cements and another (2005) 1 SCC 368;
State of U.P. vs. Singhara Singh and others AIR 1964 SC 358;
Taylor vs. Taylor 45 LJ Ch 373;
Zuari Cement Ltd. vs. Regional Director, Employees State Insurance Corporation, Hyderabad and others (2015) 7 SCC 690;

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

O R D E R

Since, identical question of facts and law arises for consideration in these petitions, therefore, they were taken up together for hearing and are being disposed of by a common judgment.

2. The petitioners have qualified B.Ed. and have sought a direction to the respondents to fill-up the posts of "Shastri Teachers" strictly in accordance with the norms as laid down by the National Council for Teacher Education (NCTE) in its Notification dated 29.07.2011 and not on the basis of the Notification issued by the State Government on 29.09.2020 which, according to them, is in violation of the instructions of the NCTE.

3. The State which had earlier conceded to the claim of the petitioners has now opposed the same on the basis of the records produced by the NCTE relating to the issuance of the Notification dated 29.07.2011.

4. It is now averred that the Notification dated 29.07.2011 issued by the NCTE is de hors the provisions of the Right of Children to Free and Compulsory Education Act, 2009, (for short "RTE Act"),more particularly, Section 23 thereof and, therefore, not binding on the State Government.

5. It is averred that the Ministry of Human Resource Development (MHRD) (Development of School Education and Literacy) in exercise of its powers as conferred under Sub-Section 29 of the RTE Act had authorized the NCTE as an "academic authority" to lay down the curriculum and evaluation procedure for Elementary Education and to develop a framework of National curriculum under Clause (a) of sub-section (6) of Section 7 vide Notification dated 31.03.2010. Similarly, vide Notification of the same date, NCTE had been notified as an "academic authority". The NCTE had inserted B.Ed. qualification for Language Teacher merely on the direction of the MHRD without there being any independent application of mind by the NCTE.

6. To similar effect is the stand taken by the private respondents, who do not hold or possess the B.Ed. Degree.

7. Thus, what would be noticed from the discussion so far is that the sole controversy which arises for consideration in these petitions is whether the NCTE has correctly and legally included B.Ed. as an essential qualification for eligibility of appointment to the posts of "Shastri Teachers".

8. In order to appreciate the controversy, we may note in brief the factual background as well as the statutory framework.

9. Article 21A was inserted in the Constitution by Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 01.04.2010 which provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. Long before the amendment of the Constitution and insertion of Article 21A, the right to primary education was recognized as a fundamental right being part of Article 21 by the Hon'ble Supreme court in the case of *Mohini Jain vs. State of Karnataka (1992) 3 SCC 666* and in the case of *Unni Krishnan J.P. vs. State of Andhra Pradesh (1993) 1 SCC 645*. With the insertion of Article 21A, this right was recognized as an independent fundamental right in the Constitution.

10. To operationalize this valuable right, the Parliament framed the RTE Act. The term 'school' has been defined in Section 2(n) as to mean any recognized school imparting elementary education and would include the schools established, owned or controlled by the appropriate Government or a local authority, schools receiving aid and even unaided schools. Clause (g) of Section 8 of the RTE Act, pertaining to duties of appropriate Government, requires that the appropriate Government shall ensure good quality elementary education conforming to the standards and norms specified in the Schedule. Section 18 requires compulsory recognition of all schools. Section 19 of the RTE Act pertains to norms and standards for school. Sub-section (1) of Section 19 provides that no school shall be established or recognized under Section 18, unless it fulfills the norms and standards specified in the Schedule. The Schedule lists the norms and standards for the schools imparting education for the classes-I to V. There are different prescriptions for the number of teachers for this section as compared to classes-VI to VIII.

11. Section 23 of the RTE Act pertains to qualifications for appointment and terms and conditions of service of teachers and reads as under:-

> "23. Qualifications for appointment and terms and conditions of service of teachers-- **(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher.**
> **(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:**
> **Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years:**
> **[Provided further that every teacher appointed or in position as on the 31st March, 2015, who does not possess minimum qualifications as laid down under sub- section (1), shall acquire such minimum qualifications within a period of four years from the date of commencement of the Right of Children to Free and Compulsory Education (Amendment) Act, 2017.]**
> **(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed.**"

12. As per sub-section (1) of Section 23, a person possessing such minimum qualifications as laid down by an "academic authority" authorised by the Central Government shall be eligible for appointment as a teacher. Sub-section (2) of Section 23, empowers the Central Government to relax such minimum qualifications under certain circumstances subject to conditions. We would make a detailed reference to this Section at a later stage.

13. Chapter-V of the RTE Act pertains to curriculum and completion of elementary education. Section 29 contained in the said part pertains to curriculum and evaluation procedure, and it reads as under:-

> "29. Curriculum and evaluation procedure.**--(1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government, by notification.**
> **(2) The academic authority, while laying down the curriculum and the evaluation procedure under sub-section (1), shall take into consideration the following, namely:--**
> **(a) conformity with the values enshrined in the Constitution;**
> **(b) all round development of the child;**
> **(c) building up child's knowledge, potentiality and talent;**
> **(d) development of physical and mental abilities to the fullest extent;**
> **(e) learning through activities, discovery and exploration in a child friendly and child-centered manner;**
> **(f) medium of instructions shall, as far as practicable, be in child's mother tongue;**
> **(g) making the child free of fear, trauma and anxiety and helping the child to express views freely;**
> **(h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same."**

14. Section 35 of the RTE Act is contained in Chapter-VII of Miscellaneous provisions and reads under:-

> "35. Power to issue directions.**--(1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purposes of implementation of the provisions of this Act.**
> **(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.**
> **(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management**

Committee regarding implementation of the provisions of this Act."

15. Sub-section (1) of Section 35 of the RTE Act, as noted above, empowers the Central Government to issue such guidelines to appropriate Government or the local authority, as it deems fit for the purpose of implementation of the provisions of the Act. Under sub-section (2) of Section 35, the appropriate Government may issue guidelines and give directions, as it deems fit, to the local authority or the school management committee regarding implementation of the provisions of this Act. Under sub-section (3) of Section 35, the local authority may issue such guidelines and directions as it deems fit to the school management committee.

16. It is not in dispute that the Central Government has notified the NCTE as the “academic authority” for the purposes of sub-section (1) of Section 23 as well as sub-section (1) of Section 29 of the RTE Act. In terms of sub-section (1) of Section 23, thus, it is the NCTE which has the authority to prescribe the minimum eligibility qualifications for appointment as a teacher.

17. Likewise, the NCTE is authorised in terms of sub-section (1) of Section 29 to lay down the curriculum and evaluation procedure for elementary education. It may be noted that the NCTE has been constituted under the National Council for Teacher Education Act, 1993 (for short 'NCTE ACT'). In its original form, the preamble to the NCTE Act provided that it was an Act to provide for establishment of NCTE with a view to achieving planned and co-ordinated development of the teacher education system throughout the country, the regulations and proper maintenance of norms and standards in the teacher education system and for matters connected therewith.

18. By Amendment Act 18 of 2011 with effect from 01.06.2012 the words "including qualifications of school teachers" were inserted in the preamble.

19. Similar amendments were made in the Act and the applicability of the Act as provided in sub-section (4) of Section 1 of the NCTE Act, was expanded to schools imparting pre-primary, primary, upper primary education.

20. The functions of the NCTE as contained in Section 12 were expanded to include laying down of guidelines in respect of minimum qualifications for a persons to be employed as a teacher in recognized institutions.

21. Section 12A was inserted with effect from 01.06.2012, which provides that for the purpose of maintaining standards of education in schools, the NCTE may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever names called, established, run, aided or recognised by the Central Government or a State Government or a local authority or other authority. First proviso, while protecting the existing teachers, was subject to further proviso, which provides that the minimum qualifications of a teacher shall be acquired within the period specified in the NCTE Act or under the RTE Act.

22. Section 29 of the NCTE Act pertains to directions by the Central Government. Sub-section (1) of Section 29 provides that the NCTE shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time. Sub-section (2) of Section 29 provides that the decision of the Central Government as to whether a question is one of policy or not shall be final.

23. Section 32 of the NCTE Act gives power to the NCTE to frame regulations. As per sub-section (1) of Section 32, the NCTE may, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, generally to carry out

the provisions of this Act. Sub-section (2) of Section 32 which provides that in particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely those contained in various sub-clauses of the said sub-section, which was amended by insertion of Clause (dd) pertaining to the minimum qualifications of teachers under Section 12A.

24. Section 33 of the NCTE Act requires the rules and regulations framed by the NCTE to be laid before the Parliament, which reads as under:-

> "*33. Rules and regulations to be laid before Parliament.*–**Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both House agree in making any modification in the rule or regulation, or both House agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.**"

25. The NCTE in exercise of powers under sub-section (1) of Section 23 of the RTE Act had issued a notification dated 23.08.2010 prescribing minimum qualifications for a person to be eligible for appointment as teacher in classes-I to VIII in a school referred to in Clause (n) of Section 2 of the RTE Act. Clause (1) of this notification pertains to minimum qualifications. Sub-clause (i) prescribes minimum qualifications for classes-I to V. The recognized persons with senior secondary or equivalent with diploma in elementary education (which is, as noted, is called D.El.Ed.) by whatever name called or senior secondary passed with prescribed percentage and 4 years Bachelor of Elementary Education and 2 year Diploma in Education as qualified for appointment; provided they possess Teacher Eligibility Test passed certificate

as conducted in accordance with the guidelines framed by the NCTE. In contrast, for classes-VI to VIII, as per this notification a candidate must possess degree in B.A. or B.Sc. with Diploma in Elementary Education or such degree with minimum 50% marks with one year B.Ed. course and such similar qualifications.

26. The notification dated 23.08.2010 was amended by the NCTE vide notification dated 29.07.2011. Certain modifications were made in the essential qualifications for appointment of a teacher for classes-I to V as well as classes-VI to VIII. We are directly concerned with these changes brought about by the subsequent notification dated 29.07.2011, which reads as under:-

> "National Council for Teacher Education
>
> Notification
>
> New Delhi, the 29th July, 2011
>
> F.No.61-1/2011/NCTE (N&S) – In exercise of the powers conferred by sub-section (1) of the Section 23 of Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009) and in pursuance of the Notification No.S.O. 750(E) dated 31st March, 2010 issued by the Department of School Education and Literacy, Ministry of Human Resource Development, Government of India, the National Council for Teacher Education (NCTE) hereby makes the following amendments to the Notification No.215 dated 25th August, 2010 published in the Gazette of India, Extraordinary Part-III, Section-4, Vide F.No.61-1/2011-NCTE (N&S) dated the 23rd August, 2010, laying down the minimum qualifications for a person to be eligible for appointment as a teacher (hereby referred to as the Principal Notification), namely:-
>
> (1) For sub-para (I) of para I of the Principal Notification, the following shall be substituted, namely:-
>
> 1. Minimum Qualifications:-
>
> (I) Class I-V
>
> (a) Senior Secondary (or its equivalent) with at least 50% marks and 2 year Diploma in Elementary Education (By whatever name known)
>
> OR

Senior Secondary (or its equivalent) with at least 45% marks and 2 year Diploma in Elementary Education (By whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4 year Bachelor of Elementary Education (B.EI.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2 year Diploma in Education (Special Education)

OR

Graduation and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by NCTE for the purpose.

(II) For sub-Para (ii) of para 1 of the Principal Notification, the following shall be substituted, namely:-

(ii)Classes VI-VIII

(a) Graduation and 2 year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1 year Bachelor in Education (B.Ed).

OR

Graduation with at least 45% marks and 1 year Bachelor in Education (B.Ed), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4 year Bachelor in Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4 year B.A./ B.Sc.Ed. Or B.A. Ed/B.Sc.Ed.

OR

Graduation with at least 50% marks and 1 year B.Ed. (Special Education)

AND

(b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the guidelines framed by the NCTE for the purpose.

(III) For para-3 of the Principal Notification the following shall be substituted, namely:-

(i) Training to be undergone.-A person-

(a) with Graduation with at least 50% marks and B.Ed. Qualification or with at least 45% marks and 1-year Bachelor in Education(B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard shall also be eligible for appointment to Class I to V up to 1st January, 2012, provided he/she undergoes, after appointment, an NCTE recognized 6-month Special Programme in Elementary Education;

(b) with D.Ed.(Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment an NCTE recognized 6-month Special Programme in Elementary Education.

(ii) Reservation Policy:

Relaxation up to 5% in the qualifying marks shall be allowed to the candidates belonging to reserved categories, such as SC/ST/OBC/PH.

(IV) For para 5 of the Principal Notification, the following shall be substituted namely:-

5(a) Teacher appointed after the date of this notification in certain cases:-Where an appropriate Government or local authority or a school has issued an advertisement to initiate the process of appointment of teachers prior to the date of his Notification, such appointment may be made in accordance with the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time).

(b) The minimum qualification norms referred to in this Notification apply to teachers of Languages, Social Studies, Mathematics, Science, etc. In respect of teachers for Physical Education, the minimum qualification norms for Physical Education teachers referred to in NCTE Regulation dated 3rd November, 2001(as amended from time to time) shall be applicable. For teachers of Art Education, Craft Education, Home Science, Work Education etc. the existing eligibility norms prescribed by the State Government and other school managements shall be applicable till such time the NCTE lays down the minimum qualifications in respect of such teachers.

VIKRAM SAHAY, CONVENER

[ADVT-III/4/131/2011/Exty.]

Note:- The Principal Notification was published in the Gazette of India, Extraordinary, Part III, Section 4 vide Number F.61-3/2011-NCTE (N&S), dated the 23rd August, 2010."

27. As observed above, the entire controversy revolves and hinges around the Notification dated 29.07.2011 issued by the NCTE making certain amendments in the earlier Notification dated 23.08.2010.

28. The NCTE has filed reply in one of the connected cases i.e. CWP No. 3132 of 2019, wherein it is averred that D.EI. Ed/JBT and B.Ed. Trained Teachers are specially trained to teach Primary/High/Secondary classes. Therefore, NCTE being an "academic authority" is competent to prescribe the minimum qualification for the recruitment of the teachers of these classes in order to raise the standard of education throughout India in the larger interest of imparting quality education to the children. Thus, the Notification dated 29.07.2011 has been issued to achieve these objectives.

29. It is further averred that to prescribe the academic standards falls in the exclusive domain of the academic bodies and, therefore, the judicial review in such matters would be very limited, especially, when the notifications are intended to improve the academic standards in the respective fields. It has been claimed that as per settled law of the Hon'ble Supreme Court, the minimum qualification as laid down by the NCTE Authorities under the Act for appointment of teachers is binding upon all States irrespective of State policy pertaining to this effect.

30. It has also been claimed that since the Notification dated 29.07.2011 has never been challenged in these batch of petitions, therefore, the same need not to be adjudicated upon and the State Government itself cannot change its stand.

31. It has been averred that the NCTE had issued the Notification dated 29.07.2011 on the directions issued by the Government of India, (MHRD) in exercise of powers vested in MHRD under Section 29 of the

NCTE Act vide letter dated 25.04.2011 followed by another letter dated 23.05.2011 inter alia directing the NCTE to insert the following paragraph:-

> "The minimum qualification norms referred to in this Notification shall apply to teachers of Languages, Social Studies, Mathematics, Science etc. for appointment of teachers for Physical Education, the minimum qualification norms for Physical Education teachers referred to in NCTE Regulation dated 3rd November, 2001 (as amended from time to time) shall be applicable. For teachers of Art Education, Work Education, etc. the existing eligibility norms prescribed by the State Governments and other school management shall be applicable till such time the NCTE lays down the minimum qualification in respect of such teachers."

32. It is also claimed that once the policy decision is taken by the MHRD and conveyed to the NCTE, the same is binding on the NCTE as per Section 29 of the NCTE Act, 1993 and the NCTE is required to comply with the same.

33. At this stage, it would be necessary to reproduce the contents of the letters dated 25.04.2011, 23.05.2011 and 14.07.2011 as they stand and the same are accordingly reproduced hereinbelow:-

> "F.No.1-3/2011-EE-4(Pt.)
> GOVERNMENT OF INDIA
> MINISTRY OF HUMAN RESOURCE DEVELOPMENT
> DEPARTMENT OF SCHOOL EDUCATION & LITERACY
>
> Room No.429A, "C" Wing, Shastri Bhavan,
> New Delhi, dated 25th April, 2011.
>
> To
>
> The Member Secretary,

National Council for Teacher Education,
Wing-II, Hans Bhawan,
1, Bahadur Shah Zafar Marg,
New Delhi-110 002.

Subject: Amendment to Gazette Notification dated 23rd August, 2010 on Teacher Qualifications.

Sir,

This has reference to the Notification dated 23rd August, 2010 issued by NCTE regarding minimum teacher qualifications. You are requested to take action to incorporate the following changes in the notification under reference:

1. The said Notification specifies that a person with B.A./B.Sc with 50% marks and B.Ed qualification is eligible for appointment as a teacher in Classes VI to VIII and for Classes I to V (till January, 2012). However, under an earlier Regulation issued by NCTE on the subject, the minimum qualification specified was Graduation with B.Ed. The Notification dated 23rd August, 2010 appears to have excluded persons with B.Com and B.Ed. From being considered for appointment as a teacher. There is, therefore need to issue a clarification/amendment to the NCTE notification dated 23rd August, 2010 to incorporate this change.

2. The Notification dated 23rd August, 2010 allows persons with Graduation and D.Ed qualification for appointment in classes I-V. It is necessary to issue a clarification/amendment that the marks obtained by them in the Senior Secondary examination need not be factored in for appointment, since such persons were already eligible for appointment in classes VI to VIII.

3. Thirdly, the notification dated 23rd August, 2010 needs to be amended to allow persons with 45% in Graduation and B.Ed degree to be eligible for appointment for classes I to V (till January, 2012) since this category of persons have been considered eligible for appointment in classes VI to VIII in the Notification.

You are requested to take appropriate action in the matter at the earliest.

sd/-
(Vikram Sahay)
Diector
Telefax: 2338 1470."

"No.F.1-2/2011-EE.4
GOVERNMENT OF INDIA
MINISTRY OF HUMAN RESOURCE DEVELOPMENT
DEPARTMENT OF SCHOOL EDUCATION & LITERACY
EE. 4 Section

New Delhi, dated the 23rd May, 2011.

To

The Chairperson (I/c),
National Council for Teacher Education, Wing-II, Hans Bhawan, 1- Bahadur Shah Zafar Marg, New Delhi-110 002.

Subject: Notification of the NCTE dated 23rd August, 2010 on minimum teacher qualifications-reg.

Sir,

This Ministry has received references from State Governments seeking clarification regarding applicability of the

aforesaid Notification for appointment of teachers for Art, Music, Physical education, etc.

2. The matter has been in this Ministry. It has been decided that the NCTE may amend the aforesaid Notification by inserting the following paragraph therein:

> "The minimum teacher qualification norms referred to in this notification shall apply to teachers of Languages, Social Studies, Mathematics, Science, etc. For appointment of teachers for physical education, the minimum qualification norms for Physical Education teachers referred to in National Council for Teacher Education (Determination of Minimum Qualifications for recruitment of Teachers in Schools) Regulations dated 3rd September,2001 shall be applicable. For teachers of Art Education, Work Education, etc. the existing eligibility norms prescribed by the State Governments and other school managements shall be applicable till such time the NCTE lays down the minimum qualifications in respect of such teachers".

3. I am accordingly directed to request you to make appropriate amendments in the aforesaid Notification.

Yours faithfully,

sd/-
(Arun Kumar)
Under Secretary to the Govt. of India
Tel. 23384581

Copy to: All State Education Secretaries/Commissioner, KVS/ Commissioner, NVS/Director, CTSA/Chairman CBSE/Secretary, Council for the Indian School Certificate Examinations."

"F.No.1-3/2011-EE-4(Pt.1)
GOVERNMENT OF INDIA
MINISTRY OF HUMAN RESOURCE DEVELOPMENT
DEPARTMENT OF SCHOOL EDUCATION & LITERACY

New Delhi, 14th July, 2011.

To

Dr. S.K. Chauhan,
Research Officer,
National Council for Teacher Education, Wing-II, Hans Bhawan,
Bahadur Shah Zafar Marg,
New Delhi-110002.

Subject:- Legal Vetting of NCTE Notification with minimum qualifications for a person to be eligible for appointment as a teacher under RTE Act, 2009.

Sir,

Reference is invited to NCTE's letter No.61-1/2011/NCTE/N&S dated 13th June, 2011 forwarding therewith a copy of the proposed amendment in the Minimum Qualifications for a Person to be Eligible for Appointment as a Teacher under provisions of the Right of Children to Free and Compulsory Education Act, 2009 for vetting.

Ministry of Law and Justice has vetted the above mentioned draft amendment and a copy of the same is forwarded to you for further necessary action at your end.

Yours faithfully,
sd/-

(Arun Kumar)
Under Secretary to the Govt. of India,
Tele: 23384589."

Encl: as above.

34. When the matter came up for hearing on 18.07.2022, this Court passed the following order:-

> "Heard in part.
> Learned Advocate General states that in view of the affidavit filed on behalf of the NCT and particularly the record produced by it, the State may now be required to file an additional reply/supplementary affidavit, as the State now intends to change its stand.
> Without going into the merit of this contention and without even examining it, we deem it proper to afford an opportunity to the State. Needful be done within one week.
> For continuity, list on 27.07.2022."

35. In compliance to the aforesaid order, the State has filed a supplementary affidavit of the Principal Secretary (Education) to the Government of Himachal Pradesh, wherein it has been averred that NCTE has inserted B.Ed. qualification for Language Teachers merely on the directions of the MHRD, whereas, the RTE Act, 2009 and Notification dated 31.03.2010 issued by the MHRD has notified NCTE as "academic authority" to lay down the qualification for being appointed as teacher under RTE Act. Section 23 has been incorporated in the RTE Act by the legislature with specific object in mind i.e. the academic affairs particularly the prescription of curriculum for degrees/courses which makes one for being appointed a teacher as well as the essential qualification for being appointed as teacher should be prescribed by a body of the individuals who, are experts in the field. It was not the intention of the legislature that even this exercise should be done by the Ministry i.e. MHRD at the relevant time. The call on the issue was

required to be taken by the NCTE with the assistance of the experts in the field. But, while issuing the Notification dated 29.07.2011, the NCTE has just signed the dotted lines and acted on the letter dated 23.05.2011 wherein it has been made clear that NCTE should amend the qualifications in time with the contents of para in inverted commas.

36. It is further averred that since the Ministry is not the academic authority, therefore, it cannot usurp the functions assigned to some other authority under the Act. Such prescription of qualifications vide Notification dated 29.07.2011 is null and void and cannot bind anyone.

37. It is lastly averred that since the Notification dated 29.07.2011 issued by the NCTE has been issued without following the procedure, therefore, the same is not binding and required to be followed by the State and the State is at liberty to prescribe the qualification for the appointment of teachers in schools and as such is not bound to amend the R&P Rules for the post of "Shastri" in accordance with the Notification dated 29.07.2011 issued by the NCTE. Thus, the stand of the State Government is that since the amendment was unconstitutional, the same cannot now be thrust upon it.

38. In such background, the learned Advocate General as also the counsel(s) for the private respondents have raised the following contentions:-

(i) Under sub-section (1) of Section 23 of the RTE Act, the authority for prescribing the qualifications for appointment as primary teaches lies with the NCTE and the Ministry of HRD had no authority to give any direction in this respect.

(ii) Even under the NCTE Act, MHRD has power only to give directions in relation to the policy matters, whereas, the question of prescribing eligibility criteria for appointment as teachers is exclusively within the domain of NCTE and it is not a policy matter in which the MHRD can have any say.

(iii) In terms of Section 35 of the NCTE Act, any regulations framed by NCTE have to be placed before the Parliament for its approval which has not been done in the present case.

(iv) Since, the primary education is the part of the Concurrent List in Schedule VII to the Constitution and under Article 309, it is the power of the State Government to make appointments to the posts created under the State Government. The Union Government while framing regulations contrary to the RTE Act and Rules framed thereunder has usurped the power of the State Government to make appointment of qualified persons in the posts created under the State Government.

39. On the other hand, learned counsel(s) for the petitioner(s) would support the NCTE Notification dated 29.07.2011 and have raised the following contentions:-

(i) That the powers are exercised under sub-section (1) of Section 23 and not under sub-section (2) of Section 23 of the RTE Act.

(ii) The Ministry of the HRD had the powers to give directions to the NCTE in relation to the policy matters. Essentially, the educational qualification for appointment as "Shastri Teachers" is an important policy issue.

(iii) It is after due deliberations that the MHRD formed a view that B.Ed degree should be recognized as additional qualification for the post of "Shastri Teachers".

(iv) In policy matters, particularly, in the area of technical fields, such as education, the Court would not substitute its wisdom for that of the authorities duly empowered under the Statute and aided by the experts in the field.

(v) It is contended that the sufficiency of the material before the Ministry for forming final opinion is not subject to judicial review. In any case, it is after full deliberations that the authority has come to the conclusion that the B.Ed. Degree should be recognized as the qualification for appointment to the post of "Shastri teachers".

(vi) It is contended that not placing the regulations before the Parliament would not vitiate them since the provision under Section 35 of the NCTE Act merely requires such regulations to be placed before the Parliament and does not attach any adverse consequences if the required prescription is not followed.

(vii) It is argued that the purpose of constituting NCTE was principally for coordinated development of teacher education system across the country and the dominant purpose for constitution of NCTE was not for laying down qualifications for school teachers.

(viii) It is further contended that the question with regard to the validity of Notification dated 29.07.2011 has otherwise been rendered academic in view of the judgment rendered by the Hon'ble Supreme Court in ***Ram Sharan Maurya and others*** *vs.* ***State of U.P. and others AIR 2021 SC 954*** and the judgment delivered by the Division Bench of this Court of which one of us (Justice Tarlok Singh Chauhan) was a member in ***CWPOA No. 6251 of 2020*** in case titled ***Vinod Kumar and others*** *vs.* ***State of H.P. and others,*** decided on 26.11.2021.

40. As noted above, the NCTE has been authorized by the Central Government for the purposes of Sub-section (1) of Section 23 as well as sub-section (1) of Section 29 of the RTE Act. Sub-section (1) of Section 23 pertains to minimum qualifications that a person must possess for eligibility for appointment as a teacher, whereas sub-section (1) of Section 29 pertains to curriculum and evaluation procedure for elementary education to be laid down by the academic authority. The issues of eligibility for appointment as a

teacher and the curriculum and evaluation procedure for elementary education are closely connected and interlinked. It is possibly for this reason, that in its wisdom, the Government of India has recognized NCTE as an "academic authority" for both the purposes. While exercising such powers, the NCTE evolves important criteria and guidelines for setting the curriculum and evaluation procedure for elementary education as well as prescribing minimum qualification for appointment as a teacher.

41. Sub-section (1) of Section 23 thus authorizes NCTE as an "academic authority" duly notified by the Central Government for prescribing minimum qualifications for appointment as a teacher. The power and authority thus exclusively vests in NCTE. Sub-section (2) of Section 23 is a special provision under which the Central Government retains its authority to relax the qualifications for appointment as a teacher under certain circumstances. As per this provision where a state does not have adequate institutions offering courses or training in teacher education or teachers possessing minimum qualifications as laid down under Sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, relax the minimum qualifications for appointment as a teacher for such period not exceeding 5 years as may be specified in the notification. First proviso of Sub-section (2) of Section 23 provides that a teacher who at the commencement of the Act does not possess minimum qualifications as laid down in sub-section (1) shall acquire such qualification within a period of 5 years. Further proviso to sub- section (2) provides that every teacher appointed or in position as on 31.03.2015, who does not possess minimum qualifications as laid down under sub-section (1) shall acquire such minimum qualification within a period of 4 years from the date of commencement of RTE (Amendment) Act, 2017.

42. Analysis of sub-section (2) of Section 23 would thus show that the Central Government has the power to relax the qualifications laid down

for appointment of the teacher where adequate number of institutions offering courses or training in teacher education or teachers possessing minimum qualifications in a State are not available. Such powers are in the nature of relaxation to the essential qualifications that may be prescribed under sub-section (1) of Section 23. In the main body of sub-section (2) and the first and second proviso thereto reference is to the qualifications laid down under Sub-section (1). The emphasis is on the person to be appointed as a teacher to possess the qualification prescribed under sub-section (1) of Section 23 which can be relaxed subject to fulfillment of conditions as provided. Thus, there is a clear distinction between the powers to be exercised under sub-section (1) of Section 23 which are vested in the NCTE and those that can be exercised by the Central Government under sub-section (2) of Section 23 of relaxing the standards laid down by NCTE under sub-section (1) of Section 23.

43. Adverting to the facts, it would be noticed that the entire exercise as undertaken by the NCTE to issue the Notification dated 29.07.2011 is as per the dictates of the MHRD without there being any independent application of mind by the NCTE.

44. Section 35 of the RTE Act, as reproduced above, confers powers on the Central Government and other authorities to issue directions or guidelines to the appropriate Government or the local authority for the purpose of implementing the provisions of the Act. But such power does not extend to the NCTE as an "academic authority" notified under sub-section (1) of Section 23 of the RTE Act.

45. Such power is also not traceable to Section 29 of the NCTE Act which reads as under:-

> "**29. Directions by the Central Government.-**(1) The Council shall, in discharge of its functions and duties under this Act be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

(2) The decision of the Central Government as to whether a question is one of policy or not shall be final."

46. The Central Government cannot also trace the source of power to give directions to the NCTE in exercise of its powers conferred under sub-section (1) of Section 23 of the RTE Act.

47. Even otherwise also, the primary source of powers of the NCTE to frame regulations prescribing the minimum qualifications for appointment of teachers is to be found in sub-section (1) of Section 23. In exercise of such powers, the NCTE is not to be guided or bound by any directive that the Central Government may issue. We do not find any such power retained by the Central Government under the RTE Act. Thus, we have no hesitation to conclude that the Ministry of HRD could not have mandated the NCTE to make the amendment in question.

48. Thus, we have no hesitation to conclude that the powers of the Central Government under sub-section (1) of Section 29 of the NCTE Act even though are wide enough to require the NCTE to frame regulations, but not to the extent so as to prescribe the eligibility in a particular manner. As per sub-section (1) of Section 29, the NCTE shall in discharge of its functions and duties under the Act is bound by the directions on the question of policy as the Central Government may give in writing to it from time to time. The powers of the Central Government to issue directions to the NCTE and its binding effect are confined to the question(s) of policy. The legislature has clearly limited the powers of the Central Government to issue directions on the question of policy which clearly indicate that the powers thus are not plenary or all pervasive but are restricted to the question of policy alone. Such provision, therefore, has to be interpreted strictly. The legislature has constituted the NCTE with specific duties, functions and powers and under which provisions a Council has been established consisting of various experts in the field of education. The legislature while empowering the Central

Government to give directions to the Council advisedly restricted such powers on the question of policy. Framing of regulations as regards prescribing eligibility criteria for appointment as primary teachers certainly cannot be said to be a policy matter.

49. At this stage, it needs to be noticed that Section 3 contained in Chapter II of the NCTE Act provides for establishment of the Council and the same reads as under:-

> "**3.Establishment of the Council**.—
>
> (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint there shall be established a Council to be called the National Council for Teacher Education.
> (2) The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal with power to contract and shall, by the said name, sue and be sued.
> (3) The head office of the Council shall be at Delhi and the Council may, with the previous approval of the Central Government, establish regional offices at other places in India.
> (4) The Council shall consist of the following Members, namely:—
>
> (a) a Chairperson to be appointed by the Central Government;
> (b) a Vice-Chairperson to be appointed by the Central Government;
> (c) a Member-Secretary to be appointed by the Central Government;
> (d) the Secretary to the Government of India in the Department dealing with Education ex officio;
> (e) the Chairman, University Grants Commission established under section 4 of the University Grants Commission Act, 1956 (3 of 1956) or a member thereof nominated by him, ex officio;
> (f) the Director, National Council of Educational Research and Training, ex officio;

(g) the Director, National Institute of Educational Planning and Administration, ex officio;
(h) the Adviser (Education), Planning Commission, ex officio;
(i) the Chairman, Central Boards of Secondary Education, ex officio;
(j) the Financial Adviser to the Government of India in the Department dealing with Education, ex officio;
(k) the Member-Secretary, All-India Council for Technical Education, ex officio;
(l) the Chairpersons of all Regional Committees, ex officio;
(m) thirteen persons possessing experience and knowledge in the field of education or teaching to be appointed by the Central Government as under, from amongst the—

(i) Deans of Faculties of Education and Professor of Education in Universities —Four;
(ii) experts in secondary teacher education — One;
(iii) experts in pre-primary and primary teacher education — Three;
(iv) experts in non-formal education and adult education — Two;
(v) experts in the field of natural sciences, social sciences, linguistics, vocational education, work experience, educational technology and special education, by rotation, in the manner prescribed — Three;

(n) nine Members to be appointed by the Central Government to represent the States and the Union territory Administrations in the manner prescribed;
(o) three Members of Parliament of whom one shall be nominated by the Chairman of the Council of States and two by the Speaker of the House of the People;
(p) three Members to be appointed by the Central Government from amongst teachers of primary and secondary education and teachers of recognised institutions.

(5) It is hereby declared that the office of the Member of the Council shall not disqualify its holder for being chosen as or for being a member of either House of Parliament."

50. The functions of the Council have been enumerated in Section 12 and 12A of the NCTE Act and the same read as under:-

"**12. Functions of the Council**.—It shall be the duty of the Council to take all such steps as it may think fit for ensuring planned and co-ordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may—

(a) undertake surveys and studies relating to various aspects of teacher education and publish the result thereof;

(b) make recommendations to the Central and State Government, Universities, University Grants Commission and recognised institutions in the matter of preparation of suitable plans and programmes in the field of teacher education;

(c) co-ordinate and monitor teacher education and its development in the country;

(d) lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher [1] *** in recognised institutions;

(e) lay down norms for any specified category of courses or trainings in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

(f) lay down guidelines for compliance by recognised institutions, for starting new courses or training, and for

providing physical and instructional facilities, staffing pattern and staff qualification;

(g) lay down standards in respect of examinations leading to teacher education qualifications, criteria for admission to such examinations and schemes of courses or training;

(h) lay down guidelines regarding tuition fees and other fees chargeable by recognised institutions;

(i) promote and conduct innovation and research in various areas of teacher education and disseminate the results thereof;

(j) examine and review periodically the implementation of the norms, guidelines and standards laid down by the Council, and to suitably advise the recognised institutions;

(k) evolve suitable performance appraisal system, norms and mechanisms for enforcing accountability on recognised institutions;

(l) formulate schemes for various levels of teacher education and identify recognised institutions and set up new institutions for teacher development programmes;

(m) take all necessary steps to prevent commercialisation of teacher education; and

(n) perform such other functions as may be entrusted to it by the Central Government."

"[**12A. Power of Council to determine minimum standards of education of school teachers**.—For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in

> any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority:
>
> Provided that nothing in this section shall adversely affect the continuance of any person recruited in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate schools or colleges, under any rule, regulation or order made by the Central Government, a State Government, a local or other authority, immediately before the commencement of the National Council for Teacher Education (Amendment) Act, 2011 (18 of 2011) solely on the ground of non-fulfilment of such qualifications as may be specified by the Council:
>
> Provided further that the minimum qualifications of a teacher referred to in the first proviso shall be acquired within the period specified in this Act or under the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009).]"

51. A perusal of the aforesaid provisions goes to indicate that the power is conferred upon the Council established under Section 3 to determine the minimum standards of education of school teachers. It is the Council alone which for the purpose of maintaining standards of education in schools may by regulations determine the qualifications of persons for being recruited as teachers. There is a proper mechanism as to how these powers have to be exercised. It is the basic principle of law long settled that if the manner of doing a particular act is provided under the statute, the act must be done in that manner or not at all.

52. The origin of this rule is traceable to the decision of the Privy Council in ***Taylor*** *vs.* ***Taylor 45 LJ Ch 373*** which was followed by Lord

Roche in ***Nazir Ahmad*** *vs.* ***King Emperor, AIR 1936 Privy Council 253***, who stated as under:-

> "where the power is given to do certain thing in a certain way, the thing must be done in that way or not at all."

53. The rule has since been approved by the Hon'ble Supreme Court in plethora of judgments such as in ***Rao Shiv Bahadur Singh and another vs. State of Vindh-P. AIR 1954 SC 322, Deep Chand vs. State of Rajasthan AIR 1961 SC 1527, State of U.P. vs. Singhara Singh and others AIR 1964 SC 358, Babu Verghese & Ors. vs. Bar Council of Kerala & Ors. (1999) 3 SCC 422, State of Jharkhand and others vs. Ambay Cements and another (2005) 1 SCC 368, Zuari Cement Ltd. vs. Regional Director, Employees State Insurance Corporation, Hyderabad and others (2015) 7 SCC 690.***

54. Now, as regards the judgment passed in ***Vinod Kumar's case*** *(supra),* the validity of the Notification dated 29.07.2011 was again not in question in the manner as stated above and there also the Court while placing reliance on the judgment of the Hon'ble Supreme Court in ***Ram Sharan Maurya's case*** *(supra)* recognized the NCTE to be an "academic authority", who alone could prescribe the qualifications as is evident from paras 14 to 17 of the judgment which read as under:-

> "14. NCTE vide Notification dated 23.08.2010, in exercise of powers under Sub-Section (1) of Section 23 of the RTE Act prescribed minimum qualifications for a person to be eligible for appointment as teacher, including teachers in Class I to V in a school referred to in Clause (n) of Section 2 of RTE Act. The qualifications so prescribed came to be amended from time to time and one such amendment was carried vide impugned notification dated 28.6.2018, as noticed above, whereby candidates with B.Ed. have also been made eligible for the post of JBT.

15. The issue as to legality, efficacy and prevalence of notification dated 28.6.2018 issued by NCTE is no more res-integra after the judgment passed by Hon'ble Supreme Court in Ram Sharan Maurya and others vs. State of U.P. and others, AIR 2021 SC 954. Hon'ble Supreme Court while dealing with the powers & jurisdiction of NCTE vis-a-vis Notification dated 28.06.2018 has been pleased to hold as under:

> "38.4 It is thus clear that for maintaining standards of education in schools, the NCTE is now specifically empowered to determine the qualifications of persons for being recruited as teachers in schools or colleges. In addition to regulating standards in "teacher education system", the NCTE Act now deals with regulation and proper maintenance of norms and standards in respect of qualifications of persons to be recruited as teachers. By Notification dated 31.03.2010, the Central Government, in exercise of powers conferred under Section 23 of the RTE Act authorised the NCTE as an "Academic Authority" to lay down the minimum qualifications for a person to be eligible for appointment as a teacher.
>
> 40. The Notification dated 28.06.2018 issued by the NCTE was in exercise of power so conferred upon it by virtue of the Notification dated 31.03.2010. In terms of the Notification dated 28.06.2018, the qualification of 'Bachelor of Education' from any NCTE recognised institution shall now be a valid qualification for appointment as a teacher in classes I to V provided the person so appointed as a teacher mandatorily undergoes six months' Bridge Course in elementary education within two years of such appointment.
>
> 41. Going by the Parliamentary intent in empowering NCTE under the provisions of the NCTE Act and specific authorization in favour of NCTE under said Notification dated 31.03.2010, the authority of NCTE is beyond any doubt. Though there is no specific regulation as contemplated under Section 32 read with Sections 12 and 12A of the NCTE Act, for the present purposes by virtue of

the specific authorization under the Notification dated 31.03.2010, NCTE was entitled to lay down that those holding the qualification of 'Bachelor of Education' as detailed in said Notification are entitled to be appointed as teachers for classes I to V. Such prescription on part of the NCTE would be binding. It is for this reason that G.O. dated 01.12.2018 notifying ATRE-2019 clearly stated that the candidates possessing minimum qualifications specified in Notifications issued by the NCTE including one dated 28.06.2018 were entitled to participate in ATRE-2019.

43. The Notification dated 28.06.2018 being binding on the State Government, the statutory regime put in place by the State has to be read in conformity with said Notification. The eligibility or entitlement being already conferred by Notification dated 28.06.2018, the amendments to 1981 Rules were effected only to make the statutory regime consistent with the directives issued by the NCTE. The right or eligibility was not conferred by amendments effected to 1981 Rules for the first time and therefore the element of retrospectivity present in the concerned amendments has to be read in that perspective. The intent behind those amendments was not to create a right for the first time with retrospective effect but was only to effectuate the statutory regime in tune or accord with NCTE directives. Theoretically, even if such statutory regime was not made so consistent, the concerned candidates holding B.Ed. Degrees could still be eligible and could not have been denied candidature for ATRE-2019.

16. There also is no challenge in second set of petitions to the power vested in NCTE, by Section 12-A of NCTE Act and under Section 23(1) of RTE Act, to prescribe minimum qualification for the teachers. This being so, the Notification issued by the NCTE prescribing qualifications for the teachers of Class I to V has to be read as mandatory prescription of valid law. Education being

> subject of concurrent list in schedule 7 of the Constitution of India, the prevalence of Central Act shall remain.
>
> 17. Thus, it is clear from above noted exposition of law that the attempt of petitioners in second set of petitions to challenge the prescription made by NCTE vide notification dated 28.6.2018 is a futile exercise. These petitioners, in the facts and circumstances of the case, cannot be heard to have acquired any vested right on the basis of advertisement issued by HPSSC, as the said advertisement itself was deficient in prescription of essential qualification mandated under law and hence would deem to include such lawful prescription. Even otherwise, the notification issued by NCTE prescribing graduation with B.Ed. as one of the essential qualifications for JBT was prior in time to the advertisement and on this account also petitioners in second set of petitions do not have any right to assail the same."

55. The issue whether the Notification dated 29.07.2011 had been issued after complying with the provisions of the NCTE Act, more particularly, Sections 3, 12, 12A, never came up for consideration before the Hon'ble Supreme Court in ***Ram Sharan Maurya's case*** *(supra)* or before this Court in ***Vinod Kumar's case*** *(supra).*

56. Moreover, the material now placed by the NCTE along with its affidavit as taken note of in the earlier part of the judgment was never placed either before the Hon'ble Supreme Court or before this Court as the need for the same otherwise did not arise. In such circumstances, neither the judgment in ***Ram Sharan Maurya's case*** *(supra)* or even for that matter in ***Vinod Kumar's case*** *(supra)* is attracted or applicable in the instant cases.

57. Since, we have already held the Notification dated 29.07.2011 to be issued by the MHRD without following the procedure and also without application of independent mind, therefore, the further question whether the regulations were required to be placed before the Parliament has been rendered academic and need not be gone into.

58. Lastly, the question which still remains for consideration is whether the State Government can now turn around and change its stand.

59. As observed earlier, the stand of the State Government as put-forth in its reply was that the State Government was bound by the Notification issued by the Central Government, as is evident from paras 8 and 9 of the preliminary submissions of the reply which read as under:-

> "8. That in order to fulfill remaining eligibility condition of possessing B.Ed./D.L.Ed./B.L.Ed. Or whatever name so known for considering for appointment as Shastri, the respondent No.1 by adhering to the norms of NCTE, decided to offer appointments to the candidates recommended by the HPSSSB Hamirpur for the post of Shastri under post Code 572 by imposing condition that the selected incumbents had to acquire/fulfill qualification of B.Ed./D.L.Ed./B.L.Ed. It was also intimated to impose similar condition to the batch-wise appointees of Shastri for the year 2016 and 2017.
>
> 9. That the said condition of acquiring/fulfilling qualification of B.Ed./D.L.Ed./B.L.Ed is being imposed to appointees of Shastri in future also so that NCTE norms could not be violated. Moreover, the State is bound to implement NCTE regulations in letter and spirit. Recruitment and Promotion Rules of Shastri wherein the qualification of B.Ed./D.L.Ed./B.L.Ed is required to be introduced as one of the mandatory conditions and said proposal for amendment in R&P Rules is under process at the level of competent authority for its finalization."

60. Now, the stand of the respondent-State is that since NCTE has not applied its mind and placed the matter before the Council as was required under Sections 12 and 12A of the NCTE Act, therefore, the instructions issued by the NCTE are not binding upon it.

61. It needs to be noticed that the change in stand of the State Government is solely on the basis of the affidavit and the material placed by

the NCTE and we really see no reason why in such circumstances the State should not be permitted to change its stand.

62. Even otherwise, it is settled law that a categorical admission cannot be resiled from, but in a given case, it may be explained and clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof.

63. In the instant case, it has been duly established and otherwise recognized by this Court that it is the NCTE alone that has been notified an "academic authority" for the purpose of sub-section (1) of Section 23 as well as sub-section (1) of Section 29 of the RTE Act and, therefore, in terms of sub-section (1) of Section 23, it is the NCTE alone which has authority to prescribe minimum eligibility qualification for appointment as a teacher. But, then such qualifications have to be laid down by the NCTE by following the procedure as laid down under the NCTE Act, more particularly, Sections 3, 12 and 12A thereof and in case the procedure is not followed, then the instructions cannot be issued by the NCTE so as to bind the State Government.

64. In view of the aforesaid discussion and for the reasons stated above, we find no merit in these petitions and the same are accordingly dismissed. The parties are left to bear their own costs. All pending applications stand disposed of.

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

Between:-

1. RAMESH VERMA SON AGED 54 YEARS OF SH.RAMANAND VERMA.

2. SHIV PRAKASH SON AGED 61 YEARS OF SH. BUDHI RAM VERMA.

3. DHANI RAM SON AGED 74 YEARS OF SH.SADH RAM VERMA.

4. DURGASI SINGH AGED 52 YEARS SON OF SH. MANOHAR LAL.

ALL RESIDENT OF VILLAGE GULLO, POST OFFICE JAIS, TEHSIL THEOG, DISTRICT SHIMLA-171201.

5. LAXMI SINGH VERMA AGED 53 YEARS SON OF SH. CHANDIA RAM VERMA, RESIDENT OF VILLAGE SHAINIAL, POST OFFICE JAIS, TEHSIL THEOG, DISTRICT SHIMLA-171201.

.....PETITIONERS.

(BY SH. B.C. NEGI, SENIOR ADVOCATE WITH SH. NITIN THAKUR AND SH. RAJATAWASTHY, ADVOCATES).

AND

1. STATE OF HIMACHAL PRADESH THROUGH CHIEF SECRETARY GOVERNMENT OF HIMACHAL PRADESH,SHIMLA.

2. HIMACHAL PRADESH GROUND WATER AUTHORITY SHIMLA THROUGH ITS MEMBER SECRETARY, GOVERNMENT OF HIMACHAL PRADESH.

3. M/S MAHAMAYA INF PRIVATE LIMITED, TAJ RESORT AND SPA, THROUGH ITS MANAGING DIRECTOR, OFFICE AT VILLAGE BASA, POST OFFICE JAIS, TEHSIL THEOG, DISTRICT SHIMLA-171201.

.....RESPONDENTS.

(SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, SH. SHIV PAL MANHANS, ADDITIONAL ADVOCATE GENERAL, SH. BHUPINDER THAKUR, DEPUTY ADVOCATE GENERAL AND SH. RAJAT CHAUHAN, LAW OFFICER, FOR RESPONDENTS-1 & 2).

(SH. SUNIL MOHAN GOEL, ADVOCATE,FOR RESPONDENT-3).

CIVIL WRIT PETITION
No.5153 OF 2022
Reserved on:19.09.2022
Decided on: 22.09.2022

Constitution of India, 1950- Article 226- Issue writ of Certiorari thereby quashing and setting aside the Annexure P-4 vide which permission to Respondent No.3 has been given- Held- It is more than settled that even though the Government enjoys great freedom while entering into contracts with the private parties, but even that freedom is circumscribed by the rule of fairness, transparency and objectivity- Fairness in State action is the soul of good-governance- Therefore, every action of the State where it infringes the constitutional mandate or is opposed to basic rule of law or suffers from an infirmity of patent arbitrariness, judicial intervention is inevitable-"Expressio unius est exclusio alterius"- Petition allowed. (Para 13, 14, 18, 22)

Cases referred:

Chandra Kishore Jha vs. Mahavir Prasad, 1999 (8) SCC 266;
Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527;
Dhananjaya Reddy vs. State of Karnataka, 2001 (4) SCC 9;
Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited, 2008 (4) SCC 755;
Nazir Ahmad vs. King Emperor AIR 1936, PC 253;
Ramana Dayaram Shetty vs. International Airport Authority of India and others (1979) 3 SCC 489;
Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P, AIR 1954, SC 322;
State of Jharkhand & Ors vs. Ambay Cements and anr. (2005) 1 SCC 368;
State of Uttar Pradesh vs. Singhara Singh and Ors, AIR 1964, SC 358;
Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389);
Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764;

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. Issue a writ of Certiorari thereby quashing and setting aside the **Annexure P-4** vide which permission to Respondent No.3 has been given by Respondent No.2; or/and
> II. Issue a writ of mandamus directing the respondents not to give effect to **Annexure P-4** vide which permission to Respondent No.3 has been given by Respondent No.2; or/and
> III. Issue a writ of certiorari thereby quashing and setting aside the **Annexure P-3** vide which the Respondent No.2 considered the application of Respondent No.3 in malafide and arbitrary manner in minutes of 42nd meeting; or/and
> IV. Issue a writ of mandamus directing the respondents not to give effect to **Annexure P-3** vide which the Respondent No.2 considered the application of respondent No.3 in malafide and arbitrary manner in minutes of 42nd meeting; or/and
> V. Directing Respondent No.1 to take action against the Respondent No.2 as the Respondent No.2 has not complied with the provision of the Himachal Pradesh Ground Water Act 2005 in right and legal manner."

2. This Court at an early occasion dealt with an issue of ground water in ***CWP No. 1809/2018*** in case titled ***Sh. Chetan Kumar and others versus The Chief Secretary to the Government of Himachal Pradesh and others***, decided on 22.10.2018, wherein in paragraphs 4 to 15, it was observed as under:-

> "4. As noticed at the outset, the petitioners are also residents of village Sanawar and since the 5th respondent did not grant them any water connection as per clause (f) of the permission letter dated 26th February, 2014, as well as allegedly to other residents of the village also, the petitioners have initiated the instant proceedings.
> 5.The 2005 Act has been enacted with the object to regulate and control the development and management of ground water and matters connected therewith. Section 3 thereof enables the State Government to constitute the Himachal Pradesh Ground Water Authority to perform the duties as enumerated under Section 5 and other provisions of the Act. The Authority has got a mandate

under Section 6 of the Act to maintain and update the database on ground water resources of the State. Section 7 of the Act provides that any user of ground water desiring to sink a well within the notified area shall have to apply alongwith prescribed fee to the Authority for grant of a permit and such applicant shall not proceed with any other activity connected with sinking unless a permit has been granted. Sub Section 3 mandates that the Authority shall satisfy itself before granting the permission and such permission may be granted "subject to such conditions and restrictions, as may be specified." The Authority while granting or refusing permission shall have regard to the objects mentioned in sub section (5) of Section 7 of the Act.

6. As has been noticed earlier, order dated 26th February, 2014 was passed granting permission to respondent No.5 to drill one tube well in purported exercise of powers under Section 7(3) of the Act and while doing so, the Authority imposed the conditions 'a to f' mentioned in the said order. The alleged deviation or non compliance of condition (f) has prompted the petitioners to approach this Court.

7.It is not necessary to refer to the reply(s)/written statement(s) filed on behalf of the respondents and suffice it would be to notice that in deference to the order dated 13th August 2018 passed by this Court, Chief Secretary, Government of Himachal Pradesh has filed an affidavit dated 7.9.2018, relevant part whereof reads as follows:-

> *"In this respect, it is submitted that the permission to sink a bore well was given to the private respondent No. 5 & 6 with the condition, amongst others, that they shall provide one water connections to the residents of village Sanwara for drinking purpose, which has been done only for limited persons with whom they have entered into an agreement. Besides, they have also not fulfilled the other conditions stipulated in the permit dated 26-02-2014 and thus violated the condition of the said permit. It is pertinent to submit here that in compliance to the orders passed by the Hon'ble Court 07-08-2018 the bore well has been sealed and the permission granted vide permit dated 26-*

02-2014 has also been withdrawn vide Member Secretary, H.P. GWA-cum-Superintending Engineer, P&I-II, IPH Department, Jal Bhawan, Kasumpti, Shimla-9 vide his office order No. 1592-99, dated 14-08-2018, copy of which is appended as Annexure R-1 for kind perusal of this Hon'ble Court.

3. That the State Water Policy-2013 emphasises the need for scientific management, conservation and regulatory mechanism with regard to the development and exploitation of resource in the State vis-a-vis its periodical re-assessment for regulation so as not to exceed recharging possibilities and also to ensure social equity taking into consideration the quality of available ground water recharge and economic viability of its extraction."

8. It may thus be seen that the official respondents after noticing the violation of terms and conditions of the permission, have vide office order dated 14.08.2018 withdrawn the permission granted to respondent No. 5. The aforesaid action has been taken in deference to the powers vested under Section 11 of the 2005 Act.

9. True it is that with the withdrawal of permission earlier accorded to respondent No.5, the writ petition as such no longer survives. On merits, we cannot, however, be oblivious of the fact that the order now passed by State Government under Section 11 of the Act is appealable under its Section 27 and respondent No.5 thus might assail the same before the Appellate or any other Forum. The State Government would thus again be in a fix as to how it should regulate the extraction of drinking water/ground water by private entities under the permits issued under Section 7 of the 2005 Act and how to ensure that the terms and conditions imposed while granting such permission are meticulously complied with.

10. This Court has no hesitation in observing that the condition (f) mentioned in the letter dated 26th February, 2014, is totally vague, evasive and is capable of misuse. It does not specify several factors like as to whether respondent No.5 will bear the expenses for providing water connectivity to the residents of

village Sanawar and if so what will be the upper limit/rationing of the water to be supplied to them, hours of supply, the rotation in which the water will be released or how much water shall be consumed by the permit holder for his/its private use etc. and such other relevant considerations are conspicuously missing from this order.

11.Coupled with this is a list Annexure R6/7, which contains the details of permits issued by Himachal Pradesh Ground Water Authority under Section 7 of the Act and in Solan district alone the total permits issued are more than 125. Lakhs of litres of water has been permitted to be extracted everyday through these permits. Water is an invaluable gift by nature to all beings including the mankind. Owing to its scarcity, it has to be saved for the posterity as well. Should, therefore, water be allowed to be used only by the permit holders or to the society at large through its equitable, proportionate and optimum distribution etc., are several burning issues which will have to be addressed by the State Authorities.

12. Ground water is a precious asset. It cannot be allowed to be misused or used with luxury. There is an onerous duty on Himachal Pradesh Ground Water Authority to ensure that every permission is conditional with an obligation like rain harvesting to ensure that the ground water level is not depleted. Extraction of water has to be permitted only when the Authorities through scientific process are satisfied about availability of water at the identified spots.

13. Still further, the distribution of the extracted water is a major administrative issue. It involves the rights of village community, gram panchayats, municipalities, private users and several other stakeholders. We are thus of the view that unless the Himachal Pradesh Ground Water Authority, in consultation with and approval of the State Government, formulates a comprehensive policy for the entire State to save, regulate, recycle and harvest the ground water level, it should be reluctant and refrain itself from issuing permits merely for the reason that the Statute has conferred such power on it.

> 14.We lay emphasis on the fact that the Authority is creation of the 2005 Act and the legislative policy of the Statute very emphatically casts an obligation as to how to regulate and control the development and management of ground water. The time has come to take strict regulatory and reformatory measures to save the ground water even in such areas in the entire State, which are not declared as 'notified areas' within the meaning of Section 2(h) of the Act.
>
> 15. In light of the above discussion, the writ petition stands disposed of with a direction to the State Government and the Himachal Pradesh Ground Water Authority to examine each and every aspect illustrated above and re-visit the existing Rules and Regulations and take an appropriate policy decision, preferably within a period of eight weeks before granting further permits under the Act."

3. It is after the aforesaid verdict that the State Government vide its Notification dated 29.11.2019 declared the whole area of the State of Himachal Pradesh to be notified area for controlling and regulating the extraction of ground water in any form in the public interest.

4. Adverting to the facts of the case, it appears that respondent No.3 filed an online application for grant of permit for sinking borewell under Section 7 and certification of registration under Section 8 of the Himachal Pradesh Ground Water Act, 2005, (for short 'Act') which was processed and thereafter in the meeting held under the Chairmanship of respondent No.2 and it was approved by granting permit for extraction and augmentation of ground water vide Annexure P-4.

5. Aggrieved thereby, the petitioners, who are villagers of Basa Panchayat have filed the instant petition mainly on the ground that the official- respondents while granting permit have not adhered to the provisions of the Act and the Himachal Pradesh Ground Water Rules, 2007 (for short 'Rules').

6. The official-respondent Nos.1 and 2 have contested the petition by filing a joint reply wherein it is averred that online application submitted by respondent No.3 was forwarded to Senior Hydrogeologist GWO, Una for getting field report after spot inspection as per the documents received online and to float the public notice (Form-2) for permit rule 17(1)/Form-5 for registration rule 23(1) in the offices of the concerned Gram Panchayat, Executive Engineer, Assistant Engineer and Junior Engineer. Thereafter, the Executive Engineer, Jal Shakti Division, Matiana, forwarded the above requisite report through Single Window Clearance System to Senior Hydrogeologist GWO, Una and after completing requisite formalities, the permit was issued in favour of respondent No.3 on 20.06.2022 for sinking borewell for commercial use subject to the following conditions amongst others:-

> "i) That the permission/sanction can be withdrawn or the quantity of water to be extracted can be restricted in case the ground water in the area is adversely affected in terms of quantity and/or quality.
>
> ii) The applicant shall construct a rain water harvesting structure for conservation and recharge of grounder water in his/her/their premises as per section 15 of the Himachal Pradesh Ground Water (Regulation & Control of Development and Management)Act, 2005 and as per Guidelines to regulate and Control Ground Water Extraction in the State of Himachal Pradesh notified vide Notification No. IPH-B(A)3-1/2019-II dated 03.05.2021 within six months of issuance of this certificate of Permit and shall intimate the Executive Engineer, JSV Division Matiana on its completion.
>
> iii) That the applicant shall install a water meter/bulk meter on the ground water extraction pipe so as to check the water drawl at any time will maintain its log book.
>
> iv) Actual water requirement be computed taking into account recycling/reuse of treated water for flushing etc.

v) The firm/applicant shall be required to adopt latest water efficient technologies so as to reduce dependence on ground water resources.

vi) The Firm/applicant drawing water more than 10 m3/day of ground water shall construct Piezometer, equipped with DWLR of latest version as per Guidelines to regulate and control Ground Water Extraction in the State of Himachal Pradesh notified vide Notification No. IPH-B A) 3-1/2019-II dated 03.05.2021 within six months in consultation with the Senior Hydrogeologist GWO, JSV Una (HP) and monthly water level shall be submitted to the Ground Water Organization Una and Himachal Pradesh Ground Water Authority. A copy of permit dated 20-06-2022 annexed as Annexure R-II for kind perusal of this Hon'ble Court."

7. In addition to the above, it is also averred that the instant petition is not maintainable on the ground of alternate and efficacious remedies as available to the petitioners under Section 24 of Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act, 2005 (for short 'Act') which reads as under:-

"24. Appeals.- (1) Any person aggrieved by an order of the officer exercising powers delegated under this Act may, within a period of thirty days from the date of such order, on payment of such fee as may be prescribed, prefer an appeal to the State Government:

Provided that the State Government may entertain an appeal after the expiry of said period of 30 days, if satisfied that the applicant was prevented by sufficient cause from filing the appeal within time.

(2) On receipt of an appeal under sub-section (1), the State Government shall, after giving the appellant an opportunity of being heard, dispose of the appeal as expeditiously as possible but not later than six months and the decision of the State Government shall be final."

8. As regards respondent No.3, it has filed a separate reply wherein various provisions of the Act have been quoted and thereafter it has been averred in para-3 of the preliminary submissions/objections as under:-

> "3. That the replying respondent further submits that the TAJ THEOG RESORTS AND SPA, SHIMLA, A UNIT OF MAHAMAYA INFRASTRUCTURE is a tourism unit of the company registered under Himachal Pradesh Tourism Development and Registration Act, 2002 by the Government of Himachal Pradesh, Department of Tourism and Civil Aviation. The unit is having around about 100 rooms and is located near Theog, District Shimla. It is further submitted on behalf of the replying respondent that the Irrigation and Public Health Department do not supply water to the replying respondent unit and the replying respondent unit has to make its own arrangement for the purposes of drinking water for their residents and other clients who visit the replying respondent unit. It is in this background that the replying respondent unit after getting a report from Himachal Ground Water Consultancy Service who are expert in investigation of ground water for hand pumps/tube wells, who had recommended that in view of the hydrogeological set up of the area the site was feasible for sinking of bore well. It was thereafter that the replying respondent unit under the single window clearance system online applied under Section 7 of the H.P. Ground Water (Regulation and Control of Development and Management) Act, 2005 applied vide application dated 1.4.2022. The online application of the replying respondent was processed by the respondent No.2and it was thereafter after getting the report from Senior Hydrogeologist, Ground Water Organization, JSV, Una after completing all the codal formalities in its 42nd meeting of the Sub Committee of H.P. Ground Water Authority processed the application for sinking of bore well under Section-7 of the H.P. Ground Water (Regulation and Control of Development and Management) Act, 2005 approved the application of the replying respondent subject to certain conditions. After examination of the application the Permit for Extraction and Augmentation of Ground Water Source was issued in favour of the replying

respondent. The copy of the permit dated 20.6.2022 issued in favour of the replying respondent is appended as **Annexure R3/3.** In this background the replying respondent submits that the writ petition is not maintainable since the permit granted in favour of the replying respondent for extraction and augmentation of ground water source is strictly in accordance with the H.P. Ground Water (Regulation and Control of Development and Management) Act, 2005."

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

10. It is not in dispute that the permission for extraction of ground water is governed and regulated by the Act and Rules referred to hereinabove. It shall be apt to reproduce the relevant provisions of the Act as contained in Sections 2(d), 7, 12 and 13 which read as under:-

"**2(d) "drinking water"** means water for consumption or use by human population for drinking and for other domestic purposes, which shall include consumption or use of water for cooking, bathing, washing, cleansing and other day-to-day activities and shall include water meant for consumption by the livestock ;"

"**7. Grant of permit to extract and use ground water.**- (1) Any user of ground water desiring to sink a well within notified area, for any purpose shall, on payment of such fee as may be prescribed, apply to the Authority for grant of a permit, and shall not proceed with any activity connected with such sinking unless a permit has been granted by the Authority.

(2) Every application made under sub-section (1) shall be in such form and contain such particulars as may be prescribed.

(3) The Authority shall consider the application made under sub-section (1) and if satisfied, may grant a permit, in such form as may be prescribed, subject to such conditions and restrictions as may be specified, within sixty days from the date of receipt of the application:

Provided that while considering the application the Authority shall give first priority for drinking water needs in preference to other needs:

Provided further that no permit shall be refused without affording an opportunity of being heard.

(4) The decision regarding grant or refusal of the permit shall be intimated by the Authority to the applicant within a period of thirty days from the date of decision.

(5) In granting or refusing a permit under sub-section (3), the Authority shall have regard to-

(a) the purpose or purposes for which water is to be used;

(b) the existence of other competitive users;

(c) the availability of water;

(d) quality of ground water to be drawn with reference to proposed usage;

(e) spacing of ground water structures keeping in view the purpose for which water is to be used;

(f) minimum distance of two hundred meters in case of shallow well and three hundred meters in case of tube well from the existing source of water supply scheme or irrigation scheme, as the case may be;

(g) long term ground water level behaviour; and

(h) any other factor relevant thereto."

"**12. Royalty in respect of use of ground water.**- (1) Every user of ground water in a notified area shall pay to the State Government a royalty for extraction of ground water at such rates and in such manner as may be prescribed:

Provided that a user of ground water who irrigates less than one hectare of land, whether owned or leased or both, shall be exempted from payment of royalty under this section.

(2) The State Government may, assign such proportion of the royalty, as may be prescribed, for development of ground water resources."

"**13. Powers of the Authority**.- (1) The Authority or any person authorized under section 17 of this Act in this behalf shall have the following powers, namely :-

(a) to inspect the well, which has been or is being sunk and the soils and other materials excavated therefrom;

(b) to take specimens of such soils or other materials or of water extracted from such wells;

(c) to require, by order, in writing the person sinking a well to keep and preserve in the prescribed manner specimens of soil or any material excavated therefrom for such period not exceeding three months from the date of completion or abandonment of such work, as may be specified by the Authority, and there upon such person shall comply with such order;

(d) to inspect and to take copies of the relevant record or documents and seek any information including diameter or depth of the well which is being or has been sunk; the level at which the water is or was struck and subsequently restored/rested, the types of strata encountered in the sinking of the well and the quality of the water struck, required for carrying out the purposes of this Act;

(e) to seize any equipment or device utilized for illegal sinking and destroy the work executed fully or partly ;

(f) to require, by order, any user of ground water who does not comply with the provisions of this Act or the rules made there under to close down any water supply or destroy any hydraulic work found to be in contravention of the provisions of this Act or the rules made there under:

Provided that where the user of ground water does not comply with such order within a period of sixty days from the date of issue of the same, the Authority or any person authorized in this behalf may carry out the necessary work and recover the cost from such user of ground water ;

(g) to enter and search with such assistance, if any, as it considers necessary, any place in which it has reason to

believe that offence under this Act has been or is being committed, and order, in writing, the person who has been or is committing the offence, not to extract ground water for a specified period not exceeding thirty days;

(h) to direct an appropriate body to assess exploitation limit of ground water in different areas and submit periodic report for consideration of the Authority ;

(i) to exercise such other powers as may be necessary for carrying out the purposes of this Act or the rules made there under.

(2) The power conferred by this section includes the power to break open the door of any premises where sinking, extraction and use of ground water may be going on:

Provided that the power to break open the door shall be exercised only after the owner or any other person in occupation of the premises, if he is present therein, refuses to open the door on being called to do so.

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply to any search or seizure under this section as they apply to any search or seizure made under the authority of a warrant
issued under section 93 of the said Code.

(4) Where the Authority or any person authorized by it seizes any mechanical equipment or device under clause (e) of sub-section (1) it shall, as soon as may be, inform a Magistrate having jurisdiction and take his orders as to the custody thereof."

11. It shall also be relevant to reproduce the necessary provisions of the Rules as contained in Rules 16 and 17 which read as under:-

"**16. Application for permit for extraction and use of ground water.-** (1) Any user of ground water desirous of sinking new well in a notified area shall apply to the Authority for grant of permit to extract and use ground water, in Form-I for domestic/ irrigation purposes and Form-I-A for commercial/industrial purpose, in triplicate and application shall be accompanied by documentary proof of having paid non-refundable fees as

specified in rule 31, and other documents as specified in the note below the said forms.

(2) The applicant shall maintain at his residence or office, as the case may be, office and at such other place as may be designated by the Authority, the copies of the documents referred to in sub-rule (1) for public inspection and furnish to the persons applying for them the copies of such documents at a price not exceeding rupee 1/- per page."

"17. Publication of notice of application for permit.- (1) If the Authority finds the application for grant of permit in the notified area is complete in all respects and is accompanied by the requisite information and documents, it shall publish notice of the application in Form-2 appended for inviting objections from the interested persons: -

(a) In case of commercial/industrial use, in two leading daily news papers and also display a copy thereof on the notice board of the Gram Panchayat or urban local authority having jurisdiction, as the case may be; and

(b) In case of irrigation, display a copy of the notice on the notice board of the local authority having jurisdiction.

(2) If no objections are received from any quarter by the due date given in the notice, the Authority shall proceed further for the grant or refusal of the permit in accordance with the provisions of the Act and under these rules."

12. It is not in dispute that after the receipt of online application of the applicant/respondent No.3, the official-respondents did not publish the notice in two leading daily newspapers, as is otherwise provided in terms of Rule 17 and only displayed a copy of the notice of application in Form-2 of the Notice Board of the Gram Panchayat. Respondent No.3 including official respondents have made a faint attempt to claim that the provisions as

contained in Rule 17 are only directory and not mandatory. However, we are not in a position to accede to such contention.

13. It is more than settled that even though the Government enjoys great freedom while entering into contracts with the private parties, but even that freedom is circumscribed by the rule of fairness, transparency and objectivity. Fairness in State action is the soul of good-governance. Therefore, every action of the State where it infringes the constitutional mandate or is opposed to basic rule of law or suffers from an infirmity of patent arbitrariness, judicial intervention is inevitable.

14. This is all the more so where the Government is dealing with State largesses. The State holds monopoly in certain fields and where this privilege of monopoly is utilized for the purposes of allocation of works or distribution of largesses, it takes the colour of State largesses since both the statutory bodies as also the bidders or allottees are expected to benefit from distribution and allocation of such works by way of contracts. Fairness then becomes the hallmark of such decision or else it could suffer from vice of arbitrariness.

15. That apart, every citizen has a fundamental and legal right to tender for allocation of such largesses. It is more than settled that wherever a contract is to be awarded or otherwise is to be given, the public authority must adopt a transparent and fair method for making selection, so that all the eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. Where, it comes to alienation of natural resources like water, etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national interest.

16. It is with a view to achieve all the aforesaid purposes that the provisions of Rule 17 providing for publication of notice in two leading daily newspapers have been provided so as to ensure that the procedure adopted by the respondents is fair and impartial or else the other method like "*first come and first serve"* is likely to be exercised by unscrupulous people in garnering maximum benefit and have no respect to the constitutional ethos and values. In other words, while alienating the natural resources, the State is duty bound to adopt the method as provided under the Act and Rules, so that all the eligible persons cannot only participate in the process, but can also file objections.

17. It is more than settled that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed or not at all. More than eighty years back, the Hon'ble Privy Council in ***Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)*** held that where a power is given to do a certain thing in a certain way, the things must be done in that way or not at all and this has been approved and further expanded by the Hon'ble Supreme court in catena of judgments (Refer: ***Rao Shiv Bahadur Singh and anr***. vs. ***State of Vindh-P***, AIR 1954, SC 322; ***Deep Chand*** vs. ***State of Rajasthan***, AIR 1961 SC 1527; ***State of Uttar Pradesh*** vs. ***Singhara Singh and Ors***, AIR 1964, SC 358; ***Chandra Kishore Jha*** vs. ***Mahavir Prasad***, 1999 (8) SCC 266 ; ***Dhananjaya Reddy*** vs. ***State of Karnataka***, 2001 (4) SCC 9; ***State of Jharkhand & Ors*** vs. ***Ambay Cements and anr.*** (2005) 1 SCC 368 ; ***Gujarat Urja Vikas Nigam Limited*** vs. ***Essar Power Limited***, 2008 (4) SCC 755 ; ***Zuari Cement Ltd*** vs. ***Regional Director, ESIC, Hyderabad & Ors***., AIR 2015, SC 2764 ; and ***Uddar Gagan Properties Ltd***. vs. ***Sant Singh and Ors***. 2016 (5) JT 389).

18. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusio alterius"* meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done

in that manner and in no other manner and following some other course is not permissible.

19. It has repeatedly been held by the Hon'ble Supreme Court that even in the matters of grant of largesses, award of jobs, contracts, quotas and licences, the Government must act in a fair and just manner and any arbitrary distribution of wealth would violate the law of land. (Refer:***Ramana Dayaram Shetty*** *vs.* ***International Airport Authority of India and others (1979) 3 SCC 489).***

20. Apart from the above, once the application for grant of extraction of ground water is to be regulated by the statute, the State can only be the last in line who could be exempted or permitted to deviate from the provisions much less violate the statutory provisions as contained in the Act and Rules.

21. Learned counsel for respondent No.3 tried to impress upon the Court that since a procedure as prescribed for dealing with the application for grant of permit for extraction of ground water has been scrupulously followed, therefore, the petitioners be granted the requisite permit.

22. We do not find any merit in this contention as the same is clearly fallacious as if we fail to understand how an action like the one in the instant case which is bad at the threshold when the official-respondents processed the application without resorting to and complying with the provisions of Rule 17(a) in its entirety would be legalized or become legal only because the respondents thereafter complied with the other procedural formalities as envisaged under the Act and Rules. In other words, the publication of notice of application for permission under Rule 17(a) is not only mandatory but a sine-qua-non before granting a permit for extraction and use of ground water.

23. Lastly, as regards the writ petition being not maintainable in view of the availability of an alternate remedy of an appeal to the petitioners, we really find no merit in the said contention. For, it is more than settled

that an alternate remedy is not an absolute bar for entertaining the writ petition under Article 226 of the Constitution of India.

24. Having regard to the facts of a case, the High Court has a discretion to entertain or not to entertain a writ petition. The High Courts have only imposed upon themselves certain restrictions one of which is the availability of an alternate remedy. However, once the records establish the failure on the part of the official-respondents to follow the rules as mentioned above, we see no reason why should we relegate the petitioners to the alternate remedy of filing an appeal under Section 24 of the Act. The rule of exclusion of writ jurisdiction by availability of an alternate remedy is a rule of discretion and not one of compulsion.

25. Having said so, we find merit in this petition and the same is accordingly allowed. Consequently, the permission granted in favour of respondent No.3 in the 42nd meeting and thereafter the permit issued to respondent No.3 in Form-3 for extraction and augmentation of ground water are both quashed and set aside, leaving the parties to bear their own costs. However, this order will not come in the way of the official-respondents in processing the application filed by respondent No.3 by complying with the provisions of the Act and Rules and taking a decision in accordance with the Act and Rules.

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

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

Between:-

1. LEKH RAJ SON OF LATE SH. SHYAM LAL, RESIDENT OF VILLAGE GHAROON, PO BHAWANA, TEHSIL PALAMPUR, DISTRICT KANGRA, HIMACHAL PRADESH, PRESENTLY WORKING AS JR. ASSISTANT IN THE OFFICE OF 1ST IRB BANGARH, DISTRICT UNA, H.P.

2. SMT. SANTOSH KUMARI WIFE OF SH. MUKTHIAR SINGH, RESIDENCE OF PUNEET COTTAGE SANJAULI, SHIMLA, PRESENTLY WORKING AS JR. ASSISTANT, PHQ, SHIMLA-2.

3. SMT. RAJESHWARI CHANDEL WIFE OF SH. CHANDER MOHAN, R/O R.R. HOUSE, ELYSEAM, HILL UPPER SHANKALI, SHIMLA-1, PRESENTLY WORKING AS JR. ASSISTANT, PHQ, SHIMLA, H.P.

4. SANSAR SINGH JAMWAL SON OF SH. SOHAN SINGH JAMWAL C/O NEGI HOUSE, BCS, NEW SHIMLA, PRESENTLY WORKING AS JR. ASSISTANT IN THE OFFICE OF ADGP/APT, PHQ SHIMLA.

5. SMT. NIRMALA DEVI WIFE OF SH. GIAN CHAND R/O AUKTA NIKETAN, BCS, NEW SHIMLA, PRESENTLY WORKING AS JR. ASSISTANT, PHQ SHIMLA-2.

6. SUSHIL KUMAR THAKUR SON OF LATE SH. BANSI RAM THAKUR, R/O BLOCK C-27, SET NO.12/A, SDA COMPLEX, VIKASNAGAR, SHIMLA, PRESENTLY WORKING AS JR. ASSISTANT, PHQ, H.P., SHIMLA-2.

....PETITIONERS.

(BY MR. DILIP SHARMA, SENIOR ADVOCATE
WITH MR. TEJASVI DOGRA AND MANISH SHARMA,
ADVOCATES.)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. SECRETARY FINANCE TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

3. DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, SHIMLA-2.

....RESPONDENTS.

(BY MR. R.P. SINGH AND MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERALS.)

2. CWPOA No. 4737 OF 2019.

Between:-

1. SURESH KUMAR S/O LATE SH. RISAL SINGH RESIDENT OF SHIV COLONY BERI-GATE, TEHSIL AND DISTT. JHAJJAR, HARYANA-124103.

2. NAND LAL S/O SH. PREM SINGH RESIDENT OF PANWAR-NIWAS, VILLAGE-BIHAR, P.O. RAJHANA, TEHSIL AND DISTRICT SHIMLA H.P. 171009.

....PETITIONERS.

(BY MR. GAURAV CHAUDHARY, ADVOCATE,
VICE MS. SHWETA JOOLKA, ADVOCATE.)

AND

1. STATE OF H.P. THROUGH CHIEF SECRETARY, GOVT. OF HIMACHAL PRADESH, SHIMLA-2.

2. SECRETARY (HOME) TO THE GOVT. OF HIMACHAL PRADESH SHIMLA-2.

3. SECRETARY (FINANCE) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-2.

4. SECRETARY MINISTRY OF HOME AFFAIRS TO THE GOVT. OF INDIA, NEW DELHI.

....RESPONDENTS.

(BY MR. R.P. SINGH AND MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERALS.)

3. CWPOA No. 4918 OF 2019.

Between:-

1. SHRI NIRMAL KUMAR GULERIA S/O SH. MADHO RAM, PRESENTLY POSTED AS JUNIOR ASSISTANT IN THE OFFICE OF D.I.G. CENTRAL ZONE MANDI, H.P.

2. SHRI LAJENDER SINGH PATHANIA S/O LATE SH. KESAR SINGH PATHANIA, PRESENTLY POSTED AS JUNIOR ASSISTANT IN THE OFFICE OF D.G.P. OFFICE NIGAM VIHAR, SHIMLA-2, H.P.

....PETITIONERS.

(BY MR. DILIP SHARMA, SENIOR ADVOCATE
WITH MR. TEJASVI DOGRA AND MANISH SHARMA,
ADVOCATES.)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH ITS SECRETARY (HOME) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-2.

2. THE DIRECTOR GENERAL OF POLICE, H.P., SHIMLA-2.

3. THE DEPUTY INSPECTOR GENERAL OF POLICE CENTRAL ZONE MANDI.

....RESPONDENTS.

(BY MR. R.P. SINGH AND MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERALS.)

4. CWPOA No. 4691 OF 2019.

Between:-

1. PREM CHAND S/O SHRI NAND LAL RESIDENT OF RANOT COTTAGE NEAR ST. MARY SCHOOL LOWER CHAKKAR, SHIMLA-171005; PRESENTLY WORKING AS JUNIOR ASSISTANT OFFICE OF DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171 002.

2. YOG SINGH RANA S/O LATE SHRI CHAMAN SINGH RANA JUNIOR ASSISTANT OFFICE OF ADDL. DIRECTOR GENERAL OF POLICE STATE CID, HIMACHAL PRADESH SHIMLA.

3. PRAKASH CHAND CHAUHAN SON OF LATE SHRI GOVIND RAM CHAUHAN, JUNIOR ASSISTANT, OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA- 171 002.

4. JEET RAM S/O LATE SHRILOHKA RAM, JUNIOR ASSISTANT OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171002.

5. GURDEEP CHHABRA, WIFE OF SHRI VIJAY RAJ CHHABRA, JUNIOR ASSISTANT OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171002.

6. BHOJ RAJ SHARMA SON OF LATE SHRI FATTA RAM, JUNIOR ASSISTANT OFFICE OF DY. INSPECTOR GENERAL OF POLICE SOUTHERN RANGE, SHIMLA.

7. GHAN SHYAM S/O LATE SHRI RAM CHANDER, JUNIOR ASSISTANT OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171002.

8. MOHINDER SINGH PATIYAL SONOF SHRI PARSHOTAM DASS, JUNIOR ASSISTANT OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171002.

9. CHANDU LAL SON OF LATE SHRI BISHAN DASS, JUNIOR ASSISTANT OFFICE OF THE INSPECTOR GENERAL OF POLICE, ARMED POLICE AND TRAINING HIMACHAL PRADESH, SHIMLA.

10. SANJEEV KUMAR SON OF LATE SHRI HARNAM SINGH KATOCH, JUNIOR ASSISTANT OFFICE OF THE DEPUTY INSPECTOR GENERAL POLICE TRAINING CENTRE DAROH, DISTRICT KANGRA, (HP).

11. GOPAL DASS SON OF SHRI SALIG RAM, JUNIOR ASSISTANT, DIRECTOR FORENSIC SCIENCE LABORATORY JUNGA, DISTRICT SHIMLA (HP).

12. RAM PIARI WIFE OF SHRI MOHINDER THAKUR, JUNIOR ASSISTANT OFFICE OF THE DIRECTOR GENERAL OF POLICE HIMACHAL PRADESH, SHIMLA-171002.

13. LEKH RAM SON OF LATE SHRI NIKA RAM, JUNIOR ASSISTANT, OFFICE OF COMMANDANT INDIA RESERVE Bn. JHALERA, TEHSIL AND DISTRICT UNA (HP).

14. MAHENDER SINGH SON OF LATE SHRI KESAR SINGH, JUNIOR ASSISTANT OFFICE OF COMMANDANT INDIA RESERVE BATTALION, JHALERA, TEHSIL AND DISTRICT UNA (HP).

15. VINOD PANWAR OF LATE SHRI BHURI SINGH PANWAR, JUNIOR ASSISTANT OFFICE OF COMMANDANT, INDIA RESERVE BATTALION, JHALERA, TEHSIL AND DISTT. UNA (HP).

16. VEENA KUMARI WIFE OF PAWAN KUMAR, JUNIOR ASSISTANT, OFFICE OF DY. INSPECTOR GENERAL, NORTHERN RANGE, DHARAMSALA (HP).

....PETITIONERS.

(BY MR. DILIP SHARMA, SENIOR ADVOCATE
WITH MR. TEJASVI DOGRA AND MANISH SHARMA,
ADVOCATES.)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (HOME) GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (FINANCE) GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171 002.

3. DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, SHIMLA-171 002.

....RESPONDENTS.

(BY MR. R.P. SINGH AND MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERALS.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 4777 OF 2019 ALONG WITH CIVIL WRIT PETITION (ORIGINAL APPLICATION) Nos. 4737, 4918 AND 4691 OF 2019

Reserved on: 26.8.2022

Decided on: 08.09.2022

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules – Pay Scale of Senior Clerks granted to petitioners was withdrawn and they were designated as Junior Assistant- Held- It is clear that the vested, accrued and fundamental rights of the petitioners have been infringed and the impugned action of respondents is in clear violation of Articles 14 and 16 of the Constitution of India- Petition allowed. (Para 24, 25)

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

J U D G E M E N T

All these petitions have been heard together and are being disposed of by a common judgment as identical questions of facts and law are involved.

2. Brief facts necessary for adjudication of these petitions are that all the petitioners are employees of police department of the State. They belong to ministerial staff and were initially engaged as Clerks. In the context of matter in issue, it will suffice to notice the posts respectively held by the petitioners as on 01.01.1996. Petitioners in CWPOA No. 4777 of 2019 and CWPOA No. 4737 of 2019 were holding posts of Clerks as on 01.01.1996,

whereas petitioners in CWPOA Nos. 4691 and 4918 of 2019 were holding posts of Senior Clerks as on the said date.

3. Respondents-State had notified Recruitment and Promotion Rules for the post of Clerk (Class-III Non-Gazetted) in the department of police on 14.02.1997. In the cadre of Clerks, three separate categories were carved. First being in the pay-scale of 950-1800 (basic entry scale with initial start of Rs.1000/-) for Clerks, second being in the pay-scale of Rs.1200-2130 for Senior Clerks on their designation after completion of minimum five years as Clerk and third being in the pay-scale of Rs.1500-2700 on their designation as Junior Assistant after putting 10 years of service as Clerks and Senior Clerks taken together.

4. *Vide* notification dated 20.01.1998, Himachal Pradesh Civil Services (Revised Pay) Rules, 1998 were notified. These rules were made operative from 01.01.1996. On the date of notification of these rules, petitioners in CWPOA No. 4777 of 2019 and CWPOA No. 4737 of 2019 had already been designated as Senior Clerks, whereas petitioners in CWPOA No. 4691 of 2019 and CWPOA No. 4918 of 2019 had been designated as Junior Assistants as per the Recruitment and Promotion Rules noted above. Petitioners were accordingly getting the pay scales admissible against their respective designation. As per the schedule annexed to Himachal Pradesh Civil Services (Revised Pay) Rules, 1998, pay scale of Senior Clerks i.e. 1200-2130 was revised to Rs.4020-6200 and the pay scale of Junior Assistants i.e. 1500-2700 was revised to 5000-8100. Since these rules were made applicable w.e.f. 01.01.1996, petitioners became entitled to the revised scales from the respective dates on which the petitioners were designated as Senior Clerks or Junior Assistants, as the case may be. Petitioners started getting the revised pay scales accordingly.

5. Respondents issued a subsequent notification dated 01.09.1998, whereby the posts with designation of Senior Clerks was abolished w.e.f.

01.01.1996 and the revised pay scales of Junior Assistant was reduced from Rs.5000-8100 to Rs. 4400-7000. The cadre of Clerk was demarcated as Clerks and Junior Assistants in the ratio of 50:50. Respondents issued yet another notification dated 31.05.2001 whereby the provision of promotion from Clerks to Junior Assistants was done away with and instead it was provided that the posts of Junior Assistants would be filled up only by way of placement.

6. On 03.11.2001, a clarification was issued to the effect that the designation and the revised equivalent of the un-revised pay scale of officials working as Senior Clerk and Junior Assistant as on 01.01.1996 shall be protected as a measure personal to them. The protection was, however, limited to the extent of excess payment made to Junior Assistants upto 01.09.1998 only. For Senior Clerks this protection was not made available.

7. On 07.06.2005, an order was issued by respondents whereby the pay scale of 4020-6200 granted to the Senior Clerks was withdrawn. Their pay was refixed as Clerks till their placement as Junior Assistants. It is relevant to notice that the prior to the issuance of order dated 07.06.2005, petitioner in CWPOA Nos. 4777 and 4737 of 2019 had also been designated as Junior Assistants.

8. In the aforesaid backdrop, the grievance of the petitioners in CWPOA No. 4777 and 4737 of 2019 is firstly against the abolition of designation of Senior Clerks vide notification dated 01.09.1998, secondly their reversion to the post of Clerks and also the reduction of their emoluments. As regards, petitioners in CWPOA Nos. 4691 and 4918 of 2019, their grievance is with regard to the reduction of pay scale of Junior Assistants and also the abolition of designation of Senior Clerks.

9. The petitioners, thus, have approached this Court for following reliefs: -

"CWPOA No. 4777 of 2019.

7.1. That the retrospectivity given to impugned notification dated 1.9.1998, Annexure A-6 may be declared to be void and inoperative to the extent it takes away the vested, acquired and fundamental rights of applicants to retain the designation of Sr. Clerk allowed to them w.e.f. 1996, with all consequential benefits. Consequently, the impugned order at Annexure A-9 dated 7.6.2005 and any other order or clarification issued pursuant to A-6 may also be quashed and set aside, with all consequential benefits.

7.2 That if during the pendency of original application, the respondent department reduces the pay of applicants and effects any recoveries from their salaries pursuant to impugned order at Annexure A-9, in that event the applicants may be held entitled to restoration of their pay and allowances with further direction to refund amount recovered from them, with interest at market rate on delayed payments.

CWPOA No. 4737 of 2019.

It is therefore, most respectfully prayed that the present writ petition may kindly be allowed and pay fixation of the petitioner No.1 vide Annexure P-5 and that of the petitioner No.2 Annexure P-7 may kindly be quashed and set aside and the respondents be directed not to give effect to Annexure P-3 retrospectively and no recoveries by ordered from the petitioners and in case the same has been done direct them to pay along with interest @9% or passed any order and direction in favour of the petitioners which this Hon'ble Court deems fit and proper in the interest of justice and fair play.

CWPOA No. 4691 of 2019.

(I) That the H.P. Civil Services (Revised Pay) (First Amendment) Rules 1998 (Annexure A-7) may be quashed and set aside.

(ii) That the office order dated November 03, 2001, Annexure A-8 issued by the Government of Himachal Pradesh may be quashed and set aside.

(iii) That the office order dated November 22, 2001, (Annexure A-9) may also be quashed and set aside.

(vi)That the respondents may be directed not to affect any recoveries from the applicants.

CWPOA No. 4918 of 2019.

1. That the HP Civil Services (Revised Pay) (First Amendment) Rules 1998 (Annexure A-4) may be quashed and set aside.

2. That the office order dated November 03, 2001, Annexure A-5 issued by the Government of Himachal Pradesh may be quashed and set aside.

3. That the office order dated November 22, 2001, (Annexure A-6) may also be quashed and set aside.

4. That the Annexure A-7 may also be quashed and respondents may kindly be directed to pay the applicants the salary without any undue delay as is being paid to similarly situated persons.

5. That the respondents may be directed not to affect any recoveries from the applicants."

10. Petitioners contend that once they were promoted as Senior Clerks after 1.1.1996 or were already working as Senior Clerks on the said date and had started getting the enhanced pay scale, they had acquired the vested right which could not be taken away retrospectively by the respondents. As per the petitioners, the promotion means advancement or conferment of honour, dignity, rank or grade and the same can be to the higher pay scale or to higher post. In such view of the matter, petitioners had been promoted, be it in the designation or the emoluments. These promotions could not be taken away retrospectively. The action of respondents has been termed as tantamounting to reversion of petitioners and violative of Articles 14 and 16 of the Constitution of India. It is further alleged that the petitioners

were not at fault and had not committed any fraud for getting the higher pay scales. There was no misrepresentation on the part of the petitioners, therefore, also the benefits once allowed to the petitioners could not be withdrawn.

11. Per contra, while admitting the factual position, respondents have tried to justify their action on the ground that the Revised Pay Rules, 1998 were amended vide notification dated 01.09.1998 on Punjab Pattern and the cadre of Clerks was bifurcated in two i.e Clerks in the pay scale of Rs.3120-5160 and Junior Assistants in the pay scale of Rs.4400-7000 in the ratio of 50:50. Thus, the category of Senior Clerks in the pay scale of 4020-6200 was eliminated.

12. I have heard Mr. Dilip Sharma, learned Senior Advocate, for the petitioners and Mr. R.P. Singh, learned Deputy Advocate General, for the respondents and have also gone through the entire record carefully.

13. It is evident from the record that the petitioners in CWPOA No. 4777 of 2019 were designated as Senior Clerks from the dates as shown against their respective names in the table as under: -

Sr. No.	Name of the petitioners	Date of Designation as Senior Clerks.
1.	Lekh Raj	29.04.1996.
2.	Smt. Santosh Kumari	05.09.1996
3.	Smt. Rajeshwari Devi	26.06.1996.
4.	Sh. Sansar Singh	12.09.1996
5.	Smt. Nirmala Devi	25.09.1996
6.	Sh. Susheel Kumar Thakur	03.10.1996

14. In CWPOA No. 4737 of 2019, the petitioners were designated as Senior Clerks from the dates shown against their names in the table as under: -

Sr. No.	Name of the petitioners	Date of Designation as Senior Clerks.
1.	Suresh Kumar	19.01.1996
2.	Nand Lal	26.07.1996.

15. In CWPOA No. 4691 of 2019, the petitioners were designated as Junior Assistants from the date as shown against their names in the table as under:

Sr. No.	Name of the petitioners	Date of Designation as Junior Assistants.
1.	Prem Chand	13.03.1996
2.	Yog Singh Rana	06.01.1996
3.	Prakash Chand Chauhan	10.03.1997
4.	Jeet Ram	22.04.1997
5.	Gurdeep Chhabra	16.10.1996
6.	Bhoj Raj Sharma	22.01.1997
7.	Ghan Shayam	05.02.1997
8.	Mohinder Singh Patiyal	28.03.1997
9.	Chandu Lal	16.10.1996
10.	Sanjeev Kumar	19.12.1997
11.	Gopal Dass	16.10.1996
12.	Ram Piari	21.12.1997
13.	Lekh Ram	13.03.1996
14.	Mahender Singh	02.05.1997
15.	Vinod Panwar	30.10.1996
16.	Veena Kumar	10.04.1996

16. In CWPOA No. 4918 of 2019, the petitioners were designated as Junior Assistants from the date as shown against their names in the table as under: -

Sr. No.	Name of the petitioners	Date of Designation as Junior Assistants
1.	Nirmal Kumar	11.11.996
2.	Lajinder Singh Pathania	24.12.1997

17. The petitioners in CWPOA Nos. 4691 and 4918 of 2019 were already Senior Clerks as on 01.01.1996.

18. There is no dispute on facts that benefits allowed to the petitioners vide Himachal Pradesh Civil Services (Revised Pay) Rules, 1998, were subsequently taken away by notifications dated 01.09.1998 and 31.05.2001. Resultantly, those petitioners who were promoted as Senior Clerks were reverted to the post of Clerks. Their pay scales were also reduced. Similarly, the petitioners in CWPOA No. 4918 and 4691 of 2019, who were Senior Clerks as on 01.01.1996 became clerks, their pay scales were also reduced and in addition after having been designated as Junior Assistants again their pay scales were reduced.

19. The questions thus arises as to whether the petitioners had acquired any vested rights and whether the respondents could take away such rights retrospectively?

20. The principles of service jurisprudence, relevant to answer the aforesaid questions have been articulated in a recent judgment passed by the Hon'ble Supreme Court in the matter of ***Punjab State Cooperative Agricultural Development Bank Limited versus The Registrar Co-operative Societies and others***, Civil Appeal No(s). 297-198 of 2022, decided on 11.01.2022. The exposition of law thus is as under: -

> *"42. The question that emerges for consideration is as to what is the concept of vested or accrued rights of an employee and at the given time whether such vested or accrued rights can be divested with retrospective effect by the rule making authority.*

43. The concept of vested/accrued right in the service jurisprudence and particularly in respect of pension has been examined by the Constitution Bench of this Court in Chairman, Railway Board and Others(supra) as follows: -

> *"**11.** On the basis of the said decision of the Full Bench of the Tribunal, other Benches of the Tribunal at Bangalore, Hyderabad, Allahabad, Jabalpur, Jaipur, Madras and Ernakulam have passed orders giving relief on the same grounds. These appeals and special leave petitions have been filed against the decision of the Full Bench and those other Benches of the Tribunal. Some of these matters were placed before a Bench of three learned Judges of this Court on 28-3-1995 on which date the following order was passed:*
>
> *"Two questions arise in the present case, viz., (i) what is the concept of vested or accrued rights so far as the government servant is concerned, and (ii) whether vested or accrued rights can be taken away with retrospective effect by rules made under the proviso to Article 309 or by an Act made under that article, and which of them and to what extent.We find that the Constitution Bench decisions in Roshan Lal Tandon v. Union of India (1968) 1 SCR 185; B.S. Vadera v. Union of India (1968) 3 SCR 575 and State of Gujarat v. Raman Lal Keshav Lal Soni (1983) 2 SCC 33 have been sought to be explained by two three-Judge Bench decisions in K.C. Arora v. State of Haryana (1984) 3 SCC 281 and K. Nagaraj v. State of A.P. (1985) 1 SCC 523 in addition to the two-Judge Bench decisions in P.D. Aggarwal v. State of U.P. (1987) 3 SCC 622 and K.Narayanan v. State of Karnataka 1 994 Supp (1) SCC 44. Prima facie, these explanations go counter to the ratio of the said Constitution Bench decisions. It is not possible for us sitting as a three-Judge Bench to resolve the said conflict. It has, therefore, become necessary to refer the matter to a larger Bench. We accordingly refer these appeals to a Bench of five learned Judges."*

***44.** This Court, after taking note of the earlier view on the subject further held in Chairman, Railway Board and Others(supra)as under:-*

"20. *It can, therefore, be said that a rule which operates in future so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.*

24. *In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (1968) 1 SCR 185, B.S. Vedera (1968) 3 SCR 575 and Raman Lal Keshav Lal Soni (1983) 2 SCC 33.*

25. *In these cases we are concerned with the pension payable to the employees after their retirement. The respondents were no longer in service on the date of issuance of the impugned notifications. The amendments in the rules are not restricted in their application in future. The amendments apply to employees who had already retired and were no longer in service on the date the impugned notifications were issued.*

> ***33.*** *Apart from being violative of the rights then available under Articles 31(1) and 19(1)(f), the impugned amendments, insofar as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement."*
>
> *(emphasis supplied)*

45. Later, in ***U.P. Raghavendra Acharya and Others(supra)****, the question which arose for consideration was that whether the appellants who were given the benefit of revised pay scale with effect from 1st January, 1996 could have been deprived of their retiral benefits calculated with effect therefrom for the purpose of calculation of pension. In that context, while examining the scheme of the Rules and relying on the Constitution Bench Judgment in* ***Chairman, Railway Board and Others****(supra), this Court observed as follows: -*

> ***"22.*** *The State while implementing the new scheme for payment of grant of pensionary benefits to its employees, may deny the same to a class of retired employees who were governed by a different set of rules. The extension of the benefits can also be denied to a class of employees if the same is permissible in law. The case of the appellants, however, stands absolutely on a different footing. They had been enjoying the benefit of the revised scales of pay. Recommendations have been made by the Central Government as also the University Grant Commission to the State of Karnataka to extend the benefits of the Pay Revision Committee in their favour. The pay in their case had been revised in 1986 whereas the pay of the employees of the State of Karnataka was revised in 1993. The benefits of the recommendations of the Pay Revision*

Committee w.e.f. 1-1-1996, thus, could not have been denied to the appellants.

30. *In Chairman, Rly. Board v. C.R. Rangadhamaiah (1997) 6 SCC 623, a Constitution Bench of this Court opined:*

*"**33**. Apart from being violative of the rights then available under Articles 31(1) and 19(1)(f), the impugned amendments, insofar as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement."*

31. *The appellants had retired from service. The State therefore could not have amended the statutory rules adversely affecting their pension with retrospective effect."*

46. *Later, in* ***Bank of Baroda and Another****(supra), the question arose with respect to the employees who retired or died while in service on or after 1st April 1998 and before 31st October, 2002 to whom benefits were vested and accrued could be deprived of their retiral benefits. In this context, while taking note of the view relying on the Constitution Bench Judgment*

in ***Chairman, Railway Board and Others****(supra), this Court observed as under: -*

*"**29.** Thus, in our opinion, the Regulations which were in force till 2003, would apply with full force and as a matter of fact, the amendments made in it by addition of Explanation (c) in Regulation 2(s) did not have the effect of amending the Regulations relating to pension, as contained in Regulation 38 read with Regulations 2(d) and 35 of the Regulations of 1995. Even otherwise, if it had the effect of amending the pay and perks 'average emoluments', as specified in Regulation 2(d), it could not have operated*

retrospectively and taken away accrued rights. Otherwise also, it would have been arbitrary exercise of power. Besides, there was no binding statutory force of the so called Joint Note of the Officers' Association, as admittedly, to Officers' Association even the provisions of Industrial Disputes Act were not applicable and joint note had no statutory support, and it was not open to forgo the benefits available under the Regulations to those officers who have retired from 1.4.1998 till December 1999 and thereafter, and to deprive them of the benefits of the Regulations. Thus, by the Joint Note that has been relied upon, no estoppel said to have been created. There is no estoppel as against the enforcement of statutory provisions. The Joint Note had no force of law and could not have been against the spirit of the statutory Regulations and the basic service conditions, as envisaged under the Regulations framed under the Act of 1970. They could not have been tinkered with in an arbitrary manner, as has been laid down by this Court in Central Inland Water Transport Corporation Limited & Anr. vs. Brojo Nath Ganguly & Anr., (1986) 3 SCC 156 & Delhi Transport Corporation vs. D.T.C. Mazdoor Congress, (1991) Supp.1 SCC 600."

47. *The exposition of the legal principles culled out is that an amendment having retrospective operation which has the effect of taking away the benefit already available to the employee under the existing rule indeed would divest the employee from his vested or accrued rights and that being so, it would be held to be violative of the rights guaranteed under Articles 14 and 16 of the Constitution."*

21. Keeping in view the aforesaid enunciations, it is no more in the realm of doubt that petitioners had acquired vested rights for the reasons that whatever designation or pay scales petitioners were allowed before the issuance of impugned notification dated 01.09.1998 were under the prevalent Rules. None of the petitioners had been granted any benefit beyond the existing Rules. It is not the case where the petitioners had acquired any benefit either by committing fraud or misrepresentation of facts.

22. Undoubtedly, the respondents being employers could have changed the service conditions so as to govern the future rights, but not retrospectively which has given cause of action to the petitioner to assail impugned decisions as being violative of Articles 14 and 16 of the Constitution of India.

23. As held above, the petitioners were not granted benefits at any stage from outside of the provisions of Rule Book. They were allowed the benefits or rights that flowed from the relevant rules. Thus, the petitioners can definitely be said to have the vested and acquired rights in the benefits allowed to them under the prevalent Rules. The amendment brought by respondents in Himachal Pradesh Civil Services (Revised Pay) Rules, 1998, vide notification dated 01.09.1998 which had effect of taking away benefits already available to the petitioners under the existing Rules is contrary, discriminatory and violative of rights granted under Articles 14 and 16 of the Constitution of India.

24. In view of the aforesaid exposition of law and its applicability to the facts of the case, it is clear that the vested, accrued and fundamental rights of the petitioners have been infringed and the impugned action of respondents is in clear violation of Articles 14 and 16 of the Constitution of India.

25. In view of the above discussion, the petitions are allowed and the impugned notification dated 01.09.1998 and notification dated 31.05.2021 are quashed to the extent these had taken away the vested and accrued rights of the petitioners retrospectively. The respondents are directed to allow the petitioners to retain the designation of Senior Clerks from 01.01.1996 in the case of the petitioners in CWPOA Nos. 4918 and 4691 of 2019 till their designation as Junior Assistants and in case of petitioners in CWPOA Nos. 4777 and 4737 of 2019 from the respective dates on which they were conferred the designation of Senior Clerks till the acquisition of designation of

Junior Assistants by them. In addition, the respondents are further directed to protect the pay scales made available to the petitioners as Senior Clerks till their designations as Junior Assistants. It is, however, specifically clarified that the relief allowed hereby to the petitioners shall be personal to them. Petitions are accordingly disposed of. Pending applications are also disposed of.

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

Between:

1. DEV RAJ,
S/O SH. CHET RAM,
R/O VILLAGE TROHALA,
P.O. DHAWALI,
TEHSIL DHARAMPUR,
DISTRICT MANDI, H.P.,
AGED 42 YEARS,

2. SATISH KUMAR,
S/O SH. CHAND LAL,
R/O VILLAGE TROHALA,
P.O. DHAWALI,
TEHSIL DHARAMPUR,
DISTRICT MANDI, H.P.

3. SURJEET SINGH,
S/O SH. SHAMBHU DUTT,
R/O VILLAGE DELAG,
P.O. GOHAR,
TEHSIL GOHAR,
DISTRICT MANDI, H.P.

4. KULDEEP KUMAR,
S/O SH. BIHARI LAL,
R/O VILLAGE KALSWAI,

P.O. & TEHSIL DHARAMPUR,
DISTRICT MANDI, H.P.

5. SUSHMA SHARMA,
W/O SH. MAHESH KUMAR,
R/O UPPER LASRANA,
P.O. & TEHSIL SANDHOLE,
DISTRICT MANDI, H.P.

6. NEELAM SHARMA,
W/O SH. SUDESH KUMAR,
R/O VILLAGE DEEPUR,
P.O. HATWAD,
TEHSIL GHUMARWIN,
DISRICT BILASPUR, H.P.

7. KISHORI LAL,
S/O SH. HET RAM,
R/O VILLAGE NALSAR,
P.O. RAJGARH,
TEHSIL BALH,
DISTRICT MANDI, H.P.

8. SUNIL KUMAR,
S/O SH. HET RAM,
R/O VILLAGE NALSAR,
P.O. RAJGARH,
TEHSIL BALH,
DISTRICT MANDI, H.P.

9. BHUWNESHWAR DUTT,
S/O SH. PARMA NAND,
R/O VILLAGE KHURI,
P.O. RAJGARH,
TEHSIL BALH,
DISTRICT MANDI, H.P.

10. JITENDER CHAUHAN,

S/O SH. DEVI RAM,
R/O VILLAGE MOSLAN,
P.O. DEVIYA,
TEHSIL NERWA,
DISTRICT SHIMLA, H.P.

11. KEWAL RAM,
S/O SH. DEVI RAM,
R/O VILLAGE BHOULALA,
P.O. DEVIYA,
TEHSIL NERWA,
DISTRICT SHIMLA, H.P.

...PETITIONERS

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

AND

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

2. DIRECTOR OF AYURVEDA,
HIMACHAL PRADESH,
SHIMLA.

...RESPONDENTS

(BY MR. ASHOK SHARMA,
ADVOCATE GENERAL, WITH
MR. VINOD THAKUR &
MR. SHIV PAL MANHANS,
ADDITIONAL ADVOCATES GENERAL

AND MR. YUDHBIR SINGH
THAKUR, DEPUTY ADVOCATE
GENERAL)

CIVIL WRIT PETITION
No. 7724 of 2021
Reserved on:17.8.2022
Decided on: 15.09.2022

Constitution of India, 1950- Article 226- Appointment for the post of Ayurvedic Pharmacist on batch wise basis- Held- Diplomas of petitioners were duly verified- Respondent No. 2 cannot now raise question/doubt over the Diplomas obtained by the petitioners from Bihar State Faculty of Ayurvedic and Unani System prior to 2003, as, it was respondent No. 2, who had registered the petitioners with the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh, after verifying the documents submitted by the petitioners- Petition allowed. (Para 26, 27)

Cases referred:

Bihar State Council of Ayurvedic & Unani Medicine vs. State of Bihar & others, 2007 (12) SCC 728;

This Civil Writ Petition coming on for orders this day, ***Hon'ble Mr. Justice Virender Singh,*** *passed the following:*

O R D E R

The above named petitioners have invoked the extra ordinary writ jurisdiction of this Court, under Article 226 of the Constitution of India, seeking the following substantive relief:

> *"i. That appropriate writ, order or direction may very kindly be issued directing the respondents to consider and offer appointment to the petitioners on batch-wise basis for the post of Ayurvedic Pharmacist from the same date, when the persons junior on batch-wise basis will be offered appointments, in the interest of law and justice with all consequential benefits of pay, arrear, seniority etc."*

2. Factual position, as per the pleadings, is as under:

The petitioners have obtained two years Diploma of Ayurvedic Pharmacy from different Colleges of Bihar, during the years 1995 to 2000,

which are stated to have been affiliated with Bihar State Faculty of Ayurvedic and Unani System of Medicine, Patna, under Section 17 of the Bihar Development of Ayurvedic and Unani System of Medicine Act, 1961.

3. After obtaining two years Diploma from Bihar State Faculty of Ayurvedic and Unani System of Medicine, the petitioners got themselves registered with the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh. The copy of the certificate of one of the petitioners issued by the Registrar, Board of Ayurvedic and Unani Systems of Medicines, Himachal Pradesh has been placed on record as Annexure P-2.

4. Respondent No. 2, who is stated to be the Appointing Authority of the Ayurvedic Pharmacists, has issued an advertisement to fill-up the posts of Ayurvedic Pharmacists, on batch-wise basis. Consequently, call letters were issued to all the petitioners on 7th August, 2021, requiring them to appear before the Interview Board on 23rd August, 2021.

5. Thereafter, the documents submitted by the petitioners were sent for verification.

6. The petitioners have claimed that they all are in the top of the list, being the senior most, for the batch-wise recruitment. It has been contended on behalf of the petitioners that the verification of their documents had earlier been done, at the time of their registration, by the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh. Now, the respondents have again wrongly submitted their documents for verification and on the basis of some verification, have deleted their names from the list of eligible candidates and as such, not offering them the letters of appointment, despite being the senior most persons in their relevant batch(es) and having the requisite qualification for the post.

7. Petitioners have also filed representation, dated 30th October, 2021 (Annexure P-5), before the respondents for redressal of their grievances, but, no decision is stated to have been taken so far, over the said representation.

8. In order to substantiate their case, the petitioners have relied upon the judgment rendered by their Lordships of Hon'ble Supreme Court in **Bihar State Council of Ayurvedic and Unani Medicine versus State of Bihar and others, 2007 (12) Supreme Court Cases 728.**

9. Apprehending that the appointment letters will be issued to some other persons, excluding the petitioners, they have filed the instant writ petition, seeking the afore-quoted relief.

10. When put on notice, respondent No. 2 has contested the writ petition, mainly, on the ground that the Diplomas of the petitioners were not recognized by H.P. Takniki Shiksha Board/University recognized by the H.P. Government, and the same were sent to the Bihar State Ayurvedic and Unani Medical Council for verification, which, in return, vide letter, dated 21st October, 2021, has intimated that the recognition of the Institutes, from where the petitioners have obtained the Degree/Certificates, stands cancelled.

11. As such, it is the stand of respondent No. 2 that those institutes were not recognized, either by the Bihar Government or by the Government of India.

12. Heavily relying upon the said communication, received from the Bihar State Ayurvedic and Unani Medical Council, it has been pleaded that the registration of the petitioners, with the Board of Ayurvedic and Unani System of Medicine, has been cancelled.

13. With all these submissions, respondent No. 2 has prayed for dismissal of the writ petition with the plea that the petitioners are not eligible for appointment to the post of Ayurvedic Pharmacists.

14. We have heard learned counsel for the parties and perused the record.

15. Respondent No. 2 has issued an advertisement by writing a letter to the Director, Public Relation Department, Himachal Pradesh, on 3rd October, 2020 (Annexure R-IV), for filling up 97 posts of Ayurvedic Pharmacists. The

last date for submission of applications has been fixed as 18th November, 2020 for the Tribal areas and 3rd November, 2020 for the candidates belonging to the other parts of Himachal Pradesh. The minimum qualification, which has been prescribed, in the advertisement, is reproduced as under:

> *"**Essential Qualification(s):***
>
> *i) Plus two from a recognized Board of School Education.*
>
> *ii) Successful training of at least two years duration in Ayurvedic Pharmacist/Diploma in Pharmacy (Ayurveda)/Bachelor Degree in Pharmacy (Ayurveda) from an Institution duly recognized by the Himachal Pradesh Takniki Shiksha Board/University recognized by the Himachal Pradesh Government."*

16. In response to the said advertisement, a communication was sent by the Director (Ayush), Himachal Pradesh, to the candidates, falling in the zone of consideration, directing them to submit one set of the photocopies of the relevant documents, as mentioned in the said letter. Apart from the other documents, the candidates were required to submit the Certificate of successful training of at least two years duration in Ayurvedic Pharmacist/Diploma in Pharmacy (Ayurveda)/Bachelor Degree in Pharmacy (Ayurveda) from an Institution duly recognized by the H.P. Takniki Shiksha Board/University recognized by the H.P. Government, as well as, Registration Certificate from Himachal Pradesh Ayurvedic and Unani Board/Council. Admittedly, the petitioners had submitted these documents.

17. It would be apt to record herein that it has been admitted in the reply that all the petitioners have been registered with the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh, after verification of their Degrees from the concerned Institutes.

18. Vide letter, dated 1st October, 2021, a request has been made by the Director Ayush, Himachal Pradesh to the Additional Chief Secretary-cum-Chairman, Bihar Ayush Society, Patna with regard to the verification of the

documents of the recognized Institutions. In response to the said letter, it has been informed by the Registrar, Bihar State Ayurvedic and Unani Medical Council, Patna, that in view of the decision taken by the Bihar State Ayurvedic and Unani Medical Council on 4th August, 2003, the Institutions were not recognized by the State Government of Bihar or Government of India, i.e. at any Government level, and recognition given by the Bihar State Ayurvedic and Unani Medicine Authority has also been abolished.

19. As per the List of Medical Qualifications included in the Schedules to the Indian Medicine Central Council Act, 1970 (Second Schedule), the State Faculty of Ayurvedic and Unani Medicine, Patna was holding validity from 1953 to 2003.

20. Section 2 (c) of the Bihar Development of Ayurvedic & Unani Systems of Medicine Act, 1951 defines the word 'Faculty', which reads as under:

> *"**2. Definitions.***
> *(a) … … …*
> *(b) … … …*
> *(c) "Faculty" means the State Faculty of Ayurvedic and Unani Medicines established under Section 17."*

21. Similarly, Section 17 (2) of the Bihar Development of Ayurvedic & Unani Systems of Medicine Act, 1951, defines the duties of the faculty. The relevant portion of the said provision is reproduced as under:

> *"**17. Establishment of Faculty.***
>
> *(1). … … …*
>
> *(2) Subject to the provisions of this Act and the Rules and Regulations made thereunder, it shall be the duty of the Faculty-*
>
> *(a) … … …*

(b) to hold examinations and grant certificates to, and confer degrees or diplomas on, persons who shall have pursued a course of study in the institutions affiliated to the Faculty."

22. Thus, it can be clearly discerned that prior to the year 2003, the State Faculty of Ayurvedic and Unani Medicine, Patna was recognized by Central Council of Indian Medicine, New Delhi for medical qualifications in Indian medicine granted by Universities, Boards or other medical institutions in India and was authorized to hold examinations and grant certificates to, and confer degrees or diplomas on, persons who shall have pursued a course of study in the Institutions affiliated to the Faculty.

23. In **Bihar State Council of Ayurvedic and Unani Medicine's case (supra),** their Lordships of Hon'ble Supreme Court have had an occasion to discuss the effect of the Amending Act, 2003. It would be profitable to reproduce the relevant portion of the judgment, as under:

"13. The Bihar Development of Ayurvedic and Unani Systems of Medicine Act, 1951 received the assent of the President on 12.9.1951 and the assent was first published in the Bihar Gazette, Extraordinary, dated 17.10.1951. This Act was enacted to provide for the development of the ayurvedic and Unani systems of medicine, to regulate their teaching and practice, and to control the sale of indigenous medicinal herbs and drugs in the State of Bihar. In exercise of powers under Section 3, the State Government shall, by notification, constitute a Council to be called the Bihar State Council of Ayurvedic and Unani Medicines, which shall consist of a President and the Members mentioned in clauses (a) to (n) of Section 3(1).

14. Under Section 17 of this Act, the Council shall establish a State Faculty of Ayurvedic and Unani Medicines for the purposes of the Act which shall consist of a Chairman and the Members enumerated in clauses (a) to (d) of Section 17(1). Under clause (d) of sub-section (2) of Section 17, it shall be the duty of the Faculty to recognize educational or instructional institutions of the Ayurvedic and Unani systems of medicine for purposes of affiliation. Under clause (b) of

Section 17(2), the Faculty is authorized to hold examination and grant certificates to, and confer degrees or diplomas on, persons who shall have pursued a course of study in the institutions affiliated to the Faculty.

15. Section 37 of this Act authorizes the Council to establish educational institutions, prescribe courses of study, etc. subject to the rules as may be prescribed by the State Government in this behalf. Section 37 clothes the Council with power to establish its own educational or instructional institutions for the purpose of conducting courses of Ayurvedic and Unani systems of medicine. Under Section 54, the Council is authorized to make regulations subject to the provisions of the Act and the rules made by the State Government.

16. Looking into the aforesaid provisions, it is clear to us that the Council constituted by the State Government under the 1951 Act shall establish a State Faculty under Section 17 which shall have the authority to recognize educational or instructional institutions of Ayurvedic and Unani systems of medicine, to conduct examinations of the persons studying in such affiliated institutions, and to grant certificates and confer degrees or diplomas.

xxx xxx xxx

56. The amendment brought about in the Indian Medicine Central Council Act, 1970, in 2003 by introduction of Sections 13-A, 13-B and 13-C are the provisions for continuance of the institution which has not obtained prior permission of the Central Government and, therefore, time limit of three years has been provided under Section 13-C to regularize the institutions affairs as required under the Act by seeking permission of the Central Government. Insertion of Section 13-A in the 1970 Central Act in the year 2003 has regulated the opening of an indigenous medical college. The non-obstante clause clearly indicates that a medical institution cannot be established except with the prior permission of the Central Government.

57. Under Section 13-B, any medical qualification granted by the colleges established without the prior permission of the Central Government is not a recognized medical qualification. The reasonable reading of Section 13-C(1) puts the existing colleges at par with the new colleges as both of them are required to seek permission within three years from the commencement of the Amending Act. The phrase on or before has made it clear that the existing colleges are also required to seek permission and there is no exemption.

58. Section 13-C(2) further provides that the medical qualification granted by existing colleges whose establishment has not been recognized by the Central Government, the medical qualification would not be a recognized qualification. Similar requirement is to be fulfilled by the new medical colleges opened, i.e., to seek permission of the Central Government for the medical qualification to be recognized qualification. Thus, new colleges or existing colleges cannot any more grant a recognized qualification without the sanction of the Central Government. Section 13-C(2) does not say that the effect of non-permission by the Central Government to the existing colleges after the Amending Act came into force would render the medical qualifications already granted by the existing colleges before the insertion of Sections 13-A, 13-B and 13-C in 2003, un-recognised.

59. The whole spectrum of the amendment brought about by introducing Sections 13A, 13B and 13C indicates that it has an application from the date they have been introduced by an amendment in the 1970 Central Act. The effect of the amendment brought about is clear to us that all the medical colleges which are in existence or the medical colleges which have to be established should compulsorily seek permission of the Central Government within the period provided and on failure to get the permission of the Central Government the medical qualification granted to any student of such medical college shall not be a recognized medical qualification for the purposes of the 1970 Act. The established colleges are also required to seek permission of the Central

Government for the medical qualification to be recognized medical qualification but it would not mean that the already conferred medical qualification of the students studied in such previously established medical colleges would not be a recognised medical qualification under the 1970 Act.

60. On a reasonable construction of these Sections, we hold that the provisions of Section 13B whereby the qualification granted to any student of a medical college would not be deemed to be a recognized medical qualification would not apply. When a degree has been legally conferred on the students prior to the commencement of the Amending Act of 2003, it shall be treated as a recognized degree although the medical college has not sought permission of the Central Government within a period of three years from the commencement of the Amending Act of 2003.

61. For the reasons aforesaid, the appeals are allowed. The judgment of the High Court is set aside and we hold that the GAMS degree conferred on the appellant-students shall be treated as a recognized degree for the purposes of taking admission to the higher courses of study and also for the purpose of employment."

24. The document, on which respondent No. 2 is heavily relying upon, is letter, dated 1st October, 2021. This letter does not demonstrate that the Diplomas, which were issued by the Bihar State Faculty of Ayurvedic and Unani System of Medicine prior to 2003, were not recognized by Central Council of Indian Medicines, which is the apex body for recognizing the medical qualifications in Indian medicine.

25. Moreover, it has rightly been pointed out by the learned counsel appearing for the petitioners that the fact, that before registration of the petitioners with the Board of Ayurvedic and Unani System of Medicines, Himachal Pradesh, their Diplomas were duly verified, has been admitted by respondent No. 2 in the reply. Thus, respondent No. 2 cannot now raise question/doubt over the Diplomas obtained by the petitioners from Bihar

State Faculty of Ayurvedic and Unani System prior to 2003, as, it was respondent No. 2, who had registered the petitioners with the Board of Ayurvedic and Unani System of Medicine, Himachal Pradesh, after verifying the documents submitted by the petitioners. As per Section 35 of the Evidence Act, there is a presumption that the official acts are done with accuracy and fidelity.

26. At the cost of repetition, it would be apt to record herein that the response of the Registrar, Bihar State Ayurvedic and Unani Medical Council, Patna to letter, dated 1st October, 2021, is too short to raise any question over the Diplomas obtained by the petitioners from Bihar State Faculty of Ayurvedic and Unani System prior to 2003.

27. Considering all these facts, the writ petition is allowed and the Diplomas obtained by the petitioners from Bihar State Faculty of Ayurvedic and Unani System prior to 2003 are held to be valid, as, the said Institutes were duly recognized by the Central Council of Indian Medicines, which is the apex body for recognizing the medical qualifications in Indian medicine. Respondent No. 2 is, accordingly, directed to consider the candidature of the petitioners for the post of Ayurvedic Pharmacists, if otherwise found eligible.

28. Pending miscellaneous applications, if any, also stand disposed of accordingly.

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

Between:
VINOD KUMAR, SON OF SHRI KARTAR SINGH RESIDENT OF V AND PO ANDHERI TEHSIL RENUKAJI, DISTRICT SIRMOUR,H.P.

.....PETITIONER

(BYMR. UMESH KANWAR, ADVOCATE)
AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EDUCATION) GOVERNMENT OF HIMACHAL PRADESH, HP SECRETARIATSHIMLA-171002.

2. DIRECTOR OF ELEMENTARY EDUCATIONHIMACHAL PRADESH, SHIMLA-171001

3. DEPUTY DIRECTOR OF ELEMENTARY EDUCATIONDISTRICT SIRMOUR, NAHAN HIMACHAL PRADESH

4. HEADMASTER GOVERNMENT MIDDLE SCHOOL, MANAL DOUCHI PO ANDHERI, TEHSIL RENUKAJI, DISTRICT SIRMOUR (HP)

5. SH. MOHAN SINGH RESIDENT OF VILLAGE MANAL DOUCHI, PO ANDHERI
TEHSIL RENUKAJI, DISTRICT SIRMOUR (HP) PRESIDENT (PTA/VEC), GMS MANAL DOUCHI DISTRICT SIRMOUR (HP)

6. PARENT-TEACHER ASSOCIATION GOVERNMENT MIDDLE SCHOOL, MANAL DOUCHIPO ANDHERI, TEHSIL RENUKAJI. DISTRICT SIRMOUR (HP) THROUGH ITS MEMBER SECRETARY (HEADMASTER) GMS MANAL DOUCHI.

7. MS SHEELA DEVI D/O SH. DEEP RAM PHYSICAL EDUCATION TEACHER, GOVT. MIDDLE SCHOOL MANAL DOUCHI PO ANDHERI, TEHSIL RENUKAJI. DISTRICT SIRMOUR (HP).

…….RESPONDENTS

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL FOR R-1 To 4;

NONE FOR RESPONDENTS NO. 5 AND 6;
MR. KARAN SINGH KANWAR, ADVOCATE FOR R-7)

CIVIL WRIT PETITION
No. 5828 of 2010

Reserved on: 14.09.2022
Decided on: 22.09.2022

Constitution of India, 1950- Article 226- Quashing of memorandum and permitting petitioner to work as PET on PTA basis- Held- Appointment of petitioner was purely temporary with the condition that he would not claim any sort of regular job- Claim of the petitioner has no basis – Petition dismissed. (Para 9 to 11)

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

ORDER

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

(i) That memorandum dated 31.08.2206(Annexure P-3) and 12.10.2006 (Annexure P-7) may kindly be quashed and set side and the petitioner may kindly be allowed to work as PET on PTA basis in Government Middle School, Manal Douchi.

(ii) That the appointment of respondent No. 7 dated 09.11.2006 may be quashed and set aside.

(iii) That the order dated 02.06.2010 (Annexure P-10) passed by Deputy Commissioner Sirmour may be quashed and set aside.

2. Brief facts necessary for adjudication of the petition are that on 02.08.2006, petitioner was appointed as Physical Education Teacher (PET) by Parents Teacher Association (PTA) in Government Middle School, Manal Douchi**,**on temporary basis, for the academic session 2006-07. On 31.03.2006, PTA passed the resolution and terminated the services of the petitioner, on the ground that petitioner belonged to another Panchayat and as per resolution of the PTA, the appointment was to be made of teacher from the local Panchayat. Subsequently respondent No.7 was appointed as PET by PTA in Government Middle School, Manal Douchi.

3. Petitioner assailed his termination before erstwhile Himachal Pradesh State Administrative Tribunal by way of O.A No. 3149 of 2006. The original application of the petitioner was dismissed on 06.08.2007 with liberty reserved in favour of the petitioner to approach the appropriate Forum. Thereafter, petitioner filed CWP No. 1502 of 2007 before this Court. On 21.04.2008, a Division Bench of this Court passed the following order and disposed of the CWP No. 1502 of 2007:-

> *"In light of the notification dated 19th April, 2008, whereby certain committees have been constituted, all the writ petitions having become infructuous are dismissed accordingly, so also all other pending applications. All the petitioners or any other aggrieved teacher who have not ever approached the court would be at liberty to make representation before the authority concerned who will consider and dispose of the same in accordance with law by a speaking order respectively.The representations shall be filed within one month from today and the same shall be decided by the authority concerned within three months thereafter."*

4. In pursuance to order dated 21.04.2008 passed by this Court, petitioner approached the Committee constituted by Government of H.P., vide notification dated 19.04.2008. Petitioner also assailed before the Committee the appointment of respondent No.7. The Committee headed by Sub Divisional Magistrate, Nahan, vide order dated 13.10.2008, set aside the appointment of respondent No. 7. However, nothing was held in respect of termination of the petitioner. Respondent No.7 filed an appeal before Deputy Commissioner, Sirmour, H.P. which was decided on 02.06.2010. *Vide* his order dated 02.06.2010, the Deputy Commissioner, Sirmour, while upholding the termination of petitioner, set aside the order passed by the Committee and the appointment of respondent No. 7 was upheld.

5. Aggrieved against his termination dated 31.10.2006 and order dated 02.06.2010, passed by Deputy Commissioner, Sirmour, petitioner has filed instant petition for the reliefs, as noted above.

6. The contention of the petitioner is that there was no provision in PTA scheme prescribing the selection of teachers only from the local Panchayat in which the School concerned, was situate.

7. In reply, filed on behalf of respondents No. 1 to 4, though, the factual position has not been denied, it has been submitted that appointment of the petitioner as PET was purely on temporary basis through PTA for session 2006-07 only. Petitioner was to be paid honorarium by PTA at the rate of Rs. 800/- per month and not under grant-in-aid Rules, 2006. Respondent No. 7 also filed separate reply. Besides adopting the averments made in reply of respondents No. 1 to 4, it has been additionally submitted that respondent No. 7 was appointed as PET on 04.11.2006. The order passed by Deputy Commissioner, Sirmour was perfectly lawful. It was further submitted that there was no relation between the termination of petitioner and appointment of respondent No. 7 as both were independent of each other. Petitioner was not entitled to challenge the appointment of respondent No. 7 as he had not participated in the selection process. Since, respondent No. 7 was working w.e.f. 04.11.2006, it was submitted that she had acquired legal vested rights.

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

9. The appointment letter dated 02.08.2006 of the petitioner is Annexure P-2. Its perusal reveal that PTA had appointed petitioner as PET purely on temporary basis with the condition that he would not claim any sort of regular job, on the basis of his appointment by PTA. The PTA was to pay monthly honorarium of Rs. 800/-. The appointment of petitioner was for academic session 2006-07. Petitioner remained as PET in Government Middle

School, Manal Douchifor less than one month. His services were terminated on 31.08.2006.

10. Petitioner has challenged his termination on the ground that he had acquired a right by such appointment and his termination without any inquiry and especially on such nonexistent groundwas bad in law. Petitioner, however, cannot be held to be justified in his claim. Nothing has been placed on record in respect of the mode of appointment of the petitioner. There is no whisper that petitioner was appointed after adoption of any selection process. It has also not been brought on record as to under which rules, the petitioner was appointed. In view of the contents of appointment letter of the petitioner, it cannot be said that the petitioner had acquired any right of permanence on the post of PET in Government Middle School, Manal Douchi. In absence of establishment of any right in favour of the petitioner, his claim has no basis.

11. Petitionerotherwise also cannot be held entitled for relief, as prayed in the instant petition, for the reason that he had not laid any challenge to the order dated 13.10.2008, passed by Committee headed by Sub Divisional Magistrate, Nahan. There was no adjudication in the said order in respect of legality or otherwise of the termination of the petitioner. However, impliedly the same was rejected and petitioner did not assail said order. The appeal before Deputy Commissioner, Sirmour was filed by respondent No. 7. The observations made in the said appeal cannot afford the cause of action to the petitioner to file instant petition challenging his termination.

12. Viewed from another angle, CWP No. 1502 of 2007 of the petitioner was decided on 21.04.2008 in light of notification dated 19.04.2008. The said notification reads as under:-

”Government of Himachal Pradesh
"Department of Education"

EDN-A (Kha) 7-3/2206 Dated Shimla-02, the 19.04.2008

NOTIFICATION

In view of a large number of complaints regarding irregularities in the appointment of teachers by Parents Teacher Associations in schools/collages, the Government had asked Shri Deepak Sanan, Pr. Secretary (Health & Family Welfare) to the Govt of Himachal Pradesh to enquire into PTA recruitments since the notification of Grant-in-Aid to PTAs Rules, 2006 on **29.6.2006** The Government has carefully considered the Report of Inquiry into appointment by PTAs submitted by Shri. Deepak Sanan, the Grant-in-Aid to PTA Rules-2006 including its amendment, Instructions issued by the Government, Directorate of Higher Education & Directorate of Elementary Education, complaints received by the Government, decisions of the Hon'ble High Court of HP. In CWP No. 1341 of 2007 titled ShalljaSood Vs. State of HP & Ors.

2. Now, the Governor, Himachal Pradesh is pleased to constitute the following Committees to enquire into the cases of irregularly appointed teachers by the Parents Teachers Associations in the Pradesh:

1. **College level:**

(i)	DC/ADC/ADM	Chairman
(ii)	Principal	
(iii)	Subject Specialist	

2. **Sr. Secondary School/High School**

(i)	ADC/ADM/SDM	Chairman
(ii)	Principal	
(iii)	Subject Specialist	

3. **Middle School** Chairman

(i) SDM
(ii) Headmaster/Senior teacher of the school
(iii) Subject Specialist

3. The affected parties/complainants will be heard by the aforesaid committees which after going through the records and guidelines to be framed bythe Department will make suitable recommendations to the PTA.

4. The Grant-in-aid-system for the existing posts of PTA teachers will continue.

By Order

P.C.Dhiman
Secretary (Higher Education) 'to the
Government of Himachal Pradesh.

Endst No: As above Dated Shimla-2, the 19.04.2008
Copy for information and necessary action to:

1. All Principal Secretaries/Secretaries to the Govt of Himachal Pradesh.
2. All the Divisional Commissioners in Himachal Pradesh.
3. The Director of Higher Education, H.P. Shimla-1.
4. The Director of Elementary Education, H.P. Shimla-1
5. All the Deputy Commissioners in Himachal Pradesh.
6. All the ADCS/ADMs in Himachal Pradesh
7. All the SDOs(Civil) In Himachal Pradesh.

Addl. Secretary (HE) to the
Government of Himachal Pradesh"

13. The contents of the aforesaid notification clearly reveal that Committees were constituted to inquire into the cases of irregularly appointed teachers by PTAs in the State of Himachal Pradesh. The grievance of the petitioner was against his termination, whereas the Committees were to inquire into the cases of irregularly appointed teachers. In these circumstances, the case of the petitioner would not have been covered by notification dated 19.04.2008. The acceptance of order dated 21.04.2008 passed by Division Bench of this Court was at his own peril. The said order dated 21.04.2008 otherwise, reveals that by such order more than one petitions were disposed ofhaving become infructuous. It was for the petitioner to have assessed the merits of his petition at that stage viz-a-viz the contents of notification dated 19.04.2008. In view of this matter also the petitioner is now estopped from challenging his termination by way of instant petition.

14. There is another angle which disentitled petitioner from grant of relief. Sixteen years have elapsed since termination of the petitioner. Petitioner hadworked only for 28days. On equity also, petitioner cannot be held entitled to the relief claimed vis a vis respondent No.7, who is stated to be working on the post since 4.11.2006. He cannot also get the monetary relief as he has not worked since 01.09.2006.

15. In view of above discussion, there is no merit in this petition and the same is accordingly dismissed.

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

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

Between:-

RAJINDER SINGH S/O SH. SUKH RAM R/O VPO DARWAR, TEHSIL SARKAGHAT,DISTRICT MANDI, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER, IPH, SUB DIVISIONAL NADAUN, DIVISION HAMIRPUR, DISTRICT HAMIRPUR,H.P.

….PETITIONER

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH ITS PRINCIPAL SECRETARY (IPH), TO THE
GOVT. OFHIMACHAL PRADESH,SHIMLA-2.

2. ENGINEER-IN-CHIEF (IPH)
DEPARTMENT, US CLUB, SHIMLA-1

3. SH. MOHINDER PAL S/O NOT KNOWN, ASSISTANT
ENGINEER (IPH) DIVISION SUNDERNAGAR, DISTRICT MANDI, H.P.

4. PAWAN KUMAR S/O NOT KNOWN, ASSISTANT ENGINEER, O/O ENC, FATEHPUR, DISTRICT KANGRA, H.P.

5. HANS RAJ S/O NOT KNOWN,ASSISTANT ENGINEER (IPH)
DIVISION CHURAG, UNDER IPH DIVISION KARSOG,
DISTRICT MANDI, H.P.

6. KAMAL KUMAR, S/O NOT KNOWN, ASSISTANT ENGINEER (IPH) DIVISION JAWALI, DISTRICT KANGRA, H.P.

…..RESPONDENTS

(MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL FOR R-1 AND R-2.
MS. BABITA, ADVOCATE, VICE MR. A.K.GUPTA, ADVOCATE, FOR R-3.
R-4 TO R-6 EX-PARTE.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.3209 of 2020
Decided on: 02.09.2022

Constitution of India, 1950- Article 226- Quashing of promotions of private respondents 3 to 6 as A.E. (Civil)- Held- Without altering the seniority list of the surveyors, the respondents could not have altered the seniority list of J.Es and that too without complying with the provisions of the principles of natural

justice- Without redrawing the final seniority list of surveyors, the seniority position of the J.Es could not have been altered- Directions issued. [Para 4(iii), (iv)]

Cases referred:

K.R. Mudgal and others Vs R.P. Singh and others AIR 1986 SC 2086;
Malcom Lawrence Cecil D'Souza Vs. Union of India & others (1976) 1 SCC 599;
S.B. Dogra Vs. State of H.P. and others (1992) 4 Supreme Court Cases 455;

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

O R D E R

The petitioner seeks quashing of promotion of private respondents No. 3 to6 as Assistant Engineers (Civil). Consequent prayer has been made for considering the case of the petitioner for promotion to the post of Assistant Engineer (AE for short) from the date his juniors i.e. respondents No.3 to 6 were promoted as such with all incidental benefits. Another prayer has been made for re-drawing the seniority list of Junior Engineers (Civil) [hereinafter as JEs (Civil)] as it stood on 31.12.2014 and to place the petitioner, therein at the same seniority position which he was holding in the seniority list of JEs issued vide Annexure A-2.

2. The relevant **factual matrix** of the case is as under:-

2(i). On 08.09.2005, the official respondents issued final seniority list of Surveyors working in Irrigation and Public Health Department (IPH hereinafter) as it stood on 31.12.2004. Name of the petitioner figured at Sr. No.276 of this list,whereas, private respondents No.3,4, 5 and6 figured at seniority position Nos. 301, 308,306 and 296, respectively. Private respondents No.3 to 6 were juniors to the petitioner as Surveyors in terms of final seniority list of the Surveyors circulated by the official respondents on 08.09.2005 (Annexure A-1).

2(ii) On the basis of final seniority list of the Surveyors dated 08.09.2005 (Annexure A-1), the respondents issued office order dated

27.09.2005 (Annexure A-2),promoting the petitioner and respondents No.3 to 6 as JEs (Civil) on ad hoc basis. The name of the petitioner is at Sr. No.1, whereas names of respondents No.3 to 6figure below the petitioner i.e. at Sr. Nos. 7,11,10 and 4, respectively, in this office order. Their seniority positions from the seniority list of Surveyors have also been depicted in this office order against their respective names.

2(iii) A provisional seniority list of JEs (Civil) was circulated by the respondents vide Annexure A-3, depicting the position of the JEs as on 31.12.2014. Here again, the petitioner has been reflected as senior to respondents No.3 to 6. He has been assigned seniority at Sr.No.372, whereas, respondents No.3 to 6 have been assigned seniority positions at Sr. Nos.378, 382, 381 and 375, respectively.

2(iv) On 17.03.2017, provisional seniority list of JEs (Civil) as it stood on 31.12.2016, was circulated vide Annexure A-4. In this seniority list, a departure was made from earlier existing seniority list inasmuch as the petitioner, who was earlier being shown as senior to the private respondents, was now shown their junior. He was assigned seniority position No.374, whereas, respondents No.3 and 4 were assigned seniority over him at Sr. Nos. 372 and 373,respectively. Respondent Nos.5 and 6 againfigured below the petitioner at seniority position Nos.382 and 377. The petitioner represented on 21.08.2017 against the downgrading of his seniority position in the seniority list of JEs dated 17.03.2017. The representation was rejected on 30.12.2017. In the meanwhile, the respondents issued notification dated 09.10.2017 (Annexure A-6), ordering placement of respondents No.3 to 6 as Assistant Engineers (Civil).

2(v) It is in the aforesaid background that the petitioner has filed the instant petition, seeking following substantive reliefs:-

> *"(a) That the impugned action as contained in the Annexure A-6 qua the respondent No 3 to 6 wherein they have been*

promoted as Assistant Engineer may very kindly be quashed and set aside and the respondents be directed to consider and promote the applicant as Assistant Engineer from the date from which respondent No.3 to 6 (who are junior to the applicant) have been promoted and further be directed to give all consequential benefits including seniority and monitory benefit w.e.f. 09.10.2017.

(b) That the respondent No.2 be directed to redraw the seniority list and place the applicant on the same position i.e. at Sr. No.372 on which he was placed vide Annexure A-2 i.e. seniority list as it stood on 31.12.2014."

3. Contentions: -

3(i) The arguments of learned counsel for the petitioner is that the petitioner had figured above respondents No.3 to 6 in the final seniority list of Surveyors issued on 08.09.2005. This seniority list has not been altered by the respondents till date. The petitioner and private respondents were promoted on 27.09.2015 to the post of JEs (Civil) on the basis of seniority list of Surveyors. The petitioner, thus, is to beranked senior to the private respondent as JE (Civil). He was accordingly shown senior to the private respondents in the promotion order dated 27.09.2015 as well as in the tentative seniority list of JEs issued on 31.12.2014. The respondents cannot downgrade petitioner's seniority in the provisional seniority list of JEs issued on 17.03.2017 without complying with the principles of natural justice. Learned counsel for the petitioner has further submitted that the respondents have altered the seniority position of the parties as JEs without altering their seniority positions in the seniority list of Surveyors. This action is impermissible in service jurisprudence**.**

3(ii) The private respondents have chosen not to defend themselves. They have been proceeded ex-parte. Learned Additional Advocate General reiterated the submissions made by the respondents in their reply. The gist of the pleadings of the official respondents and submissions made on

their behalf have been noticed in two orders passed in the matter on 30.05.2022 and 05.08.2022.

On 30.05.2022, taking note of the pleadings and submissions advanced on behalf of the official respondents, following order was passed: -

> *"In the final seniority list of the Surveyors in the I & Ph. Department, as it stood on 31.12.2004 (Annexure A-1), the date of regularization of the petitioner has been reflected as 21.09.2002, whereas that of respondent No.6 as 04.12.2002, respondent No.3 as 07.12.2002, respondent No.5 as 07.12.2002 and respondent No.4 again as 07.12.2002. Whereas in the reply filed by respondents No.1 and 2, it has been submitted that these private respondents were regularized as Surveyors on 01.01.1998, 01.01.2000, 01.01.2000 and 01.01.2000 respectively. Let respondents No.1 and 2 to produce record in respect of the factual submissions made in the reply. The respondents to also apprise as to whether final seniority list of Surveyors as it stood on 31.12.2004 (Annexure A-1) was re-drawn in accordance with law and whether any notice was issued to the petitioner for changing the seniority list of Surveyors/Junior engineers."*

In compliance to the above order, respondents filed a supplementary affidavit, relevant contents whereof were noticed in the order dated 05.08.2022, which read as under:-

> *"The respondents/State have filed supplementary affidavit pursuant to order dated 31.05.2022. In terms of this affidavit, there were certain errors in respect of date of regularization in the service record of both the petitioners. Petitioner-Rajinder Singh, who was earlier shown to have been regularized on 21.09.2002 is now reflected to have been regularized on 01.01.2000, whereas petitioner-Rakesh Soni, who was earlier shown to have been regularized on 05.12.2002 is now shown to have been*

regularized on 01.01.2001. Para-4 of the supplementary affidavit filed by the respondents/State runs as under:-

> *"4. That it is respectfully submitted that the original service record was obtained from field offices and after scrutinizing/examining the record, it has been found that petitioner in CWPOA 3209/2020 titled as Rajinder Singh Vs State of HP has been retrospectively regularized we.f. 01.01.2000 as Surveyor instead of 21.09.2002 and petitioner in CWPOA No. 3217 of 2020 Rakesh Soni Vs. State of H.P. has been retrospectively regularized w.e.f. 01.01.2001 as Surveyor instead of 05.12.2002, and the respondent No:-6 in CWPOA No. 3209/2020 has been retrospectively regularized w.e.f. 01.01.2002. Now, the date of regularization of petitioners vis-a-vis respondents as Surveyor have been corrected and position of both the petitioners vis-a-vis the respondents in CWPOA 3209/2020- titled as Rajinder Singh Vs. State of H.P & CWPOA No. 3217 of 2020 Rakesh Soni Vs. State of H.P has been corrected and is given as under*

Sr.No.	*Name S/Shri*	*Date of Birth*	*Date of regularization/Promotion as Surveyor/Junior Engineer on regular basis.*
1	*2*	*3*	*4*
268	*Mohinder Pal*	*11.04.65*	*01.01.98/27.09.05*
269	*Pawan Kumar*	*15.06.67*	*01.01.2000/27.09.05*
270	*Hans Raj*	*15.09.67*	*01.01.2000/27.09.05*
271-A	*Rajinder Singh*	*21.10.69*	*01.01.2000/27.09.05*

271-B	*Rakesh Soni*	*27.02.68*	*01.01.2001/27.09.05*
272	*Kamal Kumar*	*12.04.70*	*01.01.2002/27.09.05"*

Learned counsel for the petitioner submits that the dates of regularization of private respondents have been incorrectly depicted in the table in the above extracted para.

Faced with this, learned Deputy Advocate General, seeks time to produce record of regularization of the parties more particularly pertaining to their dates of appointment as Surveyors on daily waged basis."

During hearing of the case today, the official respondents reiterated the submissions already noticed in the afore extracted orders.

4. Observations: -

4(i) According to the official respondents, private respondents No. 3 to 5 had represented that they had been regularized as Surveyors from retrospective dates during the year 2008. The official respondents acted on the representation of the private respondents and corrected the dates of regularization of respondents No.3 to 6in the seniority list of JEs and made respondents No. 3 and 4as seniors to the petitioner in the provisional seniority list of JEs (Civil), circulated on 17.03.2017. It is, however, an admitted position thatfinal seniority list of Surveyors has not been re-drawn. The Seniority list of Surveyors even now stands as it was circulated on 08.09.2005 (Annexure A-1), wherein petitioner is enjoying higher seniority position than that of respondents No.3 to 6**.** It was on the basis of this seniority list of Surveyors that the officialrespondents had promoted the petitioner and respondents No.3 to 6 as JEs (Civil) vide office order dated 27.09.2005 (Annexure A-2). The name of the petitioner figures at Sr. No.1, whereas names

of respondents No.3 to 6 figure below him in this office order. Even in the seniority list of JEs (Civil) circulated on 31.12.2014 (Annexure A-3), the petitioner enjoyed higher seniority position than enjoyed by the private respondents. It is not decipherable from the record as to under what circumstances, the private respondents were allowed to belatedly represent against their seniority positons in the seniority list of JEs, entertainment of their such representations and subsequent downgrading of seniority position of the petitioner in the seniority list of JEs issued on 17.03.2017. Admittedly, the petitioner has not been given any opportunity of hearing to place his case/objections against downgrading of his seniority position as JE. The leastthat was expected from the respondents was that they would give an opportunity to the petitioner to have his say in the matter as he would have been adversely affected by the downgrading of his seniority position as JEin the event of allowing of representation of respondents No. 3 to 6. More so, whenpromotion of the private parties to the post of JEs (Civil) was made on the basis of final seniority list of Surveyors dated 08.09.2005 wherein petitioner ranked senior to respondents No. 3 to 6.Without redrawing the final seniority list of Surveyors, whether it was open for the official respondents to re-draw the seniority list of JEs on 17.03.2017 bydowngrading the seniority position of the petitioner therein, is an important aspect, which has not been looked into by the respondents at all.

4(ii) It would be appropriate to notice (**1976) 1 Supreme Court Cases 599, Malcom Lawrence Cecil D'Souza Verus Union of India and others**, wherein following observations were made in context of the point in issue that seniority list cannot be unsettled after a long time as it results in administrative complications &difficulties and causes uncertainty amongst public servants: -

> "*8 .....Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants*

because of stale claims made after lapse of 14 or 15 years. It is essential that any one who feels aggrieved with an administrative decision affecting one's seniority should act with due diligence and promptitude and not sleep over the matter. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay in approaching the court. It is no doubt true that he made a representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress.

9. *Although security of service cannot be used as a shield against administrative action for lapse of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible, to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."*

In (**1992) 4 Supreme Court Cases 455, S.B. Dogra Versus State of Himachal Pradesh and others,** the principle was reiterated that seniority positions holding the field for the last several years should not invariably be interfered. If the employee concerned did not file his representation within the prescribed period after the publication of provisional gradation list, then his representation should be rejected outrightly. Relevant observations are as under: -

"10. ……. In the circumstances, the Tribunal should have been slow in interfering the seniority which was holding the field for the last several years. That is the view expressed by this Court in State of Madhya Pradesh and Anr. v. Rameshwar Prasad and Ors. . In that case the seniority was fixed according to the length of service in regard to the classified officers and the grades held by those officers. No objection was, filed by the respondent to the provisional gradation list so prepared. He filed an objection only after the final gradation list was published. Contending that the services rendered by the Madhya Bharat and Vindhya Pradesh officers prior to the coming into force of the Sales Tax Acts in the respective states should not have been counted for the purpose of determining the seniority of the respondent. The High Court allowed the belated representation and hence the matter was brought before this Court in appeal. This Court held that after the reorganisation of the States it was obligatory to prepare a common gradation list of the officers of the various departments so that the officers who were allocated to the new State did not suffer any prejudice. For that a tentative or provisional gradation list was directed to be prepared with a view to giving an opportunity to the officers whose seniority was determined in the list to make their representations in order to satisfy the Government regarding any mistake or error that may have crept in. If the employee concerned did not file his representation within the period prescribed after the date of the publication of the provisional gradation list, then his representation should have been rejected outright. It is erroneous to contend that the employee concerned should have waited for filing his representation or objection until the final gradation list was published. Therefore, the representation filed by the respondent long after the expiry of the time mentioned in the Gazette publishing the provisional gradation list was rejected as

belated. The observations made in this judgment apply with all force to the fact situation in the case before us."

In **AIR 1986 Supreme Court 2086, K.R. Mudgal and others Versus R.P. Singh and others,** the *inter-se* seniority was challenged 18 years after the issuance of first seniority list. The petition was dismissed on the ground of laches with following observations. Relevant paras read as under:-

"7. The respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the above writ petition on the ground of delay, we feel that in the circumstances of this case the writ petition should have been rejected on the ground of delay alone. The first draft seniority list of the Assistants was issued in the year 1958 and it was duly circulated amongst all the concerned officials. In that list the writ petitioners had been shown below the respondents. No objections were received from the petitioners against the seniority list. Subsequently, the seniority lists were again issued in 1961 and 1965 but again no objections were raised by the writ petitioners, to the seniority list of 1961, but only the petitioner No. 6 in the writ petition represented against the seniority list of 1965. We have already mentioned that the 1968 seniority list in which the writ petitioners had been shown above the respondents had been issued on a misunderstanding of the Office Memorandum of 1959 on the assumption that the 1949 Office Memorandum was not applicable to them. The June 1975 seniority list was prepared having regard to the decision in Ravi Varma's case (AIR 1972 SC 676) (supra) and the decision of the High Court of Andhra Pradesh in the writ petitions filed by respondent Nos. 7 and 36 and thus the mistake that had crept into the 1968 list was rectified. Thus the list was finalised in January, 1976. The petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the year 1958 and the

promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately, in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches. The facts of this case are more or less similar to the facts in R.S. Makashi & Ors.v. I.M. Menon & Ors., [1982] 2 S.C.R. 69 ; (AIR 1982 SC 101). In the said decision this Court observed at page 100 (of CSR) : at page 115 of AIR) thus:

> *"In these circumstances, we consider that the High Court was wrong in over-ruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned Resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, ought to have been rejected by the High Court on the ground of delay and laches*

and the writ petition in so far as it related to the prayer for quashing the said Government Resolution should have been dismissed."

10. We feel that in the circumstances of this case, we should not embark upon on and enquiry into the merits of the case and that the writ petition should be dismissed on the ground of laches alone."

4(iii) The representations preferred by private respondents No. 3 to 6 were statedly concerning their dates of regularization as Surveyors. The dates of filing of such representations have not been indicated in the reply. The official respondents adopted a novel mechanism in deciding the representation of the private respondents inasmuch as the provisional seniority list of JEs wasre-drawn on 17.03.2017 without changing the final seniority list of Surveyors. To a query of the Court, learned Additional Advocate General, on the basis of instructions admitted,that the positions in theseniority list of JEs are dependent upon the seniority positions of the incumbents in the seniority list as Surveyors**.** If that be so, then without re-drawing the final seniority list of Surveyors, perhaps it was not open for the official respondents to change the seniority list of JEs. More so, when change sought by respondents No. 3 to 6 pertained to dates of regularization as Surveyors/Surveyors' seniority positions.Without altering the seniority list of the Surveyors, the respondents could not have altered the seniority list of JEs and that too without complying with the provisions of the principles of natural justice.

4(iv) It is also seen from the record that even in the impugnedseniority list of JEs, re-drawn by the respondents on 17.03.2017, though respondents No.3 and 4 have been made seniors to the petitioner, yet respondents No.5 and 6 still figure therein as his juniors. Despite this, in the notification issued on 09.10.2017(Annexure A-6), respondents No.5 and 6, who were juniors to the petitioner even in the impugned re-drawn seniority list of JEs,were placed

as Assistant Engineers (Civil) ignoring the claim of petitioner. Why the case of the petitioner was not considered for placement as Assistant Engineer (AE)and why the cases of private respondents No.5 and 6 were considered for placement as Assistant Engineer (Civil) vide notification dated 09.10.2017 is not forthcoming from the pleadings.

5. The sum total of above discussion is that Final Seniority list of Surveyors was issued by the respondents on 08.09.2005 wherein petitioner had been reflected as senior to respondents No. 3 to 6. There is no change in this seniority list of Surveyors till date. Based on this seniority list of Surveyors, petitioner and private respondents were further promoted as JEs on 27.09.2005. Petitioner was shown as senior to respondents No. 3 to 6 in the provisional seniority list of JEs showing the position as on 31.12.2014. Respondents No. 3 to 6 represented for correcting their dates of regularization as Surveyors. Without any regard to delay and laches, without complying with principles of natural justice, without giving opportunity to petitioner to place his objections, who would have been adversely affected, the official respondents redrew the provisional seniority list of JEs on 17.03.2017 now making respondents No. 3 and 4 as seniors to the petitioner. All this was done ignoring the fact that the seniority position in the seniority list of JEs are virtually dependent upon positions in the final seniority list of Surveyors. Therefore, without redrawing the final seniority list of Surveyors, the seniority position of the JEs could not have been altered. Learned Additional Advocate General on the basis of instructions submitted that final seniority list of JEs is under process of finalization. Yet another significant aspect of the matter is that even in the impugned seniority list of JEs, petitioner's seniority position though has been downgraded, but even then, he still ranks senior to respondents No. 5 and 6, yet for placement to the promotionalposts of Assistant Engineer (Civil), his name has not been considered, whereas

respondents No. 5 and 6 have been placed as Assistant Engineers (Civil) vide annexure A-6 dated 09.10.2017.

In view of the above discussions, following directions are issued in the facts and circumstances of the matter: -

(i) The official respondents are directed to consider the case of the petitioner for placement to the promotional post of Assistant Engineer (Civil) from the date the cases of his juniors i.e. respondents No.5 and 6 were considered under notification dated 09.10.2017 (Annexure A-2). This, be done within a period of three weeks from today.

(ii) In light of observations made above, the petitioneris permitted to place his objections to the provisional seniority list of JEs dated 17.03.2017 (Annexure A-4) within a period of four weeks from today, which shall be decided by the respondents/competent authority alongwith the representations of respondents No. 3 to 6 within four weeks thereafter in accordance with law. Decision so taken shall be communicated to the petitioner and respondents No.3 to 6.

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

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

Between:

RAKESH SONI, S/O SH. RAM PRAKASH SONI, R/O VPO GAZIAN, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P. PRESENTLY WORKING AS JUNIOR ENGINEER, IPH, SUB DIVISIONAL GALORE, DIVISION BARSAR, DISTRICT HAMIRPUR, H.P.

……PETITIONER

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH ITS PRINCIPAL SECRETARY (IPH), TO THE

GOVT. OFH.P., SHIMLA-2.

2. ENGINEER-IN-CHIEF (IPH) DEPARTMENT,
US CLUB, SHIMLA-1

3. SH. MOHINDER PAL
S/O NOT KNOWN, ASSISTANT ENGINEER
(IPH) DIVISION SUNDERNAGAR,
DISTRICT MANDI, H.P.

4. PAWAN KUMAR S/O NOT KNOWN,
ASSISTANT ENGINEER, O/O CE,
FATEHPUR, DISTRICT KANGRA, H.P.

5. HANS RAJ S/O NOT KNOWN,
ASSISTANT ENGINEER (IPH)
DIVISION CHURAG, UNDER IPH
DIVISION KARSOG, ISTRICT MANDI, H.P.

.....RESPONDENTS

(MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL FOR R-1 AND R-2.
MS. BABITA Sharma ADVOCATE, VICE MR. A.K.GUPTA, ADVOCATE, FOR R-3.
R-4 and R-5 EX-PARTE.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 3217 of 2020
Decided on: 02.09.2022

Constitution of India, 1950- Article 226- Quashing of promotions of private respondents 3 to 6 as A.E. (Civil)- Held- Without altering the seniority list of the surveyors, the respondents could not have altered the seniority list of J.Es and that too without complying with the provisions of the principles of natural justice- Without redrawing the final seniority list of surveyors, the seniority position of the J.Es could not have been altered- Directions issued. [Para 4(iii), (iv)]

Cases referred:

K.R. Mudgal and others Vs R.P. Singh and others AIR 1986 SC 2086;
Malcom Lawrence Cecil D'Souza Vs. Union of India & others (1976) 1 SCC 599;
S.B. Dogra Vs. State of H.P. and others (1992) 4 Supreme Court Cases 455;

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

O R D E R

The petitioner seeks quashing of promotion of private respondents No. 3 to 5 as Assistant Engineers (Civil). Consequent prayer has been made for considering the case of the petitioner for promotion to the post of Assistant Engineer (AE for short) from the date his juniors i.e. respondents No.3 to 5 were promoted as such with all incidental benefits. Another prayer has been made for re-drawing the seniority list of Junior Engineers (Civil) [hereinafter as JEs (Civil)] as it stood on 31.12.2014 and to place the petitioner, therein at the same seniority position which he was holding in the seniority list of JEs issued vide Annexure A-2.

2. The relevant **factual matrix** of the case is as under:-

2(i). On 08.09.2005, the official respondents issued final seniority list of Surveyors working in Irrigation and Public Health Department (IPH hereinafter) as it stood on 31.12.2004. Name of the petitioner figured at Sr. No.299 of this list, whereas, private respondents No.3, 4 and 5 figured at seniority position Nos. 301, 304 and306, respectively. Private respondents No.3 to 5 were juniors to the petitioner as Surveyors in terms of final seniority list of the Surveyors circulated by the official respondents on 08.09.2005 (Annexure A-1).

2(ii) On the basis of final seniority list of the Surveyors dated 08.09.2005 (Annexure A-1), the respondents issued office order dated 27.09.2005 (Annexure A-2), promoting the petitioner and respondents No.3 to 5 as JEs (Civil) on ad hoc basis. The name of the petitioner is at Sr. No.6, whereas names of respondents No.3 to 5 figure below the petitioner i.e. at Sr. Nos. 7, 11 and 10, respectively, in this office order. Their seniority positions from the seniority list of Surveyors have also been depicted in this office order against their respective names.

2(iii) A provisional seniority list of JEs (Civil) was circulated by the respondents vide Annexure A-3, depicting the position of the JEs as on 31.12.2014. Here again, the petitioner has been reflected as senior to respondents No.3 to 5. He has been assigned seniority at Sr.No.377, whereas, respondents No.3 to 5 have been assigned seniority positions at Sr. Nos. 378, 382 and, 381, respectively.

2(iv) On 17.03.2017, provisional seniority list of JEs (Civil) as it stood on 31.12.2016, was circulated vide Annexure A-4. In this seniority list, a departure was made from earlier existing seniority list inasmuch as the petitioner, who was earlier being shown as senior to the private respondents, was now shown their junior. He was assigned seniority position No.379, whereas, respondents No.3 and 4 were assigned seniority over him at Sr. Nos. 372 and 373, respectively. Respondent No.5 again figured below the petitioner at seniority position No.382. The petitioner represented on 21.08.2017 against the downgrading of his seniority position in the seniority list of JEs dated 17.03.2017. The representation was rejected on 30.12.2017. In the meanwhile, the respondents issued notification dated 09.10.2017 (Annexure A-6), ordering placement of respondents No.3 to 5 as Assistant Engineers (Civil).

2(v) It is in the aforesaid background that the petitioner has filed the instant petition, seeking following substantive reliefs:-

> *"(a) That the impugned action as contained in the Annexure A-6 qua the respondent No 3 to 6 wherein they have been promoted as Assistant Engineer may very kindly be quashed and set aside and the respondents be directed to consider and promote the applicant as Assistant Engineer from the date from which respondent No.3 to 6 (who are junior to the applicant) have been promoted and further be directed to give all consequential benefits including seniority and monitory benefit w.e.f. 09.10.2017.*

(b) That the respondent No.2 be directed to redraw the seniority list and place the applicant on the same position i.e. at Sr. No.372 on which he was placed vide Annexure A-2 i.e. seniority list as it stood on 31.12.2014."

3. Contentions: -

3(i) The arguments of learned counsel for the petitioner is that the petitioner had figured above respondents No.3 to 5 in the final seniority list of Surveyors issued on 08.09.2005. This seniority list has not been altered by the respondents till date. The petitioner and private respondents were promoted on 27.09.2015 to the post of JEs (Civil) on the basis of seniority list of Surveyors. The petitioner, thus, is to be ranked senior to the private respondent as JE (Civil). He was accordingly shown senior to the private respondents in the promotion order dated 27.09.2015 as well as in the tentative seniority list of JEs issued on 31.12.2014. The respondents cannot downgrade petitioner's seniority in the provisional seniority list of JEs issued on 17.03.2017 without complying with the principles of natural justice. Learned counsel for the petitioner has further submitted that the respondents have altered the seniority position of the parties as JEs without altering their seniority positions in the seniority list of Surveyors. This action is impermissible in service jurisprudence**.**

3(ii) The private respondents have chosen not to defend themselves. They have been proceeded ex-parte. Learned Additional Advocate General reiterated the submissions made by the respondents in their reply. The gist of the pleadings of the official respondents and submissions made on their behalf have been noticed in two orders passed in the matter on 30.05.2022 and 05.08.2022.

On 30.05.2022, taking note of the pleadings and submissions advanced on behalf of the official respondents, following order was passed: -

> *"In the final seniority list of the Surveyors in the I & Ph. Department, as it stood on 31.12.2004 (Annexure A-1), the date of regularization of the petitioner has been reflected as 21.09.2002, whereas that of respondent No.6 as 04.12.2002, respondent No.3 as 07.12.2002, respondent No.5 as 07.12.2002 and respondent No.4 again as 07.12.2002. Whereas in the reply filed by respondents No.1 and 2, it has been submitted that these private respondents were regularized as Surveyors on 01.01.1998, 01.01.2000, 01.01.2000 and 01.01.2000 respectively. Let respondents No.1 and 2 to produce record in respect of the factual submissions made in the reply. The respondents to also apprise as to whether final seniority list of Surveyors as it stood on 31.12.2004 (Annexure A-1) was re-drawn in accordance with law and whether any notice was issued to the petitioner for changing the seniority list of Surveyors/Junior engineers."*

In compliance to the above order, respondents filed a supplementary affidavit, relevant contents whereof were noticed in the order dated 05.08.2022, which read as under:-

> *"The respondents/State have filed supplementary affidavit pursuant to order dated 31.05.2022. In terms of this affidavit, there were certain errors in respect of date of regularization in the service record of both the petitioners. Petitioner-Rajinder Singh, who was earlier shown to have been regularized on 21.09.2002 is now reflected to have been regularized on 01.01.2000, whereas petitioner-Rakesh Soni, who was earlier shown to have been regularized on 05.12.2002 is now shown to have been regularized on 01.01.2001. Para-4 of the supplementary affidavit filed by the respondents/State runs as under:-*
>
> > *"4. That it is respectfully submitted that the original service record was obtained from field offices and after scrutinizing/examining the record, it has been found that petitioner in CWPOA*

3209/2020 titled as Rajinder Singh Vs State of HP has been retrospectively regularized we.f. 01.01.2000 as Surveyor instead of 21.09.2002 and petitioner in CWPOA No. 3217 of 2020 Rakesh Soni Vs. State of H.P. has been retrospectively regularized w.e.f. 01.01.2001 as Surveyor instead of 05.12.2002, and the respondent No:-6 in CWPOA No. 3209/2020 has been retrospectively regularized w.e.f. 01.01.2002. Now, the date of regularization of petitioners vis-a-vis respondents as Surveyor have been corrected and position of both the petitioners vis-a-vis the respondents in CWPOA 3209/2020- titled as Rajinder Singh Vs. State of H.P & CWPOA No. 3217 of 2020 Rakesh Soni Vs. State of H.P has been corrected and is given as under

Sr.No.	*Name S/Shri*	*Date of Birth*	*Date of regularization/Promotion as Surveyor/Junior Engineer on regular basis.*
1	*2*	*3*	*4*
268	*Mohinder Pal*	*11.04.65*	*01.01.98/27.09.05*
269	*Pawan Kumar*	*15.06.67*	*01.01.2000/27.09.05*
270	*Hans Raj*	*15.09.67*	*01.01.2000/27.09.05*
271-A	*Rajinder Singh*	*21.10.69*	*01.01.2000/27.09.05*
271-B	*Rakesh Soni*	*27.02.68*	*01.01.2001/27.09.05*
272	*Kamal Kumar*	*12.04.70*	*01.01.2002/27.09.05”*

Learned counsel for the petitioner submits that the dates of regularization of private respondents have been incorrectly depicted in the table in the above extracted para.

Faced with this, learned Deputy Advocate General, seeks time to produce record of regularization of the parties more particularly pertaining to their dates of appointment as Surveyors on daily waged basis."

During hearing of the case today, the official respondents reiterated the submissions already noticed in the afore extracted orders.

4. Observations: -

4(i) According to the official respondents, private respondents No. 3 to 5 had represented that they had been regularized as Surveyors from retrospective dates during the year 2008. The official respondents acted on the representation of the private respondents and corrected the dates of regularization of respondents No.3 to 5in the seniority list of JEs and made respondents No. 3 and 4 as seniors to the petitioner in the provisional seniority list of JEs (Civil), circulated on 17.03.2017. It is, however, an admitted position that final seniority list of Surveyors has not been re-drawn. The Seniority list of Surveyors even now stands as it was circulated on 08.09.2005 (Annexure A-1), wherein petitioner is enjoying higher seniority position than that of respondents No.3 to 5. It was on the basis of this seniority list of Surveyors that the official respondents had promoted the petitioner and respondents No.3 to 5 as JEs (Civil) vide office order dated 27.09.2005 (Annexure A-2). The name of the petitioner figures at Sr. No.1, whereas names of respondents No.3 to 5 figure below him in this office order. Even in the seniority list of JEs (Civil) circulated on 31.12.2014 (Annexure A-3), the petitioner enjoyed higher seniority position than enjoyed by the private respondents. It is not decipherable from the record as to under what circumstances, the private respondents were allowed to belatedly represent

against their seniority positons in the seniority list of JEs, entertainment of their such representations and subsequent downgrading of seniority position of the petitioner in the seniority list of JEs issued on 17.03.2017. Admittedly, the petitioner has not been given any opportunity of hearing to place his case/objections against downgrading of his seniority position as JE. The least that was expected from the respondents was that they would give an opportunity to the petitioner to have his say in the matter as he would have been adversely affected by the downgrading of his seniority position as JE in the event of allowing of representation of respondents No. 3 to 5. More so, whenpromotion of the private parties to the post of JEs (Civil) was made on the basis of final seniority list of Surveyors dated 08.09.2005 wherein petitioner ranked senior to respondents No. 3 to 5. Without redrawing the final seniority list of Surveyors, whether it was open for the official respondents to re-draw the seniority list of JEs on 17.03.2017 by downgrading the seniority position of the petitioner therein, is an important aspect, which has not been looked into by the respondents at all.

4(ii) It would be appropriate to notice (**1976) 1 Supreme Court Cases 599, Malcom Lawrence Cecil D'Souza Verus Union of India and others**, wherein following observations were made in context of the point in issue that seniority list cannot be unsettled after a long time as it results in administrative complications & difficulties and causes uncertainty amongst public servants: -

> *"8 .....Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants because of stale claims made after lapse of 14 or 15 years. It is essential that anyone who feels aggrieved with an administrative decision affecting one's seniority should act with due diligence and promptitude and not sleep over the matter. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay in approaching the court. It is no doubt true that he made a*

representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress.

9. *Although security of service cannot be used as a shield against administrative action for lapse of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible, to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."*

In (**1992) 4 Supreme Court Cases 455, S.B. Dogra Versus State of Himachal Pradesh and others,** the principle was reiterated that seniority positions holding the field for the last several years should not invariably be interfered. If the employee concerned did not file his representation within the prescribed period after the publication of provisional gradation list, then his representation should be rejected outrightly. Relevant observations are as under: -

"10. ……. In the circumstances, the Tribunal should have been slow in interfering the seniority which was holding the field for the last several years. That is the view expressed by this Court in State of Madhya Pradesh and Anr. v. Rameshwar Prasad and Ors. . In that case the seniority was fixed according to the length of service in regard to the classified officers and the grades held by those officers. No objection was, filed by the respondent to the provisional gradation list so prepared. He filed an

objection only after the final gradation list was published. Contending that the services rendered by the Madhya Bharat and Vindhya Pradesh officers prior to the coming into force of the Sales Tax Acts in the respective states should not have been counted for the purpose of determining the seniority of the respondent. The High Court allowed the belated representation and hence the matter was brought before this Court in appeal. This Court held that after the reorganisation of the States it was obligatory to prepare a common gradation list of the officers of the various departments so that the officers who were allocated to the new State did not suffer any prejudice. For that a tentative or provisional gradation list was directed to be prepared with a view to giving an opportunity to the officers whose seniority was determined in the list to make their representations in order to satisfy the Government regarding any mistake or error that may have crept in. If the employee concerned did not file his representation within the period prescribed after the date of the publication of the provisional gradation list, then his representation should have been rejected outright. It is erroneous to contend that the employee concerned should have waited for filing his representation or objection until the final gradation list was published. Therefore, the representation filed by the respondent long after the expiry of the time mentioned in the Gazette publishing the provisional gradation list was rejected as belated. The observations made in this judgment apply with all force to the fact situation in the case before us."

In **AIR 1986 Supreme Court 2086, K.R. Mudgal and others Versus R.P. Singh and others,** the *inter-se* seniority was challenged 18 years after the issuance of first seniority list. The petition was dismissed on the ground of laches with following observations. Relevant paras read as under:-

"7. The respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the above writ petition on the ground of delay, we feel that in the circumstances of this case the writ petition should have been rejected on the ground of delay alone. The first draft seniority list of the Assistants was issued in the year 1958 and it was duly circulated amongst all the concerned officials. In that list the writ petitioners had been shown below the respondents. No objections were received from the petitioners against the seniority list. Subsequently, the seniority lists were again issued in 1961 and 1965 but again no objections were raised by the writ petitioners, to the seniority list of 1961, but only the petitioner No. 6 in the writ petition represented against the seniority list of 1965. We have already mentioned that the 1968 seniority list in which the writ petitioners had been shown above the respondents had been issued on a misunderstanding of the Office Memorandum of 1959 on the assumption that the 1949 Office Memorandum was not applicable to them. The June 1975 seniority list was prepared having regard to the decision in Ravi Varma's case (AIR 1972 SC 676) (supra) and the decision of the High Court of Andhra Pradesh in the writ petitions filed by respondent Nos. 7 and 36 and thus the mistake that had crept into the 1968 list was rectified. Thus the list was finalised in January, 1976. The petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the year 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties.

Unfortunately, in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches. The facts of this case are more or less similar to the facts in R.S. Makashi & Ors.v. I.M. Menon & Ors., [1982] 2 S.C.R. 69 ; (AIR 1982 SC 101). In the said decision this Court observed at page 100 (of CSR) : at page 115 of AIR) thus:

> *"In these circumstances, we consider that the High Court was wrong in over-ruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned Resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, ought to have been rejected by the High Court on the ground of delay and laches and the writ petition in so far as it related to the prayer for quashing the said Government Resolution should have been dismissed."*

10. We feel that in the circumstances of this case, we should not embark upon on and enquiry into the merits of the case and that the writ petition should be dismissed on the ground of laches alone."

4(iii) The representations preferred by private respondents No. 3 to 5 were statedly concerning their dates of regularization as Surveyors. The dates of filing of such representations have not been indicated in the reply. The official respondents adopted a novel mechanism in deciding the

representation of the private respondents inasmuch as the provisional seniority list of JEs was re-drawn on 17.03.2017 without changing the final seniority list of Surveyors. To a query of the Court, learned Additional Advocate General, on the basis of instructions admitted, that the positions in the seniority list of JEs are dependent upon the seniority positions of the incumbents in the seniority list as Surveyors**.** If that be so, then without re-drawing the final seniority list of Surveyors, perhaps it was not open for the official respondents to change the seniority list of JEs. More so, when change sought by respondents No. 3 to 5 pertained to dates of regularization as Surveyors/Surveyors' seniority positions.Without altering the seniority list of the Surveyors, the respondents could not have altered the seniority list of JEs and that too without complying with the provisions of the principles of natural justice.

4(iv) It is also seen from the record that even in the impugned seniority list of JEs, re-drawn by the respondents on 17.03.2017, though respondents No.3 and 4 have been made seniors to the petitioner, yet respondent No.5 still figures therein as his junior. Despite this, in the notification issued on 09.10.2017 (Annexure A-6), respondent No.5 who was junior to the petitioner even in the impugned re-drawn seniority list of JEs, was placed as Assistant Engineer (Civil) ignoring the claim of petitioner. Why the case of the petitioner was not considered for placement as Assistant Engineer (AE) and why the cases of private respondent No.5 was considered for placement as Assistant Engineer (Civil) vide notification dated 09.10.2017 is not forthcoming from the pleadings.

5. The sum total of above discussion is that Final Seniority list of Surveyors was issued by the respondents on 08.09.2005 wherein petitioner had been reflected as senior to respondents No. 3 to 5. There is no change in this seniority list of Surveyors till date. Based on this seniority list of Surveyors, petitioner and private respondents were further promoted as JEs

on 27.09.2005. Petitioner was shown as senior to respondents No. 3 to 5 in the provisional seniority list of JEs showing the position as on 31.12.2014. Respondents No. 3 to 5 represented for correcting their dates of regularization as Surveyors. Without any regard to delay and laches, without complying with principles of natural justice, without giving opportunity to petitioner to place his objections, who would have been adversely affected, the official respondents redrew the provisional seniority list of JEs on 17.03.2017 now making respondents No. 3 and 4 as seniors to the petitioner. All this was done ignoring the fact that the seniority position in the seniority list of JEs are virtually dependent upon positions in the final seniority list of Surveyors. Therefore, without redrawing the final seniority list of Surveyors, the seniority position of the JEs could not have been altered. Learned Additional Advocate General on the basis of instructions submitted that final seniority list of JEs is under process of finalization. Yet another significant aspect of the matter is that even in the impugned seniority list of JEs, petitioner's seniority position though has been downgraded, but even then, he still ranks senior to respondent No. 5, yet for placement to the promotional posts of Assistant Engineer (Civil), his name has not been considered, whereas respondent No. 5 has been placed as Assistant Engineers (Civil) vide annexure A-6 dated 09.10.2017.

In view of the above discussions, following directions are issued in the facts and circumstances of the matter: -

(i) The official respondents are directed to consider the case of the petitioner for placement to the promotional post of Assistant Engineer (Civil) from the date the case of his junior i.e. respondent No.5 was considered under notification dated 09.10.2017 (Annexure A-2). This, be done within a period of three weeks from today.

(ii) In light of observations made above, the petitioner is permitted to place his objections to the provisional seniority list of JEs dated 17.03.2017 (Annexure A-4) within a period of four weeks

from today, which shall be decided by the respondents/competent authority alongwith the representations of respondents No. 3 to 5 within four weeks thereafter in accordance with law. Decision so taken shall be communicated to the petitioner and respondents No.3 to 5.

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

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

Between:

SH. KAILASH CHAND, S/O SH. BISHAMBER NATH, R/O VILLAGE THANDAL, PO PURTHI, TEHSIL PANGI, DISTRICT CHAMBA, HP, PRESENTLY WORKING AS PHARMACIST AT PHC PURTHI, TEHSIL PANGI, DISTRICT CHAMBA, HIMACHAL PRADESH.

……..PETITIONER

(BY MR. ONKAR JAIRATH, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH, THROUGH ITS ADDITIONAL CHIEF SECRETARY (HEALTH) TO THE GOVERNMENT OF HIMACHAL PRADESH.

2.THE DIRECTOR, HEALTH SERVICES, KASUMPTI, SHIMLA, HIMACHAL PRADESH.

3.THE CHIEF MEDICAL OFFICER, CHAMBA, DISTRICT CHAMBA, HIMACHAL PRADESH.

4.THE RESIDENT COMMISSIONER, PANGI, AT KILLAR, DISTRICT CHAMBA, HIMACHAL PRADESH.

…….RESPONDENTS

(BY P.K. BHATTI AND MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH MR. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 7401 of 2019
Reserved on: 29.7.2022
Decided on: 05.08.2022

Constitution of India, 1950- Article 226- Regularization policy- Regularization on completion of six years of contract employment- Held- Service of the petitioner to be regularized from the due date in terms of regularization policy- Petition allowed. (Para 8)

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

ORDER

Heard.

2. Brief facts necessary for adjudication of the petition are that on 10.06.2005, petitioner was appointed as Pharmacist on contract basis. His services were regularized w.e.f. 06.08.2015, whereas the claim of the petitioner is that he should have been regularized w.e.f. 01.04.2012 on completion of six years of contract employment in terms of Regularization Policy dated 31.08.2012.

3. In response, the case of the respondents is that the petitioner was initially appointed against available vacancy on contract basis for a period of 89 days, on fixed monthly remuneration. His contract continued to be extended from time to time for a period of 89 days. This arrangement continued till March,2008 and thereafter the contract of the petitioner was renewed on yearly basis. Thus, according to the respondents, the contract period of the petitioner till March, 2008, could not be considered for the purposes of regularization. The regularization of petitioner w.e.f. 06.08.2015, has been justified on aforesaid grounds.

4. The issue that arises for consideration is whether the contractual service rendered by the petitioner w.e.f. 10.06.2005 till March,

2008, was liable to be considered by the respondents towards regularization of his services?

5. An identical issue was subject matter of CWPOA No. 7370 of 2019, decided by Co-ordinate Bench of this Court, vide judgment dated 17.06.2022. The facts in the said case were *pari materia* the same, with facts of present case, save and except,the date of initial appointment in both the cases differed. In CWPOA No. 7370 of 2019, petitioner therein was appointed on 19.09.2005, whereas petitioner in the instant case was appointed on 10.06.2005. Petitioner in both the cases had the same employer. Their contracts were renewed only for 89 days till March, 2008 and their services were regularized w.e.f. 06.08.2015 by a single Office Order.

6. The Coordinate Bench of this Court while deciding CWPOA No. 7370 of 2019, has held as under:-.

> *"There is no difference between the contractual appointment of the petitioner after March, 2008 and prior to March, 2008. The terms & conditions of the contractual service of the petitioner for both the periods have remained the same. The petitioner has not undergone any fresh selection process after March, 2008. His post also did not undergo any change. He was appointed on an available vacancy in regular establishment pursuant to a selection process. Therefore, just because the contractual appointment of the petitioner prior to March, 2008 was initially for 89 days, which period was renewed from time to time thereafter, will not mean that the said contractual service is liable to be ignored for the purpose of regularization of his services. The break admitted by the respondents to have been given in the contractual service of the petitioner after 89 days before renewing his contract for further period of 89 days, has to be deemed to be a fictional/notional break in the facts and circumstances of the case. The respondents have themselves taken into consideration the contractual services rendered by the petitioner on year to year basis after March, 2008. There is no stipulation in the policy dated 31.08.2012 framed by the respondents-State for*

regularization of such contractual service, which is rendered by an employee only on year to year basis. In the facts of the case, the contractual services rendered by the petitioner w.e.f. 19.09.2005 to March, 2008 cannot be ignored by the respondents for the purpose of regularization of his services.

Reliance placed by the learned Senior Additional Advocate General upon the judgment of the Hon'ble Apex Court in R.J. Pathan's case, supra, is misplaced. The facts of that case were entirely different. In the said case, the writ petitioners were initially appointed for a period of 11 months on a fixed salary in a particular project. The project came to an end. The unit, where the writ petitioners were appointed, was required to be closed, being a temporary unit. Instead of putting an end to the services of the writ petitioners, the State Government thought it fit to transfer and place the writ petitioners with the Indian Red Cross Society. Pursuant to the interim orders passed by the High Court, the writ petitioners continued to serve on contract basis. In the letters patent appeal filed by them, the High Court directed the State Government to consider their cases for absorption/regularization sympathetically and if required by creating supernumerary posts. In the civil appeal filed by the State, the Hon'ble Apex Court held that no such direction could be issued by the High Court for absorption/regularization of the employees appointed in a temporary unit, which was created for a particular project and that too by creating supernumerary posts. The facts of the instant case, as noticed earlier, are entirely different as noticed earlier, are entirely different."

7. Nothing has been brought on record on behalf of the respondents to persuade this Court to take a different view, therefore, the case of the petitioner in the instant case is fully covered by the judgment passed in CWPOA No. 7370 of 2019 and reasoning provided therein shall apply *mutatis mutandis* to the facts of the present case.

8. For the aforesaid reasons, the present petition is allowed. Respondents are directed to take into consideration the contractual services

rendered by the petitioner with the respondents w.e.f. 10.06.2005 till March, 2008, for the purpose of regularization of his services and to regularize him from the due date in terms of policy dated 31.08.2012, with all consequential benefits.

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

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

Between:-

SH. MITTER DEV, S/O SH. KHEM DASS, RESIDENT OF VILLAGE SHAKRINDI, POST OFFICE JASSAL, TEHSIL KARSOG, DISTRICT MANDI, (HP)

....PETITIONER

(BY DEVINDER K. SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY,
(FOREST) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA.

2. CHIEF CONSERVATOR OF FOREST, FOREST DEPARTMENT OT THE GOVERNMENT OF HIMACHAL PRADESH, TALLAND, SHIMLA.

3. DIVISIONAL FOREST OFFICER, FOREST DIVISION KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

4. THE ACCOUNTANT GENERAL (A&E) SHIMLA, DISTRICT SHIMLA (HP).

....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDL. A.G. WITH SH. NARENDER THAKUR, DY. A.G FOR R-1 TO 3).

(SH. RAJINDER THAKUR, CGC, FOR R-4).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 2469 of 2019
Reserved on:16.9.2022
Decided on: 27.9.2022

Constitution of India, 1950- Article 226- Writ of mandamus for direction to Department to consider the case of the petitioner under Central Civil Service Rules, 1972 and to start deduction towards general provident funds- Held- Work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits- Service of the petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits- Petition allowed. (Para 10, 11, 13)

Cases referred:

Prem Singh vs. State of U.P. & others 2019 (10) SCC 516;

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

O R D E R

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

> *"i) Issue writ of mandamus for direction to the respondent-department to consider the case of petitioner under Central Civil Service Rules, 1972 and to start deduction towards general provident funds*
>
> *ii) Issue a writ of mandamus for direction to the respondent department not to make applicable notification dated 17.8.2006 retrospectively w.e.f. 15.5.2003 and same be made applicable prospectively more particularly no applicable in the case of the petitioner"*

2. Petitioner was employed as daily wage labourer in Karsog Forest Division in the year 1991. He completed 240 days in each calendar year w.e.f. 1991. Petitioner was granted work charge status w.e.f. 1.1.2002. His services were regularized in 2006.

3. The State Government vide notification dated 17.8.2006 made modification in Central Civil Services (Pension) Rules, 1972 and thereby, the employees appointed on or after 15.5.2003 were held disentitled under 1972 Rules and Contributory Pension Scheme was made applicable to such employees.

4. The grievance of petitioner is that on his regularization, he was also made to subscribe to the Contributory Pension Scheme and the benefits of CCS Pension Rules 1972 were illegally denied to him. He filed representation but to no avail.

5. The case of the petitioner is that since he was conferred the work charge status w.e.f. 1.1.2001, the period during which he had worked as work charge employee was to be counted towards qualifying service under CCS Pension Rules. His further case is that the Contributory Pension Scheme would not be applicable in his case.

6. Respondents have contested the claim of petitioner on the grounds that the petitioner was granted work charge status retrospectively w.e.f. 1.1.2001 vide office order dated 12.5.2011, by which time, the Contributory Pension Scheme had come in force, therefore, the same was applied in the case of the petitioner. It is also submitted that the services of the petitioner were regularized after 2003 and for such reasons also, he was not entitled to the benefit of General Provident Fund.

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

8. In ***State of H.P. and others*** vs. ***Sukru Ram and another, CMPM no. 423 of 2017***, decided by a Division Bench of this Court on 23.5.2017, it was held as under:

> *"The issue is no longer res integra, which stands settled by the Hon'ble Supreme Court of India in Punjab State Electricity Board and another v. Narata Singh and another, (2010) 4 SCC 317, as also earlier decision of this Court in CWP No. 2240 of 2008, titled*

as The State of H.P. and others v. Sh. Tulsi Ram, decided on 31.5.2012, in which learned Single Judge, while holding the service rendered by the writ petitioner on work-charged basis from 1.4.2001 to 2.4.2017 to be counted for the purpose of pension"

9. Later in ***State of H.P. & others*** vs. ***Matwar Singh & another***, ***CWP No. 2384 of 2018,*** decided by a Division Bench of this Court on 18.12.2018, it was held as under:-

"It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/struck down, in the light of view taken by this Court in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others, decided on 6th March, 2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17 (ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."

10. Similarly, in ***CWP No. 2956 of 2019,*** decided on 13.7.2021, another Division Bench of this Court observed as under:-

"*It has also been contended by respondents that the petitioners were granted work charge status only vide order dated 13.10.2015 and the expression used therein was "work charge regularization". In any case, be it conferment of work charge status or regularization in favour of petitioner vide office order dated 13.10.2015, the same will not affect the outcome of this petition. In view of the law laid down by this Court in CWP No.*

> *6167 of 2017, titled Sukru Ram vs. State of H.P. & Ors., CWP No. 2384 of 2018 titled State of Himachal Pradesh & Ors. Vs. Matwar Singh and also by Hon'ble Supreme Court in Prem Singh Vs. State of H.P. (2019) 10 SCC 516, the work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits."*

Thus, it is more than settled now that work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits.

11. Adverting to the facts of the present case, the petitioner was conferred work charge status on 1.1.2002 and was followed by his regularization in 2006. Thus, the service of petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits, hence the distinction drawn by respondents on the ground that petitioner was regularized after the cutoff date i.e. 15.5.2003 cannot be sustained.

12. It is apt to reproduce the observations made by Hon'ble Supreme Court in para-31 of the judgment rendered in case of ***Prem Singh*** vs. ***State of U.P. & others 2019 (10) SCC 516***, which read as under:-

> "*In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had*

been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment".

13. Once the work charge employment of the petitioner is held liable to be counted for the grant of pensionary benefits to him, as a natural corollary, he will be governed under CCS Pension Rules, 1972 and the Contributory Pension Scheme will not be applicable to him.

14. For the aforesaid reasons, the present petition is allowed. Respondents are directed to consider the period of work-charge employment of the petitioner, followed by his regular service for the purpose of grant of pensionary benefits and for that purpose to grant him GPF Number, within a period of three months from today. Pending applications, if any, also stands disposed

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

Between:-

SWAROOP SINGH, SON OF SH. SHIV LAL PERMANENT RESIDENT OF VILLAGE MUNISH, POST OFFICE MUNISH BAHALI, TEHSIL RAMPUR, DISTT. SHIMLA, H.P.

....PETITIONER

(SH. SUNEEL AWASTHI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH DEPARTMENT OF HORTICULTURE THROUGH ITS SECRETARY (HORTICULTURE) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (RURAL DEVELOPMENT AND PANCHAYATI RAJ) TO THE GOVERNMENT OF HIMACHAL PRADESH SHIMLA.

3. THE DIRECTOR OF RURAL DEVELOPMENT AND PANCHAYATI RAJ, HIMACHAL PRADESH, SHIMLA.

4. ACCOUNTANT GENERAL HIMACHAL PRADESH, SHIMLA.

....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, DEPUTY ADVOCATE GENERA AND SH. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL FOR R-1 TO 3). (NONE FOR R-4).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO 3294 of 2020
Reserved on: 31.08.2022
Decided on: 6.9.2022

Constitution of India, 1950- Article 226- Considering the service of the petitioner rendered as Panchayat Secretary- Held- Petition is clearly barred by principle of delay and laches- Petition dismissed. (Para 8, 10)

Cases referred:

D.C.S. Negi vs. Union of India & others 2018 (16) SCC 721;

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

O R D E R

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

> *"a) That the order dated 07.10.2017 i.e. Annexure A-5 whereby the respondent refused to count the service of the applicant from 16.04.1967 to 22.02.1978 rendered in Panchayat Samiti for pension and other benefits may kindly be quashed and set aside.*
>
> *b) That the respondents may kindly be directed to consider the case of the applicant from 16.04.1967 to 22.02.1978 for pension and other benefits on the analogy of the judgment passed in CWP No. 1802 of 2002 Annexure A-3."*

2. The case as pleaded by the petitioner is that he was initially appointed as Panchayat Secretary in the Panchayati Raj Department on

16.4.1967. Thereafter he was appointed as Gram Sewak on 20.2.1978 in the Department of Rural Development. He subsequently was appointed as Horticulture Extension Officer in Horticulture Department on 20.10.1989 and retired from the said post on 30.11.2004.

3. The grievance of the petitioner is that though he was granted all service benefits w.e.f. 20.10.1989 till his retirement as continuity in service but was denied the benefit of service, which he had rendered as Panchayat Secretary from 16.4.1967 to February, 1978. He has, thus, sought benefit in light of judgment passed in CWP No 1802 of 2002, titled as State of Himachal Pradesh & others vs. Basheshar Lal. He preferred representation dated 20.11.2013, however, his representation was finally rejected on 7.10.2017 vide Annexure A-6, forcing him to file the instant petition.

4. Petitioner has assailed the impugned order dated 7.10.2017 on the grounds that his case has not been considered in light of the judgment passed by a Division Bench of this Court in CWP No. 1802 of 2002, titled as State of Himachal Pradesh & others vs. Basheshar Lal. It has further been contended that the petitioner has been discriminated and denial of service benefits to him for the service rendered from 16.4.1967 to 22.9.1978 is violative of Articles 14 and 16 of the Constitution of India. As per petitioner, though he served the Panchayat Samiti as Panchayat Secretary w.e.f. 16.4.1967 to 22.9.1978, his services were later absorbed in Rural Development Department, therefore, he was entitled for benefit of continuity of service since the very first day of his employment as Panchayat Secretary i.e. 16.4.1967.

5. In reply, respondents No. 2 and 3 have submitted that the petitioner had joined as Panchayat Secretary in Gram Panchayat, Munish under Panchayat Samiti, Rampur, District Shimla, H.P. on 16.4.1967 and continue to work in such capacity till 22.2.1978. *Vide* office order dated 2.2.1978, the petitioner was offered fresh appointment as regular Gram Sewak

in Rural Development Department. The petitioner accepted the appointment on the basis of offer made to him vide letter dated 2.2.1978, which clearly contained the stipulation that the previous service of Panchayat Secretary would not be taken into account for any purpose. As per the respondents, the case of petitioner was distinguishable from the case of Basheshar Lal, respondent in CWP No. 1802 of 2002, as the services of said Basheshar Lal were taken over by the department vide order dated 1.6.1984, while he was working as Panchayat Secretary in the Panchayat Samiti. The benefit of the judgment of Basheshar Lal was available only to those Panchayat Secretaries, whose services had been taken over by the department w.e.f. 1.6.1984.

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

7. The office order dated 2.2.1978 by virtue of which, the petitioner was appointed as Gram Sewak in Rural Development Department is on record as Annexure R-1. Para-2 (vi) of the said letter stipulated that previous service as Panchayat Secretaries would not be taken into account for any purpose. It is not denied that petitioner had accepted the appointment as Gram Sewak in pursuance to the office order dated 2.2.1978, Annexure R-1. Thus, he was fully aware that his past service as Panchayat Secretary would not be taken into account for any purpose, still he accepted the offer and continued to work as Gram Sewak from 20.2.1978 till his appointment as Horticulture Extension Officer in Department of Horticulture on 20.10.1989. He served as Horticulture Extension Officer till 30.4.2004, when he got superannuated. Noticeably, till the date of his retirement, petitioner did not either raise any objection to the terms and conditions of his appointment nor raised any claim for counting his past service as Panchayat Secretary.

8. Petitioner for the first time raised the issue vide his representation dated 20.11.2013. There is no explanation as to why the petitioner remained silent during his entire service career as also for the

period of about nine years after his retirement. In these circumstances, the petition filed by the petitioner before the erstwhile H.P. State Administrative Tribunal in the year 2017 was clearly time barred. The representation made by the petitioner in 2013 for cause of action that had arisen in favour of petitioner on 2.2.1978 would not have created or revived the cause of action for him. It is more then settled that the limitation once expired cannot be revived by a subsequent representation.

9. The Hon'ble Supreme Court in ***2018 (16) SCC 721*** titled as ***D.C.S. Negi vs. Union of India & others,*** has held as under: -

> "*12. Before parting with the case, we consider it necessary to note that for quite some time, the Administrative Tribunals established under the Act have been entertaining and deciding the applications filed under Section 19 of the Act in complete disregard of the mandate of Section 21, which reads as under:-*
>
> > *"**21. Limitation**.—(1) A Tribunal shall not admit an application,—*
> >
> > *(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*
> >
> > *(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*
> >
> > *(2) Notwithstanding anything contained in sub-section (1), where—*
> >
> > *(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal*

becomes exercisable under this Act in respect of the matter to which such order relates; and

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

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

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period".

13. A reading of the plain language of the above reproduced section makes it clear that the Tribunal cannot admit an application unless the same is made within the time specified in clauses (a) and (b) of Section 21 (1) or Section 21 (2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period. Since Section 21 (1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period of sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21 (3).

14. In the present case, the Tribunal entertained and decided the application without even adverting to the issue of limitation. The learned counsel for the petitioner tried to explain this omission by pointing out that in the reply filed on behalf of the respondents, no such objection was raised but we have not felt impresses. In our view, the Tribunal cannot abdicate its duty to act in accordance with the statute under which it is established and the

fact that an objection of limitation is not raised by the respondent/non-applicant is not at all relevant."

10. Thus, the petition of the petitioner before the erstwhile H.P. State Administrative Tribunal was clearly time barred. Merely because now due to abolition of the erstwhile Tribunal, the matter has been transferred to this Court, the point of limitation cannot be ignored. The petition of the petitioner is clearly barred by principle of delay and laches.

11. Even on merit, the petitioner has not been able to make out a case. His appointment letter had a specific stipulation as noticed above and petitioner joined as Gram Sewak by accepting such condition. The case of petitioner cannot be equated with the case of Sh. Basheshar Lal, respondent in CWP No. 1802 of 2002 on account of distinction in fact situation. The services of said Basheshar Lal along with other Panchayat Secretaries were taken over by the State Government w.e.f. 1.6.1984 and they were absorbed in the Panchayati Raj Department, whereas the case of petitioner was different. He was offered fresh appointment as Gram Sewak in different department and he accepted the same without any reservation to specific stipulation, as noticed above.

12. In view of the observations made hereinabove, there is no merit in the petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Between:-

PARVESH SHARMA S/O LATE SH. V.K. SHARMA,
AGED 38 YEARS, PRESENTLY WORKING AS
CONTRACT TABULATOR-CUM-FIELD DATA
COLLECTION IN MARKET SURVEY SCHEME
PROJECT OF AGRO-ECONOMIC RESEARCH
CENTRE, H.P. UNIVERSITY, SHIMLA R/O
14/2, VINOD NIWAS, UPPER KAITHU,
SHIMLA-3, H.P.

…PETITIONER

(BY SH. P.P. CHAUHAN, ADVOCATE).

AND

1. HIMACHAL PRADESH UNIVERSITY, SUMMER HILL, SHIMLA-5, H.P. THROUGH ITS REGISTRAR.
2. CHAIRMAN (VICE-CHANCELLOR), H.P.U. SHIMLA-5, ADVISORY COMMITTEE OF AGRO ECONOMIC RESEARCH CENTRE, SHIMLA- 5, H.P.
3. OFFICER-IN-CHARGE/DIRECTOR, AGRO ECONOMIC RESEARCH CENTRE, SHIMLA-5.
4. SH. SATYAVEER SINGH, FIELD INVESTIGATOR/FIELD ASSISTANT, COST OF CULTIVATION SCHEME/AGRO-ECONOMIC RESEARCH CENTRE, HIMACHAL PRADESH UNIVERSITY, SHIMLA-5.
5. SH. BIR PAL SINGH, FIELD ASSISTANT, CCS/AERC, PAONTA SAHIB, DISTRICT SIRMAUR, H.P.
6. DR. D.V. SINGH, FIELD OFFICER, CCS/AERC, H.P. UNIVERSITY, SHIMLA, H.P.
7. SH. RANVEER SINGH, SENIOR RESEARCH OFFICER, COST OF CULTIVATION/AGRO ECONOMICS CENTRE,H.P. UNIVERSITY, SHIMLA-5.

….RESPONDENTS

(BY SH. SURENDER VERMA, ADVOCATE, FOR R-1 TO R-3.)

RESPONDENT No.5, PROCEEDED AGAINST EXPARTE VIDE ORDER DATED 02.11.2010.

RESPONDENTS NO. 6 & 7 PROCEEDED AGAINST

EXPARTE VIDE ORDER DATED 28.09.2010.

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 3737 of 2019
Reserved on: 08.09.2022
Decided on: 14.09.2022

Constitution of India, 1950- Article 226- Regularization of service- Held- Petitioner has failed to substantiate his allegation of nepotism, against private respondents, by placing on record any tangible material- Petition dismissed. (Para 16, 17)

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

O R D E R

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

> *a) Quash the impugned orders A-1 and impugned order whereby the respondents have regularised the service of the respondent No.5 (the copy being not available with the present applicant) and also quash the impugned inaction of the respondent department whereby the respondents are not regularizing the service of the applicant being arbitrary, malafide and illegal.*
> *b) Direct the respondent to regularize the service of the applicant against the post of Field Investigator/Field Assistant, w.e.f. the date on completion of 10 years of service or from the date his juniors respondents No. 4 and 5 have been regularised with all the consequential benefits and interest on the arrears @ 18% p.a. from the due date till the date of realization.*
> *c) Direct the respondents to re-engage the applicant against the same post at the same place in the same capacity with all the consequential benefits and granting him seniority ante-date.*

2. The petitioner approached the erstwhile State Administrative Tribunal in the year 2003. With the abolition of the Tribunal, the matter was transferred to this Court and has been registered as CWPOA No.3737 of 2019.

CASE OF PETITIONER:

3.1 The case set up by petitioneris that he was initially engaged on daily wage basis for compilation/ duplication of Primary Data under the Market Survey Scheme from 21.11.1984 to 15.06.1985 in Agro Economic

Research Centre of Himachal Pradesh University (for short,'Agro Centre'). Thereafter, the petitioner was engaged by Agro Centre in different projects from time to time as per details as under:

i)	19.10.1989 to 17.04.1992	As Temporary Tabulator on the recommendations of Selection Committee, on consolidated salary of Rs.1200/- with further increase of salary from time to time in Wood Balance Study (USAID).
ii)	20.04.1992 to 30.04.1996	As Tabulator in Integrated Water Shed Development Hills Project on the consolidated monthly salary of Rs.1800/-.
iii)	02.05.1996 to 02.11.1996	As Tabulator in Plant Protection Project.
iv)	04.11.1996 to 28.02.2002	As Tabulator in Market Survey Scheme.
v)	01.03.2002 to 28.02. 2003	As Research Investigator on consolidated salary of Rs.6000/- per month.
vi)	01.03.2003 to 20.06.2003	Fictional Break given in the service of the applicant with a view to deprive him of benefit of being regularised despite the fact that the work existed and the funds were released/ available.

vii) 20.06.2003 to 17.06.2004 Field Assistant in Market Survey Scheme.

On the basis of aforesaid engagements, petitionerclaims to have served Agro Centre for about 15 years.

3.2 Petitionerpreferred the instant petition with grievance*firstly* that despite longevity of his engagement with Agro Centre, his services were not regularised and, *secondly*, he being senior to respondents No. 4 and 5 was entitled to be regularised as Field Assistant before them.

3.3 Petitioner also alleged that regularisation of respondents 4 and 5 was result of nepotism as they were closely related to respondents 6 and 7, who were senior officials.

RESPONSE BY OFFICIAL RESPONDENTS:

4.1 In their reply, respondents No. 1 to 3 contested the claim of petitioner on the ground that the petitioner had worked under different *ad-hoc* projects and lastly on completion of one such projects (Market Survey Scheme/project) on 31.03.2004, the services of petitioner were dispensed with *vide*notice dated 20.02.2004. His engagement always was co-terminus with the project.

4.2 As regards, the claim of petitioner vis-à-vis respondents No. 4 and 5, it was submitted that they were engagedunder Cost Cultivation Scheme (for short, 'CCS') which according to respondents No.1 to 3 was altogether a different project. As per official respondents, both the schemes i.e. Agro Centre and CCS were being implemented by the H. P. University by virtue of different memoranda of understanding and having different administrative setup. In

such circumstances, petitioner was stated to be not entitled to claim any right vis-à-vis respondents No. 4 and 5.

4.3 It was further submitted that the petitioner had worked in different temporary/time bound projects under Agro Centre as Temporary Tabulator/Field Assistant. His engagement always was co-terminus with the projects. As per respondents No. 1 to 3, CCS is the permanent scheme, therefore, respondents No. 4 and 5 were regularised under the said scheme on the basis of their experience in the said scheme. The allegation of nepotism was specifically denied. It was submitted that respondents No. 4 and 5 were appointed by the Vice Chancellor of the University and not by respondents No. 6 and 7.

RESPONSE OF PRIVATE RESPONDENTS:

5.1 Only respondent No.4 filed reply to the petition. Remaining private respondents did not file any response.

5.2 In reply filed by respondent No.4, it was submitted that the employers of the petitioner and respondent No.4 were different identities. Whereas, the petitioner was employed by Agro Centre, respondent No.4 was employed by CCS. Both programmes were distinct and different for all intents and purposes as the two schemes had been established by entering into two different memoranda of understanding by the Ministry of Food and Agriculture, Government of India with the Himachal Pradesh University on two different dates. The purpose and nature of two establishments was also stated to be different and distinct besides their staffing pattern having no parity with each other whatsoever.

REJOINDER OF PETITIONER:

6 In rejoinder to reply of respondents No. 1 to 3, petitioner alleged that respondent No.4 had worked as temporary Field Assistant for two small durations of 89 days each in project titled as "Wood Balance Study" conducted by the Agro Centre. It is thereafter that he was given *ad-hoc* appointment in CCS. The petitioner further challenged the appointment of respondents 4 and 5 as Field Assistant in the CCS on the ground that they did not belong to Himachal Pradesh and only persons belonging to state of Himachal Pradesh were eligible for appointments in CCS.

COUNTER AFFIDAVIT OF OFFICIAL RESPONDENTS:

7. Respondents No. 1 to 3 filed counter-affidavit. It was submitted that respondent No.4 had five years' experience as Field Assistant in CCS and more than nine years of total work experience as Field Assistant in different projects of Agro Centre. It was clarified that respondent No.4 was initially appointed as Field Assistant in "Integrated Watershed Development Project". Thereafter on 01.10.1993 his services were utilized in place of Sh. R.L. Verma, Field Assistant, who was deputed on ad-hoc/time bound project assigned by Land Use Board, Shimla in CCS. This appointment continued till 31.07.1998. Thus, respondent No.4 worked as Field Assistant in CCS for about five years and gained such experience. Keeping in view the work performance and experience of respondent No.4, he was considered for the post of Field Assistant which has fallen vacant due to promotion. Respondents No.1 to 3 further contended that the petitioner did not have the requisite experience as he had not worked as Field Assistant to collect data/information in the field of CCS. To similar effect are the averments made in respect of respondent No.5. It was clarified that respondent No.5 had worked under CCS scheme for 14 years and thereafter his services were regularized.

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

9. It is not in dispute that petitioner was engaged in Agro Centre, from time to time, against specific projects only. Lastly, his services were dispensed with w.e.f. 31.3.2004.

10. There is no fundamental right to employment much less permanent employment.Public employment is governed by statutory rules. One can be said to be aggrieved only if he is discriminated or is sufferer of arbitrariness or can show infraction of rules in the matter of public employment.

11. Petitioner has not been able to cross above said barrier. Save and except reference to the case of Mool Raj Upadhyaya vs. State of H.P, there is nothing in the petition to suggest as to on what basis the petitioner claimed right to be permanently employed by respondents No.1 to 3. Mool Raj Upadhyaya vs. State of H.P. was in the context of the rights of the workmen, who were employed on daily wage/ muster roll basis and had completed 10 years of continuous service with minimum of 240 days in a calendar year. Admittedly the petitioner was not a daily wage/muster roll workman, therefore,he cannot derive any benefit from above referred case.

12. The case of respondents No. 1 to 3 specifically is that the employment of petitioner was purely temporary and co-terminus with the projects and on completion of the project his services were not required further and were accordingly disengaged. Petitioner has not been able to rebut such factual aspect of the matter.

13. The challenge of petitioner to regularisation/ permanent appointment of respondents No.4 and 5in CCS is also bound to fail for the

reason that the petitioner has failed to make out any ground to claim any right vis-à-vis said respondents. There were lot of dissimilarities in the engagement of petitioner and respondents Nos 4 and 5. Whereas, petitioner was engaged by Agro Centre, respondents No. 4 and 5 were engaged not only by Agro Centre but CCS also. Respondent No.4 had worked from 01.10.1993 to 31.07.1998 as Field Assistant in CCS. Respondent No.5 had worked under CCS for about 14 years. It was for this reason that respondents No. 4 and 5 were considered for permanent appointments in CCS by respondents No. 1 to 3.

14. Petitioner has further failed to deny or rebut the fact that the Agro Centre and CCS were different schemes having different objectives. Whereas the projects under Agro Centre were temporary in nature, the CCS scheme was permanent. Since the petitioner had not worked in CCS and had no work experience in said project as Field Assistant, he could not claim any right vis-à-vis the appointments given to respondents No. 4 and 5.

15. Further, the petitioner has not laid any foundation in the petition for challenging the selection process adopted by official respondents for appointment of respondents No. 4 and 5. In absence of such challenge, the petitioner cannot claim the appointments of respondents No. 4 and 5 to be illegal. Though, a feeble attempt was made by the petitioner in his rejoinder to challenge the selection process but again the grounds of challenge have remained unsubstantiated.

16. Petitioner has failed to substantiate his allegation of nepotism, against private respondents, by placing on record any tangible material. The appointments of respondents No. 4 and 5 were made by the Vice Chancellor of the University and nothing has been produced on record to show that the Vice Chancellor had any personal interest in respondents No. 4 and 5. On the

other hand Respondents No. 1 to 3 have justified the appointments of respondents No. 4 and 5 on the basis of their experience and requirements of job. The explanation rendered by official respondents is reasonable.

17. Another circumstancewhich cannot be ignored is that the petition was filed in the year 2003. Nineteen years have already elapsed. Petitioner was 38 years of age in 2003, meaning thereby that he would have almost reached the age of superannuation. Nothing has been shown to the Court that petitioner remained unemployed after 2003. Similar is the situation with respondents No. 4 and 5. During the course of hearing the Court was informed that respondent No.4 is about to retire this year and similar is the situation with respondent No.5. In this view of the matter also, no relief can be granted to the petitioner at this stage. No monetary reliefs can be allowed to the petitioner for the reasons firstly that he has failed to establish any right in his favour and secondly, he cannot get the monetary relief for the period when he has not worked.

18. In view of the above discussion, there is no merit in the petition and the same is accordingly dismissed. Pending application(s), if any, also stands disposed of.

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

Between:-

SHRI BRIJESH KUMAR, S/O SH. BENIMADHAV, RESIDENT OF HOUSE NO. 119/2 PURANI MANDI, PRESENTLY SENIOR ACCOUNTANT IN THE OFFICE OF REGIONAL MANAGER, HPMC, BHUNTAR, DISTT. KULLU (H.P.)

....PETITIONER

(SH. MAAN SINGH, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS SECRETARY (HORTICULTURE) H.P. SHIMLA-171002.

2. MANAGING DIRECTOR, H.P. HORTICULTUREAL PRODUCE MARKETING & PROCESSING CORPN. LTD. NIGAM VIHAR, SHIMLA-171002 (H.P.)

....RESPONDENTS

(SH. R. P. SINGH, DEPUTY ADVOCATE GENERAL FOR R-1).

(SH. P. D. NANDA, ADVOCATE FOR R-2).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 3969 of 2019
Reserved on: 26.8.2022
Decided on: 31.8.2022

Constitution of India, 1950- Article 226- Promotion- Juniors were promoted to the post of Assistant Accounts Officer, whereas, petitioner was ignored- Petitioner had never laid any challenge to the grading awarded to him- That being so, the petitioner cannot be said to have any merit in his claim, especially when the post of Assistant Accounts Officer was a selection post- Petition dismissed. (Para 9, 10)

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

O R D E R

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

"a) That the respondent may kindly be directed to issue promotion order of the applicant as an Assistant Accounts Officer retrospectively form the date his juniors have already been promoted as such.

b) That the entire original record of the Departmental Promotion Committee Meetings held during 95-96 may kindly be summoned for perusal and verification of the Hon'ble Tribunal."

2. Record reveals that petitioner approached the erstwhile H.P. State Administrative Tribunal in the year 1998 by way of O.A. No. 483 of 1998. The grievance of the petitioner was that his juniors were promoted to the post of Assistant Accounts Officer, whereas, he was ignored. Petitioner, as per affidavit annexed with O.A. No. 483 of 1998 was aged 52 years in the year 1998. 24 long years have elapsed but the case of the petitioner remained being knocked from one forum to another and finally again came to be registered in this Court as CWPOA No. 3969 of 2019.

3. Petitioner was working as Senior Accountant and at that time, the petitioner was posted in the office of Regional Manager, HPMC, Bhunter, District Kullu, H.P. As per petitioner, there was no complaint with his working and he had unblemished service record of more than 17 years. The name of petitioner was at Sr. No.2 of the tentative seniority list of Senior Accountants as on 1.1.1989. Respondent No.2 had called for options for promotion to the post of Assistant Accounts Officer in its Regional Office of Madras. Petitioner also opted for promotion but not for the Madras Office. Sh. B. S. Kashyap, who was at Sr. No.1 in the seniority list was promoted to the post of Assistant Accounts Officer in Madras Office of respondent No.2. One Sh. Rajender Chauhan, who was lower in seniority to petitioner was also promoted and posted as Assistant Accounts Officer at Bombay. Similarly, another person junior to petitioner was promoted as Assistant Accounts Officer was also promoted before petitioner. Despite representation of the petitioner, he was not extended the benefit of promotion, forcing him to file the instant petition.

4. Per-contra, respondents submitted that the post of Assistant Accounts Officer was selection post, therefore, merit-cum-seniority was the criteria for promotion. Petitioner had lesser merit than the persons promoted and hence, the grievance of the petitioner was said to be unjustified. The objection as to limitation was also raised. It was alleged that the promotions assailed by the petitioner were effected on 14.3.1996, whereas petitioner

approached the learned Tribunal in December, 1998. As per respondents, the petition was otherwise also not maintainable, as the petitioner had not exhausted the remedy available to him, under the service bye-laws of the respondent Corporation by filing appeal to the Board of Directors.

5. Petitioner in his rejoinder did not contest the plea of the respondents that the post of Assistant Accounts Officer was a selection post. The allegations of the respondents that the persons with higher merit were promoted also could not be seriously disputed by the petitioner.

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

7. On 8.7.2022, this Court had passed the following orders:-

> *"It has been contended by learned counsel for respondent No.2 that post of Assistant Accounts Officer being selection post, all the incumbents including the petitioner in the zone of consideration were considered but the petitioner was not found fit for promotion.*
>
> *The contention so raised on behalf of respondent No.2, however, is not borne out from the record save and except averment in reply to that effect. In view of this, respondent Nno.2 is directed to produce the complete record regarding promotion to the post of Assistant Accounts Officer along with the proceedings of Departmental Promotion Committee, if any, whereby the name of petitioner was not found fit for promotion to the post of Assistant Accounts Officer. Record be produced before this Court on the next date of hearing. List on 26th August, 2022."*

Record was produced and a copy thereof was placed on file. Learned counsel for the petitioner was also afforded opportunity to go through the records.

8. As per record produced by the respondents, the meeting of Department Promotion Committee was held on 14.3.1996 to consider promotion to the post of Assistant Accounts Officers in HPMC. As per memorandum submitted before the DPC, there were two vacancies of

Assistant Accounts Officer in the pay scale of Rs. 2130-3700, available at Madras and Bombay. It was found that one Senior Accountant was already officiating as Assistant Accounts Officer and was posted at Madras since August, 1995. The DPC, therefore, considered the available seven senior most Accountants vis-à-vis their grading. As per available grading Sh. Rajender Chauhan, who was otherwise junior to the petitioner had 'Very Good' as overall grading whereas, the petitioner had 'Good' grading against his name. Accordingly, Sh. Balbir Kashyap and Rajender Chauhan were promoted. Petitioner could not have any possible grievance against the promotion of Sh. Balbir Kashyap being senior to him. The promotion of Sh. Rajender Chauhan also could not be faulted as he had 'Very Good' grading against his name as against the petitioner, who was graded as 'Good'.

9. The petitioner had never laid any challenge to the grading awarded to him. That being so, the petitioner cannot be said to have any merit in his claim, especially when the post of Assistant Accounts Officer was a selection post.

10. Further there is substance in the arguments raised on behalf of the respondents that the original application, as filed by the petitioner, was time barred. The cause of action had arisen to the petitioner on 14.3.1996, when his junior was promoted. There is no explanation as to why the petition could not be filed by petitioner, within the period of limitation, as prescribed under Section 21 of the Administrative Tribunal's Act.

11. Noticeably, the petitioner had not even impleaded the persons promoted as Assistant Accounts Officers before him. On this account also, the petitioner cannot be said to have validly constituted the application.

12. In view of above discussion, there is no merit in the petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Between:-

SHER SINGH, S/O SHRI PRATAP CHAND, RESIDENT OF VILLAGE AND P.O. BELA AND TEHSIL NADAUN, DISTT. HAMIRPUR, PRESENTLY EMPLOYED IN H.P. GOVT. COMMUNITY FRUIT PROCESSING AND TRAINING CENTRE NADAUN (GAGAAL) DISTT. HAMIRPUR, HP.

....PETITIONER

(BY ARUN KUMAR, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS SECRETARY, (HORTICULTURE), SHIMLA-2, HP.

2. DIRECTOR, HORTICULTURE DEPTT. NAVBAHAR, SHIMLA-2.

3. DY. DIRECTOR OF HORTICULTURE DEPTT. KANGRA AT DHARMSHALA H.P.

4. FRUIT TECHNOLOGIST, HP FRUIT CANNING UNIT, NAGROTA BAGWAN, KANGRA.

5. INCHARGE, H.P. GOVT. COMMUNITY FRUIT PROCESSING AND TRAINING CENTRE NADAUN (GAGAAL), DISTT. HAMIRPUR, H.P.

....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDL. AG WITH SH. NARENDER THAKUR, DY. A.G).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

No. 7632 of 2019
Reserved on: 14.9.2022
Decided on: 21.9.2022

Constitution of India, 1950- Article 226- Regularization as per regularization policy of the Government of H.P.- Held- The case of petitioner herein is squarely covered by the judgment, passed by this Court in CWPOA No. 6748 of 2019- The reasons detailed therein shall apply mutatis-mutandis to the present case- Petition allowed- Termination of petitioner is set aside. (Para 9, 10)

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

O R D E R

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

> *"a) That termination order/letter Annexure A3 may kindly be quashed and set aside and respondents may kindly be directed to reinstate the services of the applicant with all consequential benefits such as seniority, arrears etc. and the original application may kindly be allowed.*
>
> *b) That the respondents may kindly be directed to regularize the services of the applicant after completion of 6 or 8 years as per policy of the state after condoning the fictional breaks period or if no policy is there, then to direct the respondents to formulate a policy being a model state; so the Constitutional mandates provided for the welfare state be fulfilled and justice be done.*
>
> *c) That the respondents may kindly be directed not to give fictional breaks to the applicant and allow him to do work throughout the year and the consequential benefits of the regularization of fictional breaks may also be given to applicant as per law"*

2. The petitioner had originally filed O.A. No. 2675 of 2016 before the learned H.P. State Administrative Tribunal in the year 2016 and after the abolition of the Tribunal, the Original Application of the petitioner was

transferred to this Court and the same was registered as CWPOA No. 7632 of 2019. By virtue of an interim direction issued by H.P. State Administrative Tribunal, petitioner continued in the job.

3. The case of petitioner is that he was engaged as daily wagelabourer/Contract Beldar in the year 2007 in Community Fruit Processing-cum-Training Centre, (Nagaan), District Hamirpur, H.P (for short, 'the Centre'). He had rendered continuous service with 240 days in each calendar year from the date of his engagement till the date of filing of the petition. The respondents had regular work in the Centre and petitioner had been assigned multiple jobs from time to time viz preparation of pickles, jams, jelly etc, to impart training to local residents, to clean and maintain the premises, attend counter sales, gardening work and duty as watchman. The working hours have been from 9.00 a.m. to 5.00 p.m.

4. Petitioner has sought relief of regularization as per the regularization policy of the Government of Himachal Pradesh. The grievance of the petitioner has not been redressed till date.

5. Respondents have contested the claim of the petitioner on the ground that he was engaged on hourly basis in the year 2007 and he had been paid for the work performed by him on hourly basis. Petitioner was not entitled to regularization, as his engagement was not on Muster Roll basis. The regularization policy would not be applicable in the case of petitioner, who was engaged on hourly basis.

6. I have heard Mr. Arun Kumar, learned counsel for the petitioner and Mr. Desh Raj Thakur, learned Additional Advocate General for the respondents and have also gone through the record carefully.

7. On 24.8.2022, the respondents were directed to produce records pertaining to the service of petitioner. In compliance to said order, the record was produced on 14.9.2022 and on its perusal, it has been found that the petitioner has completed 240 days in each calendar year since 1.1.2008 till

2021 and even in this current year also, he has completed 242 days till 31.8.2022. The only contention of respondents is that the petitioner was engaged on hourly basis and not on daily basis. This distinction is clearly superfluous. Respondents with their reply have annexed the documents, reflecting working hours of the petitioner. As per these documents, petitioner has been rendering service for seven hours every day and his employment was continuous. In these circumstances, the conversion of hours into days can clearly be said to be unjustified or illegal.

8. This Court in ***CWPOA No. 6748 of 2019***, titled as, ***Vikram Singh*** vs. ***State of H.P. & others***, while dealing with identical issue has held as under:-

> *"*10. *In CWPOA No. 1833, the respondents had raised same objections as raised in the present case. The Coordinate Bench after perusing the official records produced by the respondents held as under:-*
>
> > *"4. In the aforesaid documents, which are part of the record of the Government, petitioner, Smt. Asha Devi has been shown to be working as daily wager w.e.f.12.3.2001 and she has been shown to have worked for more than 240 days in the years, 2001, 2002, 2003, 2004, 2005, 2006, 2007,2008 and 2009. Though, in the aforesaid document alteration with pen has been made to make it appear that this seniority list-cum-yearwise days of engagement of daily wagers also pertains to seasonal workers, but learned Additional Advocate General was unable to dispute that all the persons named in this list were engaged on daily wage basis and if itis not then how the name of petitioner Smt. Asha Devi came to be reflected in the afore list, if she was given appointment on hourly basis. Besides above, Page No.34 of the record, as detailed hereinabove, reveals that in the years 2001 to 2015 petitioner worked for more than 240 days in a calendar year. In this document, it has been nowhere mentioned that petitioner herein was appointed on hourly basis and as such, there appears to be*

merit in the claim of the petitioner that she had been working regularly on daily wages since her initial appointment in the year, 2001. At this stage, learned Additional Advocate General made available some documents to demonstrate that petitioner herein had been working on hourly basis not on daily wage basis, however, having carefully perused the aforesaid documents, which otherwise appear to be a bill raised by Incharge of Fruit Processing-cum-Training Centre, Nurpur with regard to payment of the workers, reveals that petitioner as well as other similarly situate persons had been working for 7-8 hours every day, meaning thereby they like other daily wagers were also performing duties for the whole day and not on hourly basis. Needless to say, Government servant is obliged to work for 7 to 8 hours i.e.10 to 5 PM in the government offices of State of Himachal Pradesh. Though, having carefully scrutinized the entire record, as has been taken note hereinabove, this Court is fully convinced that petitioner had been rendering her services from the date of her initial appointment till date on daily wage basis, but still if aforesaid documents i.e. bills placed on record are taken into consideration even then petitioner cannot be said to be working on hourly basis, especially when respondents have not been able to refute/dispute that petitioner had been working for 7 to 8 hours per day.

5. Faced with the aforesaid situation, Mr. Sudhir Bhatnagar, learned Additional Advocate General argued that even as per policy of regularization petitioner is/was firstly required to be converted to daily wage basis from part time and thereafter she can claim benefit of regularization. But this Court is not impressed with the aforesaid submission made on behalf of learned Additional Advocate General, since it stands duly established on record that from the date of her initial appointment petitioner has been working on daily wage basis, there is/was no requirement if any for respondents to first convert her services from part time to daily wage so as to

make her entitled for claiming benefit of regularization in terms of policy of regularization framed by the Government of Himachal Pradesh from time to time.

6. Consequently, in view of the above, this Court finds merit in the present petition and accordingly same is allowed and respondents are directed to extend the benefit of regularization to the petitioner in terms of the regularization policy framed by the Government of Himachal Pradesh in the year, 2009, from the date she had completed 8 years daily wage service with 240 days in each calendar year. The consequential/ financial benefits shall however be restricted to three years prior to filing of the Original Application No. 374 of 2016"

9. Thus, the case of petitioner herein is squarely covered by the judgment, passed by this Court in CWPOA No. 6748 of 2019. The reasons detailed therein shall apply *mutatis-mutandis* to the present case.

10. Consequently,the petition deserves to be allowed. His termination is set aside. Respondents are directed to extend the benefit of regularization to the petitioner from the date, petitioner had completed eight years of service with 240 days in each calendar year, in terms of applicable regularization policy framed by the State Government. Consequentialfinancial benefits shall, however, be restricted to three years prior to the filing of the Original Application No. 7632 of 2016. Pending applications, if any also stand disposed of.

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

Between:-

1. SH. SANT RAM S/O LATE SH. DIWAKER, R/O VILLAGE DHUNDAN, POST OFFICE ALSINDI, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

2. SH. RAI SINGH S/O SH. DUNI CHAND, R/O VILLAGE AND POST OFFICE BARMA PAPRI, TEHSIL NAHAN, DISTRICT SIRMOUR, HIMACHAL PRADESH.

…PETITIONERS

(BY MR. DEVENDER K. SHARMA, ADVOCATE VICE MR.C.N. SINGH, ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (FOREST) TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-171002.

2. THE CHIEF CONSERVATOR OF FOREST, FOREST DEPARTMENT, TALLAND, DISTRICT, SHIMLA (HP).
3. CHIEF PROJECT DIRECTOR, (H.P. MID HIMALAYAN WATERSHED DEVELOPMENT PROJECT) SOLAN, DISTRICT SOLAN, HIMACHAL PRADESH.

4. DIVISIONAL FOREST OFFICER, FOREST DIVISION, NAHAN, DISTRICT SIRMAUR, (HP).

5. REGIONAL PROJECT DIRECTOR, H.P. MID HIMALAYAN WATERSHED DEVELOPMENT PROJECT, BILASPUR, DISTRICT BILASPUR, HIMACHAL PRADESH.

6. DIVISIONAL WATERSHED DEVELOPMENT OFFICER, H.P. MID HIMALAYAN WATERSHED DEVELOPMENT PROJECT, NAHAN, DISTRICT SIRMAUR, HIMACHAL PRADESH.

….RESPONDENTS.

(BY MR. DESH RAJ THAKUR, ADDL. A.G. WITH MR. NARENDER THAKUR, DY. A.G. AND MR. MANOJ BAGGA, ASST. A.G.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 3562 OF 2019
Reserved on:29.8.2022
Decided on:06.09.2022

Constitution of India, 1950- Article 226- Writ of mandamus directing the respondents to grant the work charge status on completion of eight years of regular daily wage service and regularization- Held- Once the respondents had regularized the services of various other employees initially employed under the projects, the petitioners could not be singled out to be discriminated- Right of equality being one of the fundamental traits of the Constitution, the same cannot be denied at the whims and fencies of the authorities- Petition allowed. (Para 19, 20, 21)

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

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

O R D E R

By way of instant petition, the petitioners have prayed for following substantive reliefs:-

> *"(I) Issue a writ on Mandamus or other appropriate writ order or direction directing the respondents to grant the work charge status after completion of eight years of regular daily wage service i.e. 1.1.2005 and regularized the service of petitioners with all consequential benefits.*
>
> *(II) Issue a writ of Mandamus or other appropriate writ order or direction directing the respondents to regularise the service of petitioners after completion of eight years of regular daily wage service by observing the petitioner permanently in the department or in the project as done in the past."*

2. The case as pleaded by the petitioners is that they were engaged on daily wage basis as Class-IV employees in the Integrated Watershed Development Project, Kandi (Hills) (for short "IWD Project") in the year 1996. The project was part and parcel of the forest department. In the year 2005, IWD Project came to an end and a new project namely Mid Himalayan Watershed Development Project (for short "Mid Himalayan Project") was started by the forest department. The services of the petitioners were continued in Mid Himalayan Project also.

3. As per petitioners, some of the employees of the IWD Project were adjusted in various departments of the State Government and

others including the petitioners were taken in the Mid Himalayan Project. Both the projects were funded by the forest department.

4. Petitioners completed 240 days in each calendar year w.e.f. 1997 and became entitled for conferment of work charge status after completion of eight years of continuous service on daily wages.

5. Petitioners further alleged that persons similarly situated to the petitioners in the above noted projects were regularized by respondent department/project authority by adopting pick and choose policy. Some of the persons were adjusted in Horticulture Department and others namely S/Sh. Shayam Lal, Yog Raj, Ram Krishan, Ram Lal, Devender Singh and Liyakat Ali etc., all Class IV employees were regularised either in the government departments or in the project itself. Petitioners also claimed regularization in parity with other projects such as Him Urja Project, Indo Germin Changer Project, Palmpur etc.,

6. Grievance of the petitioners is that despite having continued for more than 16 years on daily wage basis neither work charge status was conferred upon them nor regularized. The inaction of respondents has been assailed as violative of Articles 14 and 16 of the Constitution of India. Petitioners claimed the work charge status as also regularization on the premise of legitimate expectations. Their further grievance is that similarly situated persons have been granted the benefit of regularization, whereas petitioners have been left out.

7. Respondents have contested the claim of the petitioners. It is submitted that the projects were functioning with the financial aid of the

World Bank in which the share of the government was 20% only. Such projects were functioning under a society registered under the name and style of Himachal Pradesh Natural Resources Management Society. The forest department is only a nodal agency, whereas Animal Husbandry Department, Horticulture, Agricultural and Rural Development Departments of the State were the line departments. It has further been submitted that there was provision in the Project Implementation Plan for deployment of regular staff from department of forest and line departments and also to engage staff on contract basis. There were no posts of daily wagers, however, depending upon requirement and there past performance, the intake of daily wagers of earlier project had been preferred in pursuance to a decision of the Executive Committee of the Society. Broadly, the claim of the petitioners has been contested on the ground that the petitioners were employees under a specific project and as such they cannot claim either the work charge status or regularization. The factum of adjustment of certain other employees by regularization, who were employed under the aforesaid projects has not been denied.

8. I have heard Mr. Devender K. Sharma, Advocate, for the petitioners and Mr. Desh Raj Thakur, learned Additional Advocate General for the State and have also gone through the record carefully.

9. As far as the factum of engagement of petitioners initially in IWD Project on daily wage w.e.f. 1996 and thereafter their continuation in Mid Himalayan Project after 2005 is not denied. It is also not denied that petitioners have worked continuously for 240 days in each calender year since 01.01.1997. Another fact which has been admitted by the respondents in their reply is that some of the persons initially employed in the aforesaid projects were adjusted and regularised either in the project or other

departments. The respondents, however, have denied the existence of any right in favour of the petitioners to claim either work charge status or regularization solely on the ground that their job is co-terminus with the project.

10. The questions, thus, arises as to whether the petitioners have acquired any right to claim the work charge status or/and regularization?

11. As per the respondents, above noted projects were funded by World Bank to the extent of 80% and the share of the State Government in funding the project is to the extent of 20%. Be that as it may, the fact that these projects are government projects cannot be disputed.

12. Petitioners have been working in the projects for more than 16 years continuously. They definitely must have lost the chances of employment elsewhere. The longevity of projects and their objective has not come to an end. It is not the case of the respondents that the objective for which these projects were started has been achieved.

13. Once the projects have considerable long life and the respondents have allowed the petitioners to work on daily wage basis for more than 16 years, it does not lie in the mouth of the respondents to say now that the petitioners can be thrown on the road at their option. In a welfare State such plea may not be available to the State authorities. There cannot be any worst example of exploitation than the case in hand.

14. Petitioners also contend to have acquired right to be conferred work charge status or/and regularization having entertained legitimate expectations. The claims based on “legitimate expectation” have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel. It is

settled that for proving the claim on legitimate expectations the petitioners need not to prove pre-existing right in their favour.

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

> **"40.** Under Indian Law, there is often a conflation between the doctrines of *promissory estoppel* and legitimate expectation. This has been described in Jain and Jain's well known treatise, *Principles of Administrative Law*:
>
> > "At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel'.
> >
> > …
> >
> > A reading of the relevant Indian cases, however, exhibit some confusion of ideas. It seems that the judicial thinking has not as yet crystallised as regards the nature and scope of the doctrine. At times, it has been referred to as merely a procedural doctrine; at times, it has been treated interchangeably as promissory estoppel. However both these ideas are incorrect. As stated above, legitimate expectation is a substantive doctrine as well and has much broader scope than promissory estoppel.
> >
> > …
> >
> > In *Punjab Communications Ltd.* v. *Union of India*, the Supreme Court has observed in relation to the doctrine of legitimate expectation:

> "the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way Reliance must have been placed on the said representation and the representee must have thereby suffered detriment."
>
> It is suggested that this formulation of the doctrine of legitimate expectation is not correct as it makes "legitimate expectation" practically synonymous with promissory estoppel. Legitimate expectation may arise from conduct of the authority; a promise is not always necessary for the purpose."

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

> "Thus, in India, the characterization of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel in the light of the evolution of doctrines like LE [Legitimate Expectations] and abuse of power. If the Supreme Court of India has shown its creativity in transforming the notion of

> promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the doctrine of LE for judicial review of resilement of administrative authorities from policies and longstanding practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil. Presently, in the absence of a like doctrine to that of promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation."

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

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

43. However, before we do this, it is important to clarify the understanding of the doctrine of legitimate expectation in previous judgments of this Court. In *National Buildings*

Construction Corporation v. *S. Raghunathan* ("*National Buildings Construction Corpn.*"), a three Judge bench of this Court, speaking through Justice S. Saghir Ahmad, held that:

> "18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. <u>But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.</u>"
>
> (emphasis supplied)

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

(Pebsham) Ltd) v. *East Sussex County Council*[30], the House of Lords has held thus:

> "33 In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone". (See also Dyson J in *R* v. *Leicester City Council, Ex p Powergen UK Ltd.* [2000] JPL 629, 637.)
>
> 34 There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power... But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see *Coughlan's case*, at pp 254-255) while ordinary property rights are in general far more limited by considerations of public interest : see *R (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.
>
> 35 It is true that in early cases such as the *Wells case* [1967] 1 WLR 1000 and *Lever Finance Ltd.* v. *Westminster (City) London Borough Council* [1971] 1 Q.B. 222, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful.....It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of

estoppel and the time has come for it to stand upon its own two feet."

(emphasis supplied)

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

"Promissory Estoppel and Legitimate Expectations

289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice. In the instant case it was only a proposal, and it was very much made clear that it was to be approved by the Central Government, prior whereto it could not be construed as containing a promise. Besides, equity cannot be used against a statutory provision or notification.

290.....In any case, in the absence of any promise, the Appellants including Aadhunik cannot claim promissory estoppel in the teeth of the notifications issued under the relevant statutory powers. Alternatively, the Appellants are trying to make a case under the doctrine of legitimate expectations. The basis of this doctrine is in reasonableness and fairness. However, it can also not be invoked where the decision of the public authority is founded in a provision of law, and is in consonance with public interest."

(emphasis supplied)

46. In *Union of India* v. *Lt. Col. P.K. Choudhary*, speaking through Chief Justice T.S. Thakur, the Court discussed the

decision in *Monnet Ispat* (supra) and noted its reliance on the judgment in *Attorney General for New South Wales* v. *Quinn*. It then observed:

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

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

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

> "7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the

> decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.
>
> 8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."
>
> (emphasis supplied)

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

> "39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law

> prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.
>
> …
>
> 41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other…]"
>
> (emphasis supplied)
>
> **50.** As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression."

16. Adverting again to the facts of the instant petition, the factual position is more or less admitted. The initial recruitment of the petitioners on daily wage basis, longevity of their continuous service, considerations and decisions at the end of the respondents to grant similarly situated persons continuity of service either by merger or regularization are the facts which admittedly have taken place. The respondents have not

specifically denied that the similarly situated person in other government departments were not conferred with the benefit of work charge status and regularization after the policies were framed in that respect from time to time. Merely because the petitioners were employed under project, the denial of the similar benefits to them is wholly unjustifiable.

17. Indisputably, the State Government has resorted to the mode of recruitment through contract employment since long. It also cannot be denied that the State Government from time to time has formulated policies whereunder the employees initially employed on daily wage basis were conferred work charge status in the first instance and then regularized.

18. Initial recruitment of the petitioners was though under specific project, nevertheless, the project was for a specific purpose and object and was an initiative of the government itself. Merely, the funding of project to the larger extent was by the World Bank, it cannot be said that the project was alien to the State Government as it was under the aegis of State Government that the projects have worked.

19. Once the respondents had regularized the services of various other employees initially employed under the projects, the petitioners could not be singled out to be discriminated. The State Government had regularized the services of the employees working in special projects like Sarv Siksha Abhiyan, subsequently converted into District Primary Education Programme and Rashtriya Madhayamik Siksha Abhiyan and Samagar Siksha Abhiyan etc.

20. The State Government has to act as a model employer in a welfare State. It cannot have different yardstick for different persons. Conceptually, the executive authorities have the onerous duty to work for the benefit of the public at large. As far as the mode and manner in which the Government has to achieve its purpose is to be chosen by the Government itself, however, with caveat that the same cannot be irrational, unreasonable

or arbitrary. In a State where rule of law prevails, the Government is no exception. Right of equality being one of the fundamental traits of the Constitution, the same cannot be denied at the whims and fencies of the authorities.

21. Thus in view of the above discussion, there is no hesitation to hold that the petitioners have acquired a right for grant of work charge status or/and regularization by application of principle of legitimate expectations and such rights are to be conferred upon them on the same parameter on which other employees of the State government have been conferred with such benefits.

22. In result, the petition is allowed and the respondents are directed to grant the work charge status to the petitioners on completion of eight years of continuous daily wage service commencing from 01.01.1997 and further to regularize their services with all consequential benefits at par with similarly situated persons in other departments of the State government. However, it is clarified that the petitioners are held entitled for monetary benefits only for three years from the date immediately preceding the date of filing of the petition. Petition is accordingly disposed of, so also, the pending applications, if any.

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

Between:-

RAM PAL SON OF SHRI UTTAM CHAND, RESIDENT OF VILLAGE SURJEHRA ALIAS KURIALA, TEHSIL & DISTRICT UNA, H.P.

....APPELLANT.

(SH. DIVYA RAJ SINGH, ADVOCATE)

AND

RAM DEVI, WIFE OF RAM PAL, DAUGHTER OF LATE SH. KHUSHI RAM, RESIDENT OF VILLAGE AMROH, TEHSIL BANGANA, DISTRICT UNA, H.P.

....RESPONDENTS

(DHEERAJ K. VASHIST, ADVOCATE).

FIRST APPEAL FROM ORDER (MVA)
No. 288 OF 2011
Reserved on: 29.8.2022
Decided on: 7.9.2022

Hindu Marriage Act, 1955- Section 13- Divorce petition- Cruelty- Held- Appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and his children- Appellant is guilty of not fulfilling his matrimonial obligations towards the respondent and children- Appellant has filed petition to suppress his own wrongs- Petition dismissed. (Para 24, 26)

Cases referred:

Dr. N. G. Dastane vs. Mrs. S. Dastane, 1975 (2) SCC 326;

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

J U D G M E N T

By way of instant appeal, the appellant has assailed judgment and decree dated 25.6.2011, passed by learned District Judge, Una, H.P. in HMA petition No. 31 of 2008, whereby the petition of the appellant was dismissed.

2. Appellant filed petition under Section 13 of the Hindu Marriage Act, 1955 (for short the Act) before the learned District Judge, Una on 12.11.2008. The grounds for divorce were cruelty and desertion. The parties were Hindu by religion and their marriage was stated to have been solemnized in 1982 in accordance with Hindu rites and customs. Five daughters were born out from the said wedlock.

3. Appellant specifically alleged that respondent was a cruel and quarrelsome lady. She started torturing the appellant from the very beginning of marriage. Three specific dates i.e. 1.1.1984, 15.1.1985 and 30.1.1986 were mentioned on which, the appellant was abused with filthy language and ill-

treated by respondent. He further alleged that respondent had turned the petitioner, his old mother and brother out of house and made them to live in cattle shed. Allegations were leveled against respondent that she always used to take help of her sister and a brother, who was posted in police.

4. As per appellant his brother Ramesh Chand came back to India on 7.9.2001. Immediately thereafter, respondent managed to harass the appellant, his mother and brother through police machinery. Reports were stated to have been made to the authorities but without any result.

5. Appellant further alleged that respondent involved him in a false case under Section 125 Cr.P.C. Further, the case of appellant was that on 22.9.2001, respondent along with her children left the house of appellant and started living in the house of her parents at Village Amroh, Tehsil Bangana, District Una, H.P.

6. It was also submitted that respondent was working in some hotel. The Respondent was further accused of having manipulated the children towards her and against the appellant.

7. Respondent in her reply challenged the maintainability of the petition. Plea of estoppel was also raised on the ground that the divorce petition by appellant was filed after 28 years of married life, which was just an attempt to harass the respondent and her children by dragging them into unnecessary litigation. On merits, it was stated that the appellant had not come forward to attend the marriage of his daughter. The allegation that the brother of the respondent was an employee of police department was specifically denied. It was alleged in counter that appellant was habitual of dragging the respondent and her children and other family members into false and frivolous litigations. In fact, appellant and his family members had turned out the respondent and her children from the house after maltreating them. Feeling apprehensive as to their safety, the respondent was forced to live in her parents' house. It was further submitted that appellant throughout

neglected the respondent and the children. He did not pay anything towards maintenance to respondent and her children despite orders from the Court.

8. On the pleadings of the parties, learned trial Court framed following issues:-

1. Whether the respondent treated the petitioner with cruelty as alleged? OPP.
2. Whether the respondent deserted the petitioner as alleged? OPP.
3. Whether the petition is not maintainable? OPR.
4. Whether the petitioner is stopped by his act and conduct from filing the instant petition? OPP.
5. Relief.

Issues No. 1 and 2 were answered in negative, whereas issues No. 3 and 4 were answered in affirmative and the petition of the appellant was dismissed.

9. Aggrieved against the dismissal of his petition, the appellant is before this Court by way of present appeal.

10. The impugned judgment and decree has been assailed predominately on the ground that it is result of mis-appreciation of the evidence. It has also been asserted that the marriage has been broken down irretrievably between the parties, as both are residing separately for more than 20 years. On the other hand, learned counsel for the respondent has supported the impugned judgment on the ground that the view taken by learned trial Court is the only possible view on appreciation of evidence.

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

12. The allegations of cruelty that can be culled out from the contents of petition have been averred in vague manner. The Hindu Marriage Divorce (Himachal Pradesh Rules 1982) (for short the Rules) clearly provides that specific acts of cruelty and the time and place where such acts were committed and that the appellant has not in any manner condoned such acts

of the respondent are to be specifically pleaded. The petition thus does not confirm to the requirement of 1982 Rules. The provision of Section 23 (i)(b) of the Act also makes it necessary, for passing of decree of divorce on the ground of cruelty for the Court to be satisfied that the petitioner has not in any manner condoned the cruelty.

13. The petition of the appellant as well as affidavit accompanying such petition is completely silent on this aspect. Even in his deposition on oath before the Court, appellant has remained silent on this aspect. In these circumstances, the respondent was precluded from rebutting any such contention and more importantly, the Court could not record its satisfaction as to the requirement of petitioner having not, in any manner, condoned the cruelty.

14. Though, no such objection was taken by the respondent before learned trial Court, even learned trial Court also omitted to consider the aforesaid requirement of law, yet these being jurisdictional issues, cannot be waived and required compliance. In absence of necessary pleadings and proof on the aforesaid question of fact and law, the petition filed by the appellant cannot be said to be maintainable.

15. On merits of the case, learned trial Court after detailed appreciation of evidence has taken a view that the allegations of cruelty were not proved. Learned trial Court held that the appellant had alleged three specific instances, when respondent had allegedly misbehaved with him from 1984 to 1986 but had failed to prove any of such instances to the satisfaction of the Court. Such findings cannot be faulted and except bald statement of the appellant, there was no corroboration to his assertion.

16. It is well settled that onus to prove the allegation of cruelty is on the person, who alleges it. In case ***Dr. N. G. Dastane vs. Mrs. S. Dastane, 1975 (2) SCC 326***, the Hon'ble Supreme Court has held as under:-

"23. But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common-sense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of Section 10(1)(b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order 10 judge whether the burden has been discharged ?

24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A. prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he links that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than

> *those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue" or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear". But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."*

17. Appellant had alleged another instance of cruelty at the hands of respondent when he stated that the respondent along with her children had turned the petitioner, his old mother and brother of the appellant out from the house by forcing them to live in cattle shed. Again, except for his bald statement nothing has been proved. Neither the mother of the appellant nor his brother, who allegedly were made to live in cattle shed were examined.

18. The brother of appellant had returned from Malaysia on 7.9.2001 and on 22.9.2001, the respondent left her matrimonial home and started living with her parents. In these fifteen days, multiple litigations were started. Appellant also did not lead any convincing evidence to prove that he along with his mother and brother were harassed by the police at the instance of respondent and her family members. In fact, what has transpired from the evidence is that though some complaints were filed by the appellant but no action was taken thereon. Nothing has further been established to show the credential of the family members of respondent. In absence of such material, it cannot be assumed that the respondent and her family members were so influential that they could manage the Superintendent of Police of the District and Director General of Police of the State.

19. Noticeably, appellant examined himself as his own witness and also examined his brother Ramesh Chand and a witness named Mehar Chand

as PW-4. The evidence on record clearly reveals that appellant and his brother Ramesh Chand were following the same foot marks. Both of them were married to two real sisters i.e. respondent and her sister. Both the brothers had filed divorce petitions against their respective wives almost on identical grounds. In such situation, it was natural for Ramesh Chand to support the case of the appellant, as the appellant also appeared as a witness in the divorce case of Ramesh Chand. As regards the statement of PW-4 Mehar Chand is concerned, much credence cannot be attached to such statement. He had submitted in the general terms that he knew the respondent, who was a quarrelsome nature. She had been fighting with her husband. Such, vague allegations cannot be said to be sufficient to prove the fact of cruelty. More importantly, none of the family members of the appellant supported him by appearing in the witness box.

20. The family disputes are more often than not observed by the close family members. In this view of the matter, adverse inference was liable to be drawn against the appellant for not having produced best evidence.

21. Keeping in view the holistic view after appreciating the entire material on record, it can be said with certainty that appellant had failed to discharge the burden of proof placed on him. No doubt, the standard of proof required in the petition for dissolution of marriage under Hindu Marriage Act is that of preponderance of probability but that does not absolve the person alleging cruelty from discharging his initial burden. Judging the case of the appellant, on the touch stone of aforesaid legal principles, this Court has no hesitation to hold that the appellant had failed to prove that respondent treated him with such cruelty, which made it impossible for him to live with respondent without being in consistent fear of danger to his health and life.

22. Learned District Judge, Una while passing the impugned judgment has arrived at the conclusion after detailed and thorough

consideration of the evidence coupled with all attending and material facts and circumstances of the case.

23. There is yet another factor, which disentitled the appellant from claiming divorce from the respondent on the ground of cruelty. Section 23 (i) (b) of the Act reads as under:-

> *"(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and*
> *(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and".*

24. Appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and his children. It has been proved on record that the children of the parties, who had grown up in age had not supported the case of the appellant at all. It cannot be assumed that even after attaining majority, they would be in the hands of their mother only. This fact is evident of the neglect of respondent and her children at the hands of appellant.

25. In reply submitted by the respondent, it was clearly mentioned that the appellant had not even attended the marriage of his daughter and had not come forward to perform "Kanyadan".

26. In light of the above noted facts, the appellant was guilty of not fulfilling his matrimonial obligations toward the respondent and her children. In these circumstances, it can also be assumed that the petition for divorce was filed by the appellant in order to suppress his own wrongs. Thus, there is material on record to hold that appellant was disentitled from claiming the decree of divorce on the ground of cruelty, on account of his own wrong.

27. As regards, the issue of desertion, the same has also been decided against the appellant. Learned trial Court has decided issue No.2

against the appellant on the ground that the respondent in the facts and circumstances of the case cannot be held having necessary animus to leave the company of the appellant. The entire evidence as discussed earlier suggests that it was the appellant, who had failed to maintain and look after the respondent. The allegations of cruelty have also been found to be motivated. In such situation, the respondent cannot be said to have no reasonable ground to leave the company of the appellant. Respondent had every reasonable and probable cause to live separately, as she had right to live with dignity. The appellant had thus failed to prove all necessary ingredients of desertion and on this count also, no fault can be found with the findings returned by the learned trial Court.

28. Lastly, the learned counsel for the appellant has argued with vehemence that marriage between the parties has broken irretrievably and hence should be dissolved by a decree of divorce. It has been submitted that in some of the cases before Hon'ble Supreme Court, the marriages have been dissolved having irretrievably broken down. The appellant cannot derive any benefit from the fact that in some of the cases, Hon'ble Supreme Court has dissolved the marriage between the parties on the ground that there was no scope to reunite, as no such ground is envisaged under the Act and this Court lacks jurisdiction to pass a decree of divorce on any such ground, which does not find mention in the Act. The appellant otherwise cannot be allowed to raise this argument on account of the fact that he has been proved guilty of commission of material wrongs towards the respondent.

29. In view of the above discussion, the appeal being devoid of any merit is accordingly dismissed. The judgment and decree passed by learned trial Court is affirmed. Pending applications, if any, also stand disposed of. Records be sent back forth.

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

Between:-

RAMESH CHAND SON OF SHRI UTTAM CHAND, RESIDENT OF VILLAGE SURJEHRA ALIAS KURIALA, TEHSIL & DISTRICT UNA, H.P.

....APPELLANT.

(SH. DIVYA RAJ SINGH, ADVOCATE)

AND

LEELA DEVI, WIFE OF RAMESH CHAND, DAUGHTER OF LATE SH. KHUSHI RAM, RESIDENT OF VILLAGE AMROH, TEHSIL BANGANA, DISTRICT UNA, H.P.

....RESPONDENTS

(DHEERAJ K. VASHIST, ADVOCATE).

FIRST APPEAL FROM ORDER (MVA)
No. 289 OF 2011
Reserved on:29.8.2022
Decided on: 7.9.2022

Hindu Marriage Act, 1955- Section 13- Divorce petition- Cruelty- Held- Appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and his children- Appellant is guilty of not fulfilling his matrimonial obligations towards the respondent and children- Appellant has filed petition to suppress his own wrongs- Petition dismissed. (Para 24, 26)

Cases referred:

Dr. N. G. Dastane vs. Mrs. S. Dastane, 1975 (2) SCC 326;

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

J U D G M E N T

By way of instant appeal, the appellant has assailed judgment and decree dated 25.6.2011, passed by learned District Judge, Una, H.P. in

HMA petition No. 30 of 2008, whereby the petition of the appellant was dismissed.

2. Appellant filed petition under Section 13 of the Hindu Marriage Act, 1955 (for short the Act) before the learned District Judge, Una on 12.11.2008. The grounds for divorce were cruelty and desertion. The parties were Hindu by religion and their marriage was stated to have been solemnized in 1982 in accordance with hindu rites and customs. Two sons and a daughter were born out from the said wedlock.

3. Appellant specifically alleged that respondent was a cruel and quarrelsome lady. She started torturing the appellant from the very beginning of marriage. Three specific dates i.e. 15.6.1983, 15.3.1985 and 30.1.1986 were mentioned on which, the appellant was abused with filthy language and ill-treated by respondent. As per appellant, he went to Malaysia in 1992, after having found difficult to live with respondent. He further pleaded that from Malaysia, he was regularly sending maintenance amount to the respondent and children and had provided them with all basic facilities. He further alleged that in his absence, respondent turned the old mother and a brother of appellant out of house and made them to live in chow shed. Allegations were leveled against respondent that she always used to take help of her sister and a brother, who was posted in police.

4. As per appellant he came back to India on 7.9.2001. Immediately thereafter, respondent managed to harass the appellant, his mother and brother through police machinery. Reports were stated to have been made to the authorities but without any result.

5. Appellant further alleged that respondent involved him in a false case under Section 498-A of IPC, in which, he was later on acquitted. Respondent and her other family members instigated Yash Pal, one of the sons of appellant, to give him beatings and in respect of such instance also the matter was reported to the police. Further, the case of appellant was that on

22.9.2001, respondent along with her children left the house of appellant and decamped with all the money and gold, which he had brought from Malaysia and thereafter, started living in the house of her parents at Village Amroh, Tehsil Bangana, District Una, H.P.

6. It was also submitted that respondent was working in some hotel and earning Rs. 5000/- per month. The son of the appellant named Yash Pal was also working in Indian Army and was paying his entire salary to the respondent. Respondent was further accused of having manipulated the children towards her and against the appellant.

7. Respondent in her reply challenged the maintainability of the petition on the ground that earlier also, appellant had filed divorce petition against the respondent being HMA No. 26/2001, which was dismissed. Plea of estoppel was also raised on the ground that the divorce petition by appellant was filed after 28 years of married life, which was just an attempt to harass the respondent and her children by dragging them into unnecessary litigation. On merits, it was stated that the appellant was not even aware about the correct names of his children and had wrongly mentioned their names in the petition. The allegation that the brother of the respondent was an employee of police department was specifically denied. It was alleged in counter that appellant was habitual of dragging the respondent and her children and other family members into false and frivolous litigations. In fact, appellant and his family members had turned out the respondent and her children from the house. Feeling apprehensive as to their safety, the respondent was forced to live in her parents' house. It was further submitted that appellant throughout neglected the respondent and the children. He did not pay anything towards maintenance to respondent and her children. He with ulterior motive even sold his house to one of his brother. The conduct of appellant was so deplorable that despite the orders of the Court to pay maintenance to respondent, he chose to spend time in judicial custody rather

to pay the legitimate claim of respondent. Similarly, the appellant had been ordered to pay maintenance pendent lite by the Court, in his earlier divorce petition, but again the appellant failed to abide by the orders of the Court and for such reason his petition for divorce was dismissed.

8. On the pleadings of the parties, learned trial Court framed following issues:-

1. Whether the respondent treated the petitioner with cruelty as alleged? OPP.
2. Whether the respondent deserted the petitioner as alleged? OPP.
3. Whether the petition is not maintainable? OPR.
4. Whether the petitioner is stopped by his act and conduct from filing the instant petition? OPP.
5. Relief.

Issues No. 1 and 2 were answered in negative, whereas issues No. 3 and 4 were answered in affirmative and the petition of the appellant was dismissed.

9. Aggrieved against the dismissal of his petition, the appellant is before this Court by way of present appeal.

10. The impugned judgment and decree has been assailed predominately on the ground that it is result of mis-appreciation of the evidence. It has also been asserted that the marriage has been broken down irretrievably between the parties, as both are residing separately for more than 20 years. On the other hand, learned counsel for the respondent has supported the impugned judgment on the ground that the view taken by learned trial Court is the only possible view on appreciation of evidence.

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

12. The allegations of cruelty that can be culled out from the contents of petition have been averred in vague manner. The Hindu Marriage Divorce (Himachal Pradesh Rules 1982) (for short the Rules) clearly provides

that specific acts of cruelty and the time and place where such acts were committed and that the appellant has not in any manner condoned such acts of the respondent are to be specifically pleaded. The petition thus does not confirm to the requirement of 1982 Rules. The provision of Section 23 (i)(b) of the Act also makes it necessary, for passing of decree of divorce on the ground of cruelty for the Court to be satisfied that the petitioner has not in any manner condoned the cruelty.

13. The petition of the appellant as well as affidavit accompanying such petition is completely silent on this aspect. Even in his deposition on oath before the Court, appellant has remained silent on this aspect. In these circumstances, the respondent was precluded from rebutting any such contention and more importantly, the Court could not record its satisfaction as to the requirement of petitioner having not, in any manner, condoned the cruelty.

14. Though, no such objection was taken by the respondent before learned trial Court, even learned trial Court also omitted to consider the aforesaid requirement of law, yet these being jurisdictional issues, cannot be waived and required compliance. In absence of necessary pleadings and proof on the aforesaid question of fact and law, the petition filed by the appellant cannot be said to be maintainable.

15. On merits of the case, learned trial Court after detailed appreciation of evidence has taken a view that the allegations of cruelty were not proved. Learned trial Court held that the appellant had alleged three specific instances, when respondent had allegedly misbehaved with him from 1983 to 1986 but had failed to prove any of such instances to the satisfaction of the Court. Such findings cannot be faulted and except bald statement of the appellant, there was no corroboration to his assertion.

16. It is well settled that onus to prove the allegation of cruelty is on the person, who alleges it. In case ***Dr. N. G. Dastane vs. Mrs. S. Dastane, 1975 (2) SCC 326***, the Hon'ble Supreme Court has held as under:-

> *"23. But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common-sense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of Section 10(1)(b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order 10 judge whether the burden has been discharged ?*
>
> *24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A. prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he links that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice*

> *to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue" or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear". But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."*

17. Admittedly, the appellant had remained out of India from 1992 to 2001 and he has failed to prove that he had maintained his family including the respondent by providing them necessary subsistence allowance. Had he been sending money from Malaysia to his family, there definitely would have been some proof of such international transmission of money. No such evidence has been produced.

18. Appellant had alleged another instance of cruelty at the hands of respondent when he stated that the respondent along with her children had turned the old mother and brother of the appellant out from the house by forcing them to live in cow shed. Again, except for his bald statement nothing has been proved. Neither the mother of the appellant nor his brother, who allegedly were made to live in cow shed were examined.

19. Appellant had returned from Malaysia on 7.9.2001 and on 22.9.2001, the respondent left her matrimonial home and started living with her parents. In these fifteen days, multiple litigations were started. Appellant also did not lead any convincing evidence to prove that he along with his mother and brother were harassed by the police at the instance of respondent and her family members. In fact, what has transpired from the evidence is

that though some complaints were filed by the appellant but no action was taken thereon. Nothing has further been established to show the credential of the family members of respondent. In absence of such material, it cannot be assumed that the respondent and her family members were so influential that they could manage the Superintendent of Police of the District and Director General of Police of the State.

20. Noticeably, appellant examined himself as his own witness and also examined his brother Ram Pal and a witness named Mehar Chand as PW-4. The evidence on record clearly reveals that appellant and his brother Ram Pal were following the same foot marks. Both of them were married to two real sisters i.e. respondent and her sister. Both the brothers had filed divorce petitions against their respective wives almost on identical grounds. In such situation, it was natural for Ram Pal to support the case of the appellant, as the appellant also appeared as a witness in the divorce case of Ram Pal. As regards the statement of PW-4 Mehar Chand is concerned, much credence cannot be attached to such statement. He had submitted in the general terms that he knew the respondent, who was a quarrelsome nature. She had been fighting with her husband. Such, vague allegations cannot be said to be sufficient to prove the fact of cruelty. More importantly, none of the family members of the appellant supported him by appearing in the witness box.

21. The family disputes are more often than not observed by the close family members. In this view of the matter, adverse inference was liable to be drawn against the appellant for not having produced best evidence.

22. Keeping in view the holistic view after appreciating the entire material on record, it can be said with certainty that appellant had failed to discharge the burden of proof placed on him. No doubt, the standard of proof required in the petition for dissolution of marriage under Hindu Marriage Act is that of preponderance of probability but that does not absolve the person alleging cruelty from discharging his initial burden. Judging the case of the

appellant, on the touch stone of aforesaid legal principles, this Court has no hesitation to hold that the appellant had failed to prove that respondent treated him with such cruelty, which made it impossible for him to live with respondent without being in consistent fear of danger to his health and life.

23. Learned District Judge, Una while passing the impugned judgment has arrived at the conclusion after detailed and thorough consideration of the evidence coupled with all attending and material facts and circumstances of the case.

24. There is yet another factor, which disentitled the appellant from claiming divorce from the respondent on the ground of cruelty. Section 23 (i) (b) of the Act reads as under:-

> *"(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and*
> *(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and".*

25. As held above, appellant had miserably failed to prove that he had been discharging his legal obligation to maintain the respondent and her children. It has been proved on record that the children of the parties, who had grown up in age had not supported the case of the appellant at all. It cannot be assumed that even after attaining majority, they would be in the hands of their mother only. This fact is evident of the neglect of respondent and her children at the hands of appellant. It was also alleged that one of the sons of appellant had even given beatings to the appellant. Though, as per allegation, such act of the son of appellant was at the instance of respondent and her family members but again it is hard to assume that a grown up son would beat his father merely on some instigation.

26. In reply submitted by the respondent, it was clearly mentioned that the appellant had not even given correct names of his children which again reflects the callousness of the appellant towards his children.

27. In light of the above noted facts, the appellant was guilty of not fulfilling his matrimonial obligations toward the respondent and her children. In these circumstances, it can also be assumed that the petition for divorce was filed by the appellant in order to suppress his own wrongs. Thus, there is material on record to hold that appellant was disentitled from claiming the decree of divorce on the ground of cruelty, on account of his own wrong.

28. As regards, the issue of desertion, the same has also been decided against the appellant. Learned trial Court has decided issue No.2 against the appellant on the ground that the respondent in the facts and circumstances of the case cannot be held having necessary animus to leave the company of the appellant. The entire evidence as discussed earlier suggests that it was the appellant, who had failed to maintain and look after the respondent. The allegations of cruelty have also been found to be motivated. In such situation, the respondent cannot be said to have no reasonable ground to leave the company of the appellant. Respondent had every reasonable and probable cause to live separately, as she had right to live with dignity. The appellant had thus failed to prove all necessary ingredients of desertion and on this count also, no fault can be found with the findings returned by the learned trial Court.

29. Lastly, the learned counsel for the appellant has argued with vehemence that marriage between the parties has broken irretrievably and hence should be dissolved by a decree of divorce. It has been submitted that in some of the cases before Hon'ble Supreme Court, the marriages have been dissolved having irretrievably broken down. The appellant cannot derive any benefit from the fact that in some of the cases, Hon'ble Supreme Court has dissolved the marriage between the parties on the ground that there was no

scope to reunite, as no such ground is envisaged under the Act and this Court lacks jurisdiction to pass a decree of divorce on any such ground, which does not find mention in the Act. The appellant otherwise cannot be allowed to raise this argument on account of the fact that he has been proved guilty of commission of material wrongs towards the respondent.

30. In view of the above discussion, the appeal being devoid of any merit is accordingly dismissed. The judgment and decree passed by learned trial Court is affirmed. Pending applications, if any, also stand disposed of. Records be sent back forth.

BEFORE HON'BLE MR. JUSTICE VIRENDER SINGH, J.

Between:

1. GULAB SINGH, S/O LATE SH. BAHADUR SINGH, AGED ABOUT 37 YEARS,

2. JAIPAL,S/O LATE SH. BAHADUR SINGH, AGED ABOUT 32 YEARS,

3. SURESH,S/O LATE SH. BAHADUR SINGH,AGED ABOUT 28 YEARS,

4. SMT. SANTO DEVI,WD/O LATE SH. BAHADUR SINGH, AGED ABOUT 50 YEARS,

ALL RESIDENTS OF VILLAGE LAMBIDHAR,
P.O. MILLAH, TEHSIL SHILLAI, DISTRICT SIRMOUR (HP)

...APPELLANTS

(BY MR. PARKASH SHARMA,
ADVOCATE)

AND

1. ARVIND KUMAR,S/O SH. SITA RAM,R/OVILLAGE BARWAS, SUB TEHSIL KAMROU, TEHSIL PAONTA SAHIB,

DISTRICT SIRMOUR, H.P. (OWNER OF BUS NO. HP-71-2243)

2. KULDEEP SINGH, S/O SH. BHAGAT SINGH, R/O VILLAGE BASOG, TEHSIL SHILLAI, DISTRICT SIRMOUR, H.P. (DRIVER OF BUS NO. HP-71-2243)

3. THE CHOLAMANDALAM,IMS GENERAL INSURANCE COMPANY LTD., 2nd FLOOR, DARI HOUSE, 2NSC BOSE ROAD, CHENNAI – 600 001, THROUGH ITS BRANCH MANAGER.

...RESPONDENTS

(NONE FOR R-1,

MR. KARAN SINGH KANWAR, ADVOCATE, FOR R-2,

MR. VIRENDER SHARMA, ADVOCATE, FOR R-3)

FIRST APPEAL FROM ORDER
No. 331 of 2017
Reserved on: 26.08.2022
Decided on:02.09.2022

Motor Vehicle Act, 1988- Section 173- Death case- Total compensation of Rs.1,82,650/- awarded- Held- Income of the deceased is assessed as Rs.10,000/- per month- Compensation enhanced to Rs. 7,78,450/- along with interest @ 7.5% per annum- Appeal partly allowed. (Para 35, 38, 40, 47)

Cases referred:

Chandra alias Chanda alias Chandraram & another vs. Mukesh Kumar Yadav & others,(2022) 1 SCC 198;

Magma General Insurance Co. Ltd. vs. Nanu Ram alias Chuhru Ram & others, (2018) 18 SCC 130;

National Insurance Co. Ltd. vs. Pranay Sethi & others, 2017 ACJ 2700;

Sarla Verma & others vs. Delhi Transport Corporation & another, 2009 ACJ 1298;

This Appeal coming on for pronouncement of judgment this day, this Court delivered the following:

J U D G M E N T

The appellants detailed and described hereinabove have filed the present appeal under Section 173 of the Motor Vehicle Act, 1988 (hereinafter referred to as 'MV Act') against the award, dated 29th April, 2017, passed by the learned Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (hereinafter referred to as 'the MACT').

2. For the sake of convenience, the parties to the lis are hereinafter referred to as referred by the learned MACT.

3. Claimants No. 1 to 3 are the sons and claimant No. 4 is the widow of Sh. Bahadur Singh, who had died due to the injuries sustained in the road side accident on 7th April, 2014, involving bus No. HP-71-2243.

4. The claim petition was filed against the respondents being the driver, owner and insurer of the ill fated bus.

5. As per the stand of the claimants, deceased Bahadur Singh, alongwith his son Gulab Singh, boarded the bus bearing registration No. HP-71-2243 from Millah to Timbi on 7th April, 2014. The bus in question, at the relevant time, was being driven by its driver in a rash and negligent manner and when the said bus reached near Chamnol (Basog), Tehsil Shillai, the driver could not control the bus, resultantly, the bus had fallen into a deep gorge. In the said accident, Bahadur Singh sustained injuries. He was firstly taken to Civil Hospital Paonta Sahib from where, he was referred to PGI Chandigarh, where he remained admit from 8th April, 2014 to 12th April, 2014. Unfortunately, on 12th April, 2014, Bahadur Singh had expired.

6. According to the claimants, the deceased was employed as a carpenter by one Shri Surat Singh, s/o Sh. Chanan Singh from where he was earning ₹ 15,000/- per month and he was also earning ₹ 10,000/- from

agricultural pursuits. Thus, his income has been stated to be ₹ 25,000/- at the time of his death.

7. On the basis of the above facts, the claimants have sought the compensation of ₹ 15 lakhs alongwith interest @ 12 % per annum from the date of accident till the realization of the whole amount from the respondents.

8. The said claim petition was contested by the respondents.

9. Respondents No. 1 and 2 admitted the factum of accident but denied that there was any negligence on the part of the driver-respondent No. 2, by putting forward the plea of mechanical fault in the vehicle in question, at the time of accident.

10. The insurer has taken the preliminary objections regarding the facts that the driver of the vehicle was not having a valid driving licence; the vehicle was being plied in violation of terms and conditions of the Insurance Policy. The petition is also stated to be bad for non-joinder of necessary parties.

11. On all these submissions, the respondents have prayed for the dismissal of the claim petition.

12. The learned MACT framed the issues in this case on 6th June, 2015. Thereafter, the parties to the lis were directed to adduce the evidence.

13. After the closure of the evidence, the learned MACT has passed the impugned award by awarding the compensation to the tune of ₹ 1,26,000/- as loss of dependency, which has been confined only to claimant No. 4; ₹ 10,000/- as funeral expenses, ₹ 30,000/- as loss of love and affection and ₹ 10,000/- to respondent No. 4 for loss of consortium. Apart from this, a sum of ₹ 6,650/- has also been awarded to the claimants on account of the amount spent by them on the treatment of deceased Bahadur Singh at PGI, Chandigarh. Thus, a total sum of ₹ 1,82,650/- has been awarded to the claimants by the learned MACT.

14. Feeling aggrieved from the said award, the claimants have approached this Court under Section 173 of the MV Act. The bone of contention of the claimants is that the learned MACT has wrongly assessed the income of the deceased, at the time of his death, as ₹ 3,000/- per month. According to the claimants, this amount is a cruel joke for the claimants, as in the year 2014, even an unskilled worker, as per the notification issued by the Government of Himachal Pradesh, Department of Labour and Employment, dated 28th May, 2014, was getting ₹ 5,100/- per month, whereas, the learned MACT has assessed the income of the deceased, less than the minimum wages, for which, an unskilled labourer was entitled.

15. Apart from this, the claimants have assailed the award on the ground that the other statutory benefits have not been given to the claimants.

16. On all these submissions, the learned counsel appearing for the claimants/appellants has prayed that the appeal may kindly be accepted and the compensation amount may kindly be enhanced, as prayed for in the claim petition.

17. The prayer, so made by the learned counsel for the claimants/appellants, has been opposed by the learned counsel appearing for the insurer as well as by the private respondents on the ground that the learned MACT has rightly taken into consideration the amount of earnings of deceased Bahadur Singh at the time of his death. According to them, there is nothing on the file to show that the deceased was a skilled carpenter and was working with the person, whose name has been mentioned in the claim petition.

18. According to the learned counsel appearing for the insurer, in the absence of any documentary evidence, the right approach has been adopted by the learned MACT in this case.

19. I have heard the learned counsel for the parties and perused the record carefully.

20. The MV Act is a beneficial piece of legislation, where the liability of the tort feaser is to be fixed on the principle of preponderance of probability.

21. In this case, the award passed by the learned MACT has not been assailed either by the private respondents or by the insurer. As such, the controversy is confined to the fact as to whether the learned MACT has rightly assessed the monthly earnings of the deceased as ₹ 3,000/- per month and thus, awarded the "just compensation".

22. Claimant No. 1, Gulab Singh, while appearing in the witness box as PW-1, has stated on oath that his father was earning ₹ 10,000/- per month from the agricultural pursuits and ₹ 500/- per day by working as a carpenter. Whatsoever deposed by this witness, in his examination-in-chief, has not been controverted by the respondents in the cross-examination. Interestingly, even suggestion has not been put by respondent No. 3, in this case, that the deceased was not earning the amount so deposed by PW-1 in his examination-in-chief.

23. Their lordships of Hon'ble Supreme Court in a recent judgment in **Chandra alias Chanda alias Chandraram and another versus Mukesh Kumar Yadav and others, (2022) 1 Supreme Court Cases 198,** have held that in absence of the documentary evidence on record, some amount of guesswork is required to be done to assess the income of the person (deceased). Para 9 of the said judgment is reproduced as under:

> *"9. It is the specific case of the claimants that the deceased was possessing heavy vehicle driving licence and was earning Rs. 15,000 per month. Possessing such licence and driving of heavy vehicle on the date of accident is proved from the evidence on record. Though the wife of the deceased has categorically deposed as AW 1 that her husband Shivpal was earning Rs. 15,000 per month, same was not considered only on the ground that salary certificate was not filed. The Tribunal has fixed the monthly income of the deceased by adopting minimum wage notified for the skilled labour in the year 2016. In absence of salary certificate the minimum wage notification*

can be a yardstick but at the same time cannot be an absolute one to fix the income of the deceased. In absence of documentary evidence on record some amount of guesswork is required to be done. But at the same time the guesswork for assessing the income of the deceased should not be totally detached from reality. Merely because the claimants were unable to produce documentary evidence to show the monthly income of Shivpal, same does not justify adoption of lowest tier of minimum wage while computing the income. There is no reason to discard the oral evidence of the wife of the deceased who has deposed that late Shivpal was earning around Rs. 15,000 per month."

24. Judging the facts and circumstances of the present case in the light of the decision of the Hon'ble Supreme Court in **Chandra alias Chanda alias Chandraram's case (supra)**, this Court is of the view that the contribution of the deceased, has not been properly considered by the learned MACT, as the amount of contribution, so assessed by the learned MACT is much below the wages of an unskilled labourer, as per the notification, dated 28th May, 2014, issued by the Government of Himachal Pradesh, Department of Labour and Employment.

25. At the cost of repetition, the factual position, deposed by the claimants, in their pleadings, has evasively been denied by the respondents, in their replies. An evasive denial, amounts to admission, as admittedly, the respondents are under no disability.

26. Learned MACT, in this case, while considering the contribution of deceased Bahadur Singh as ₹ 3,000/- per month, has discarded the oral evidence adduced by the claimants. Apart from this, the learned MACT has also deducted one half of the income of the deceased, on account of his personal expenses on the ground that claimants No. 1 to 3 are major and no more dependent upon heir father Shri Bahadur Singh.

27. The factual position has to be decided on the basis of the pleadings as well as the evidence adduced by the parties before the learned MACT. The

claimants categorically pleaded that the deceased was earning ₹ 10,000/- per month from agriculture and ₹ 15,000/- per month as carpenter. The above facts have been pleaded in para 7 of the claim petition. Respondents No. 1 and 2, in their reply, have denied these facts by pleading that the claimants have put forward the exaggerated amount of the income of the deceased.

28. The similar stand has been taken by respondent No. 3.

29. Admittedly, in this case, the claimants have not submitted any documentary proof to prove the income of deceased Bahadur Singh, at the time of his death. However, the oral evidence is on the file in the shape of statements of claimant No. 1-Gulab Singh as PW-1 and Surat Singh as PW-22.

30. As per the Pariwar Register Ex. PW-1/B, claimants No. 3 and 4 were residing with Shri Bahadur Singh.

31. Since the onus was upon the claimants to prove the income of the deceased at the time of death of Shri Bahadur Singh, as such, claimant No. 1 Gulab Singh, while appearing in the witness box as PW-1, has deposed that his father was doing the agricultural pursuits and was earning ₹ 10,000/- per month. Apart from this, he has deposed that his father was earning ₹ 500/- per day by working as carpenter.

32. To substantiate the said stand, he has deposed that his father was working with one Surat Singh, s/o Sh. Chanan Singh. Neither respondent No. 1 nor respondent No. 3 has bothered to put a specific suggestion to this witness that his father was not earning the amount, as deposed by him in his examination-in-chief. The learned counsel appearing for the insurer has simply put a suggestion that due to the old age, his father was not doing any work of carpenter and agriculture, such suggestion has been denied by claimant No. 1.

33. The claimants have also examined said Surat Singh, s/o Sh. Chanan Singh, with whom the deceased was allegedly working as carpenter,

as PW-22. No doubt, this witness has stated that the deceased was working with him as carpenter and he had paid him ₹ 500/- per day, but, from this witness, the claimants could not probabilize their stand that the deceased was carpenter by profession and was earning ₹ 500/- per day from the said work.

34. If the statement of PW-22 Surat Singh is taken as it is, then it can only be held that deceased Bahadur Singh had occasionally worked as carpenter.

35. From the oral evidence of PW-1 Gulab Singh, which remained uncontroverted, in this case, this Court is of the considered view that the approach of the learned MACT to assess the income of deceased Bahadur Singh as ₹ 3,000/- per month is not sustainable in the eyes of law. Accordingly, the income of deceased Bahadur Singh, at the time of his death, is assessed as ₹ 10,000/-.

36. The learned MACT has deducted one half of the income/contribution of the deceased on account of his personal expenses. This Court is not in agreement with the said approach as in the tradition bound conservative society, it cannot be expected from a person, aged about 64 years, to spend 50% of his earnings as his personal expenses. Claimant No. 3 alongwith his family as well as claimant No. 4 were residing with Sh. Bahadur Singh during his life time, as depicted from the Pariwar Register Ex. PW-1/B.

37. In view of the law laid down by the Hon'ble Supreme Court in **Sarla Verma and others versus Delhi Transport Corporation and another, 2009 ACJ 1298,** which was further approved by the Constitution Bench of the Hon'ble Supreme Court in **National Insurance Co. Ltd. versus Pranay Sethi and others, 2017 ACJ 2700,** this Court is of the view that the learned MACT has wrongly deducted half of the income of the deceased on account of his personal expenses and the deduction should be one-third of the income of the deceased.

38. Deducting one third amount on account of personal expenses, had the deceased been alive, the contribution of deceased Bahadur Singh towards his family comes to ₹ 6,700/- per month.

39. The learned MACT has applied the multiplier of 7, in this case, which does not require any interference by this Court

40. The learned MACT has awarded the amount of ₹ 1,26,000/- on account of loss of dependency, in this case, which is liable to be enhanced to ₹ 6,700/- x 12 x 7 = ₹ 5,62,800/-.

41. Apart from this, the claimants are also held entitled for loss of estate, loss of consortium and funeral expenses.

42. The Hon'ble Supreme Court in **Pranay Sethi's case (supra)** has mandated to enhance the amount to be paid under the conventional heads @ 10% after every three years.

43. The amount of compensation for loss of consortium, in this case, has been given to claimant No. 4 only. Such approach of the learned MACT is also not sustainable in the eyes of law.

44. The Hon'ble Supreme Court in **Magma General Insurance Company Limited versus Nanu Ram alias Chuhru Ram and others, (2018) 18 Supreme Court Cases 130,** has enhanced the scope of awarding compensation under the head 'loss of consortium'. Paras 21 to 24 of the said judgment are reproduced as under:

> *"21. A Constitution Bench of this Court in Pranay Sethi dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses `spousal consortium', `parental consortium', and `filial consortium'. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse:*

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation".

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under `loss of consortium' as laid down in Pranay Sethi (supra). In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium."

45. In view of the above fact, the claimants are held entitled for a sum of ₹ 16,500/- under the head 'loss of estate' and ₹ 16,500/- under the head 'funeral expenses'. Apart from the above, the claimants are also held entitled for a sum of ₹ 44,000/- each under the head 'parental consortium' (claimants No. 1 to 3) and 'spouse consortium' (claimant No. 4).

46. No interference is required to be made to the amount awarded by the learned MACT on account of the treatment of deceased Bahadur Singh before his death in PGI, Chandigarh.

47. Thus, the claimants are held entitled to compensation to the tune of ₹ 5,62,800/- + ₹ 16,500/- + ₹ 16,500/- + ₹ 1,76,000/- + ₹ 6,650/- = ₹ 7,78,450/- alongwith interest @ 7.5% per annum, as awarded by the learned MACT, from the date of filing of the claim petition till the realization of the whole amount from the insurer as the liability has been fastened upon the insurer by the learned MACT, which has not been assailed by the insurer.

48. The amount of compensation is apportioned as under:

(i) Claimants No. 1 to 3 = 10% each.

(ii) Claimant No. 4 = 70%.

49. The appeal is partly allowed in the aforesaid terms. No order as to costs.

50. Record be sent back.

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

Between:-

BAJAJ ALLIANZ GENERAL INSURANCE COMPANY LTD. HAVING ITS REGISTERED AND HEAD OFFICE AT GE PLAZA, AIRPORT ROAD, YERWADA, PUNE-411006, THROUGH ITS SENIOR EXECUTIVE LEGAL, SH. SACHIN OHRI, (AUTHORISED OFFICER) HAVING ITS REGIONAL OFFICE AT SCO NO. 14, FOURTH FLOOR, NEAR SHIRAZ-II, SECTOR-5, PUNCHKULA (HARYANA).

…APPELLANT

(BY SH. AMAN SOOD, ADVOCATE.)

AND

1. SMT. SHAKUNTALA DEVI, WIDOW OF LATE SH. TOTA RAM,
2. KUMARI PREETI (MINOR) DAUGHTER OF LATE SH. TOTA RAM,
3. KUMARI PRIYA (MINOR), DAUGHTER OF LATE SH. TOTA RAM,
4. KUMARI PRATIBHA (MINOR) DAUGHTER OF LATE SH. TOTA RAM,

RESPONDENTS No.2 TO 4, THROUGH THEIR NATURAL MOTHER AND GUARDIAN SMT. SHAKUNTALA DEVI, RESPONDENT NO.1,
ALL RESIDENTS OF VILLAGE CHAKHTI, POST OFFICE THELI CHAKHTI, SUB TEHSIL NANKHARI, DISTRICT SHIMLA, H.P.

..RESPONDENTS/CLAIMANTS.

5. SH. HOSHIYAR SINGH SON OF SH. TOTA RAM, RESIDENT OF VILLAGE CHUHA BAGH, POST OFFICE KHANERI, TEHSIL RAMPUR,DISTRICT SHIMLA (H.P.), (OWNER OF VEHICLE No. HR-37B-2594).

…RESPONDENT.

(BY SH. B. N. SHARMA, ADVOCATE FOR R-1 TO R-4).
SH. KAMLENDER BHARDWAJ, ADVOCATE FOR R-5).

FAO (WC)
No. 32 of 2013
Reserved on: 30.08.2022
Decided on: 05.09.2022

Workmen's Compensation Act, 1923- Section 4- Ld. Commissioner calculated the compensation by taking the income as Rs.8,000/- per month- Held- Ld. Commissioner erred in calculating the compensation as the Act provided capping of monthly wage of an employee at Rs.4,000/- a person becomes entitled to compensation on the date on which cause of action accrued- Appeal disposed of accordingly. (Para 11 to 14)

Cases referred:

Oriental Insurance Co. Vs Khajuni Devi and others (2002) 10 SCC 567;
Partap Narain Singh Deo Vs Siriniwas Sabata and others (1976) 1 SCC 289;
Ved Prakash Vs Premi Devi (1997) 8 SCC 1;

This appeal coming on forpronouncement of judgmentthis day, the Court deliveredthe following:

J U D G M E N T

By way of instant appeal, the appellant has assailed award dated 09.08.2012 passed by learned Commissioner under the Employee's Compensation Act, Rampur Bushehr, District Shimla, H.P. in case No.5 of 2008/32-2 of 2012.

2. Brief facts necessary for adjudication of the appeal are that respondents No.1 to 4 herein (hereinafter referred toas "claimants") filed application for grant of compensation under the Employee's Compensation Act, 1923 (for short 'Act') on account of death of Sh. Tota Ram in a road accident. The claimants were the legal heirs of deceased Sh. Tota Ram, who was employed as driver of vehicle No. HR-37B-2597 owned by respondent No.5 herein (hereinafter referred to as "owner". The vehicle was insured with the appellant herein (hereinafter referred to as the "insurer"). It was alleged that Sh. Tota Ram had died in the course of his employment with the owner while driving the vehicle of the owner on his instructions. The monthly salary of the deceased was alleged to be Rs.5,000/-. It was also claimed that deceased was getting Rs.100/- per day as subsistence allowance in addition to his monthly salary. The deceased was stated to be 31 years old at the time of death.

3. In response, the owner admitted that the deceased was his employee. However, as per the owner deceased was being paid Rs.4000/- per month as salary and Rs.50/- per day as died money.

4. The insurer contested the claim on the ground of maintainability. The relationship of employer and employee between the owner and deceased was denied. It was alleged that the deceased was under influence of liquor at the time of accident and claimed exclusion under the insurance policy. In addition, various other breaches of terms and conditions of insurance policy were alleged. The claim of the claimants towards the income of deceased was also denied.

5. The learned Commissioner framed the following issues:

i) Whether the deceased was workman within the meaning of workman's compensation Act? OPP
ii) Whether the deceased died during the course of employment with respondent No.1? OPP
iii) Whether the deceased was getting wages, as claimed? OPA
iv) Whether the applicants are entitled to get the compensation as claimed? OPP
v) Relief.

6. Issues No. 1 to 4 were decided in affirmative and an award of Rs.16,64,076/- was passed in favour of the claimants. The awarded amount was calculated under the following heads:

(i) *Age 31 years, factor 205.95, which comes to Rs.205.95x4,000 =Rs.8,23,800/-.*
(ii) Simple interest @ 12% from 08.04.2008, till date, comes out to Rs.4,28,376/-.
(iii) Penalty @ 50% comes out to Rs.4,11,900/-.
(iv) Total amount comes out to Rs.16,64,076/- (Sixteen lacs sixty-fourthousand and seventy-six) only.

7. The learned counsel for the appellant contended that the award passed by learned Commissioner required interference by this Court as the same was based on wrong premise. He contended that the accident had taken

place on 07.04.2008 and as per second explanation appended to Section 4 (1) of the Act, the monthly wages were to be confined to the maximum of Rs.4,000/- per month notwithstanding the fact that the workman was proved to have been earning amount more than that. On the strength of such submission, it is further contended that the calculation of the compensation made by learned Commissioner was patently wrong. It should have been calculated by taking the monthly income of deceased at Rs.4,000/- and after dividing it by two, it was to be multiplied with relevant factor of 205.95. Learned counsel for the appellant has further contended that learned Commissioner has also erred in awarding the interest from the date of accident, whereas it would have been awarded from the date of compensation.

8. On the other land, learned counsel for the claimants has supported the impugned award.

9. Vide order dated 03.07.2013, the appeal was admitted on the following substantial questions of law: -

1. Whether the award/judgment as passed by the learned Commissioner below is sustainable, as the same has been passed in contravention and violation of Section 4 (a) and Explanation-II of Section 4 of the Workmen's Compensation Act, 1923 (Act No. 8 of 1923), especially when the amount of compensation payable to the claimants on account of death of deceased Tota Ram is to be calculated on the basis of monthly wages of the deceased and which in any case cannot exceed to or more than Rupees 4,000/- when the accident has occurred on 07.04.2008?
2. Whether the learned Commissioner below is justified while passing the impugned award and awarding interest @ 12% p.a. especially when the Hon'ble Supreme Court in such and similar situated cases had awarded interest @ 7.5% p.a. from the date of the petition and not from the date of accident?
3. Whether the learned Workmen Commissioner below was justified in passing the impugned award/judgment and granting compensation from the date of accident against the appellant especially when the date of adjudication of claim and amount payable to the claimant is the date of filing of the petition and not the date of the accident?

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

11. As regards the first substantial question of law, as noted above, the question arises whether the Commissioner had wrongly calculated the compensation payable to the claimants by taking the income at Rs.8,000/- per month ? The answer, without any doubt, is "No". The date of accident is 07.04.2008 and at that stage, the second proviso to Section 4 (1) of the Act, provided for capping of monthly wages of an employee at Rs.4,000/- even where an employee was able to prove the payment of monthly wages in excess of Rs.4,000/-. This was the situation prior to 18.01.2010, whereafter by virtue of amending Act 45 of 2009 Explanation-II to Section 4 was deleted. Thus, the learned Commissioner clearly erred in calculating the compensation payable to claimants by ignoring the provisions of second Explanation to Section 4 of the Employee's Compensation Act. The first substantial question of law is answered accordingly.

12. It is no more *res integra* 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 07.04.2008 i.e. the date of accident. Reference can be made to the judgment of the Hon'ble Supreme Court in **Partap Narain Singh Deo Vs Siriniwas Sabata and others (1976) 1 SCC 289** and also **Oriental Insurance Co. Vs Khajuni Devi and others (2002) 10 SCC 567**. Further, the liability of interest has to be borne by the insurer as the said liability is attached to the amount of awarded compensation under the Act, which the insurer is liable to indemnify and as necessary corollary the liability to pay interest would run from the date on which right to receive compensation accrues. Reference in this regard can be made to the judgment passed by the Hon'ble Supreme Court in **Ved Prakash Vs Premi Devi (1997) 8 SCC 1.** The third substantial question of law is answered accordingly.

13. As regards the second substantial question of law, as noticed above, the Act provides for payment of simple interest at the rate of 12% per annum. By virtue of its provision contained in Section 4A of the Act, the second substantial question of law is accordingly answered.

14. The impugned award is accordingly modified and it is held that the claimants are entitled to following amounts:

(i) Compensation : Rs.4000-:- 2 x205.95= Rs.4,11,900.00
(ii)Simple interest @ 12% P.A.from 8.4.2008
Till date of Award. = Rs.2,14,188.00

(iii) Penalty @ 50% = Rs.2,05,950.00

Total **Rs. 8,32,038.00**

(iv) Simple interest @ 12% P.A. on
Rs.4,11,900/- from date of Award
Till date of payment/deposit.

The liability to pay the amount of compensation and interest shall be borne by the insurer, whereas the liability to pay the amount of penalty shall be on the owner.

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

BEFORE HON'BLE MR. JUSTICE A.A. SAYED, CJ AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

SHESH RAM S/O SH. BAMBRIA RAM,R/O VILLAGE CHHAPRO, PO BASSI,TEHSIL JOGINDER NAGAR,DISTRICT MANDI, HIMACHAL PRADESH, PRESENTLY WORKING AS CONSTABLE NO.562, POLICE STATION PADHAR, DISTRICT MANDI, HIMACHAL PRADESH

……APPELLANT

(BY MR. J.R. POSWAL, ADVOCATE)

AND

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

2. THE DIRECTOR GENERAL OF POLICE,
   NIGAM VIHAR, HIMACHAL PRADESH,
   SHIMLA-2

3. ADDITIONAL DIRECTOR GENERAL OF POLICE,
   NIGAM VIHAR, HIMACHAL PRADESH,
   SHIMLA-2

4. DEPUTY SUPERINTENDENT OF POLICE
   (ENQUIRY OFFICER), 3RD HP ARMED
   POLICE BATTALION, PANDOH,
   DISTRICT MANDI, HIMACHAL PRADESH

……RESPONDENTS

(BY MR. YUDHVIR SINGH THAKUR, DEPUTY ADVOCATE GENERAL)

LETTERS PATENT APPEAL
No.390 of 2011
Decided on:22.09.2022

Letters Patent Appeal- Appellant's petition assailing imposition of penalty of forfeiture of two years' service for the purpose of future increments dismissed by the learned Single Judge- Letters patent appeal – Held- Appellant has not proved any prejudice caused to him by the alleged non supply of inquiry report- Penalty cannot be said to be disproportionate to the charges framed against him- Appeal dismissed. [Para 4(i), 4(ii)]

Cases referred:

B.C. Chaturvedi Vs. Union of India (1995) 6 SCC 749;
ECIL Vs. B. Karunakar (1993) 4 SCC 727;
Haryana Financial Corporation and another vs. Kailash Chandra Ahuja, (2008) 9 SCC 31;
Lucknow Kshetriya Gramin Bank Vs. Rajendra Singh (2013) 12 SCC 372;
Om Kumar Vs. Union of India (2001) 2 SCC 386;
Uttrakhand Transport Corporation and others Vs. Sukhveer Singh, (2018) 1 SCC 231;

This appeal coming on for hearing this day, ***Hon'ble Mr. Justice A.A. Sayed,*** *delivered the following:*

J U D G M E N T

Appellant's petition assailing imposition of penalty of forfeiture of his two years' service permanently for the purpose of future increments has been dismissed by the learned Single Judge. Aggrieved, the instant letters patent appeal has been instituted by him.

2. Facts:-

2(i). The appellant was posted in the security duty alongwith other personnel at the residence of the then Hon'ble Chief Minister of Himachal Pradesh on 18.02.2002. He was assigned sentry duty at Post No.3. On that day, an intruder breached the security, entered the compound, covered some distance and escaped un-apprehended.

2(ii). A preliminary inquiry was conducted in the matter to order to establish misconduct. On receipt of the preliminary inquiry report, a joint

regular departmental inquiry was ordered against the appellant and some other officials deployed in the security duty. **2(iii).** The inquiry proceedings were held. The appellant participated in the inquiry. The inquiry officer submitted his report holding the delinquent officials guilty of charges. The disciplinary authority agreed with the findings of inquiry officer. Show cause notice was served upon the appellant for forfeiture of his seven years' service permanently for the purpose of future increments. On consideration of the entire material, the disciplinary authority vide order dated 27.10.2002, found the appellant guilty of negligence amounting to grave dereliction of duty and professional incompetency, however, taking lenient view of the matter two years of appellant's service were forfeited permanently for the purpose of his future increments.

2(iv). The appellant preferred appeal against the order passed by the disciplinary authority. The appellate authority rejected the appeal vide speaking order passed on 02.09.2003. The revision petition filed by the appellant was dismissed by the Additional Director General of Police, Himachal Pradesh under a detailed order passed on 10.06.2004. The mercy appeal preferred by the appellant was also turned down by the Director General of Police, Himachal Pradesh on 16.12.2004.

In the aforesaid background, the appellant instituted the original application before the erstwhile H.P. Administrative Tribunal seeking quashing of the orders dated 16.12.2004 passed by the Director General of Police, H.P. confirming the orders dated 10.06.2004 and 02.09.2003, imposing penalty of forfeiture of two years of appellant's service permanently for the purpose of increments. Learned Single Judge did not find merit in the petition. The same was dismissed on 21.02.2011. Feeling aggrieved, the appellant has preferred the present letters patent appeal.

3. The only points raised by learned counsel for the appellant are that :- **(i)** the copy of the inquiry report was not supplied to the appellant,

which has vitiated entire inquiry proceedings and consequent orders passed thereupon ; **(ii)** the penalty imposed upon the appellant was disproportionate to the charges levelled against him.

4. The above points raised by the appellant are being discussed hereinafter:-

4(I). Non-supply of inquiry report:-

Insofar as alleged non-supply of copy of the inquiry report is concerned, we find that the ground is factually incorrect. In reply to para 6(i) of the original application, the respondents have categorically stated that the appellant was given copy of the inquiry report. No rejoinder controverting this averment has been filed by the appellant. The appellant had preferred appeal, revision and mercy appeal against the imposition of penalty upon him. He had objected to the findings returned by the inquiry officer in his report. This presupposes that he had the copy of inquiry report. The appellant had participated in the inquiry proceedings. He was afforded due opportunity to cross examine the witnesses and to lead his evidence. During hearing, learned counsel for the appellant did not even contend infraction of any procedure in conduct of the inquiry proceedings. Even otherwise, it is well settled that non supply of inquiry report is in breach of natural justice but failure to supply inquiry report to the delinquent official would not ipso facto result in declaring the proceedings being null and void. It is for the delinquent employee to plead and prove that non-supply of inquiry report caused prejudice to him and resulted in miscarriage of justice. If he is unable to satisfy the Court on that point, the order of punishment cannot automatically be set aside **[*re: Haryana Financial Corporation and another* Versus *Kailash Chandra Ahuja, (2008) 9 SCC 31*]**.

In **(2018) 1 SCC 231 Uttrakhand Transport Corporation and others** Vs. **Sukhveer Singh,** the High Court had relied upon **(1993) 4 SCC 727 ECIL** Vs. **B. Karunakar** and set aside the dismissal order on the ground

that reasonable opportunity was denied to the employee by not furnishing the inquiry report alongwith show-cause notice. The Apex Court set aside the judgment of the High Court on the ground of no prejudice having been caused to the delinquent and held as under :-

> *"7. …….. Though, it was necessary for the Appellants to have supplied the report of the inquiry officer before issuance of the show cause notice proposing penalty, we find no reason to hold that the Respondent was prejudiced by supply of the inquiry officer's report along with the show cause notice. This is not a case where the delinquent was handicapped due to the inquiry officer's report not being furnished to him at all."*
>
> *8. In ECIL Hyderabad & Ors. v. B. Karunakar & Ors. (supra) this Court, while considering the effect on the order of punishment when the report of the inquiry officer was not furnished to the employee and the relief to which the delinquent employee is entitled, held as under:*
>
> > *"30….[v] ……..When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an*

"unnatural expansion of natural justice" which in itself is antithetical to justice.

9. The question of the relief to be granted in cases where the report of the inquiry officer was not supplied to the delinquent employee came up for consideration of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja in which it was held as follows:

> *21. From the ratio laid down in B. Karunakar [(1993) 4 SCC 727] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and 2 (2008) 9 SCC 31 the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."*

After a detailed examination of the law on the subject, this Court concluded as follows:

> *44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show "prejudice". Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down.*

10. It is clear from the above that mere non-supply of the inquiry report does not automatically warrant re-instatement of the delinquent

employee. It is incumbent upon on the delinquent employee to plead and prove that he suffered a serious prejudice due to the non-supply of the inquiry report. We have examined the writ petition filed by the Respondent and we find no pleading regarding any prejudice caused to the Respondent by the non-supply of the inquiry report prior to the issuance of the show cause notice. The Respondent had ample opportunity to submit his version after perusing the report of the inquiry officer. The Respondent utilised the opportunity of placing his response to the inquiry report before the disciplinary authority. The High Court committed an error in allowing the writ petition filed by the Respondent without examining whether any prejudice was caused to the delinquent employee by the supply of the inquiry officer's report along with the show cause notice. We are satisfied that there was no prejudice caused to the respondent by the supply of the report of the inquiry officer along with the show cause notice. Hence, no useful purpose will be served by a remand to the court below to examine the point of prejudice.

11. The Respondent contended that the punishment of dismissal is disproportionate to the delinquency. It is submitted that he was working as a driver and the irregularity in issuance of tickets was committed by the conductor. We are in agreement with the findings of the inquiry officer which were accepted by the disciplinary authority and approved by the appellate authority and the labour court that the Respondent had committed the misconduct in collusion with the conductor. It is no more res integra that acts of corruption/misappropriation cannot be condoned, even in cases where the amount involved is meagre. (See - U.P.SRTC v. Suresh Chand Sharma (2016) 6 SCC 555)".

From the facts of instant case, as observed earlier, supply of inquiry report to the appellant can be safely inferred. Even otherwise, appellant has not proved any prejudice caused to him by the alleged non supply of inquiry report.

The point is answered accordingly against the appellant.

4(II). Disproportionate penalty:-

In **Civil Appeal No. 2707 of 2022**, decided by Hon'ble Apex Court on 20.04.2022 **(Anil Kumar Upadhyay** Vs. **The Director General, SSB and others)**, learned Single Judge had interfered with the order of

punishment imposed by the disciplinary authority inter-alia on the ground that the same was disproportionate to the charges and set it aside. The Division Bench of the High Court restored the punishment imposed by the disciplinary authority. The question before the Hon'ble Apex Court inter-alia was whether the learned Single Judge was justified in interfering with the order of punishment imposed by the disciplinary authority on the ground of same being disproportionate in the facts of the case where delinquent official was charged with indiscipline and misconduct leading to compromising security of occupants of 'Mahila Barrack'. It was observed that when disciplinary authority considered it appropriate to punish him with penalty of 'removal from service', which is confirmed by the appellate authority, thereafter it was not open for the learned Single Judge to interfere with the order of punishment passed by the disciplinary authority. Relying upon **(2001) 2 SCC 386 Om Kumar** Vs. **Union of India, (1995) 6 SCC 749 B.C. Chaturvedi** Vs. **Union of India, (2013) 12 SCC 372 Lucknow Kshetriya Gramin Bank** Vs. **Rajendra Singh,** it was *held that question of quantum of punishment in disciplinary matters is primarily for disciplinary authority and jurisdiction of High Courts under Article 226 of Constitution or of Administrative Tribunals is limited and is confined to applicability of 'Wednesbury principles.' When a statute gave discretion to an administrator to take a decision, scope of judicial review would remain limited. Interference with punishment order on ground of disproportionate to the charges was not permissible unless punishment imposed was shocking to the conscience of the Court.*

In the instant case, it is an admitted position that the appellant was deployed to guard the official residence of the then Hon'ble Chief Minister, Himachal Pradesh. It is also an admitted position that a person breached the security, entered the official residence and escaped without being apprehended. He was not even given a chase. It was a case of serious dereliction of duty on the part of the appellant. The appellant was deputed for

discharging very sensitive duty. He was found utterly negligent. Such negligence cannot be overlooked. The disciplinary authority had proposed imposing penalty of forfeiture of seven years of service of the appellant permanently for the purpose of increments, however, taking a lenient view of the matter, only two years of appellant's service were forfeited permanently for the purpose of future increments. All the authorities i.e. the appellate authority, the revisional authority and the Director General of Police, H.P. while deciding appeal, revision and mercy appeal of the appellant, have considered the matter in detail and passed speaking orders confirming the punishment imposed by disciplinary authority. In the facts and circumstances of the case, the penalty imposed upon the appellant cannot be said to be disproportionate to the charges levelled and proved against him.

The point is answered accordingly against the appellant.

No other point was urged.

In view of the above, we do not find any ground to interfere in the impugned order dated 21.02.2011 passed by the learned Single Judge, dismissing the petition filed by the appellant. The present appeal is accordingly dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

1. SH. SUMAN DAWAR, AGED ABOUT 48 YEARS,
2. SHRI VARUN DAWAR
   BOTH SONS OF LATE SH. VARESH DAWAR, C/O 5, NORTH BROOKE TERRACE, THE MALL, SHIMLA, H.P.

……. PETITIONERS/TENANTS

(BY MR. ANUJ GUPTA, ADVOCATE)

AND

SH. SURINDER SINGH KHERA S/O LATE SH. BACHHITER SINGH, R/O 5, THE MALL, SHIMLA.

.....RESPONDENT/LANDLORD

(M/S RAJEEV SAXENA AND RAHUL MAHAJAN, ADVOCATES)

CIVIL REVISION
NO. 156 OF 2019
Reserved on:27.06.2022
Decided on:28.07.2022

H.P. Urban Rent Control Act, 1987- Section 24(5)- Eviction petition allowed on the ground of bonafide requirement for rebuilding and reconstruction – Held- Approval of the plan of reconstruction by the statutory authority is not a condition precedent for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of the Rent Act- Petition dismissed. (Para 22)

Cases referred:

Hari Dass Sharma Vs. Vikas Sood and others (2013) 5 SCC 243;

Jagat Pal Dhawan Vs. Kahan Singh (dead) by LRs and others, (2003)1 SCC 191;

Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel, latest HLJ 2015 (HP)1096;

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

J U D G E M E N T

By way of this revision petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act (hereinafter to be referred as 'the Rent Act'), the petitioners/tenants (hereinafter to be referred as the 'tenants') have challenged both the order passed by leaned Rent Controller (1), Shimla, in Rent Petition No. 4-2 of 2007, titled as Surender Singh Khera Vs. Sh. Varesh Dawar, dated 17.02.2014, in terms whereof, the eviction petition filed under Section 14 of the Rent Act by the respondent/ landlord (hereinafter to be referred as the 'landlord'), has been allowed and the tenants have been ordered to be evicted on the ground of *bonafide* requirement of the landlord for the purpose of rebuilding and reconstruction of the demised premises, which reconstruction as per learned Rent Controller cannot be carried out without

vacating the demised premises as reconstruction has to be done after demolition of the building and also against the judgment passed by learned Appellate Authority in Rent Appeal No. 31-S/14 of 2015/14, titled as Sh. Suman Dawar and another Vs. Sh. Surinder Singh Khera and another, dated 09.09.2019, in terms whereof, the appeal preferred by the tenants against the order of eviction stands dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the landlord filed an eviction petition qua the demised premises known as '5 North Brooke Terrace, The Mall Shimla', against the tenants on the ground that the demised premises was old and its condition was not good. The landlord required the same for rebuilding and reconstruction, which is not possible without the building being vacated. According to the landlord, the proposed construction was not only to increase the value of the property as it was situated in the heart of the city but the same would also have had enhanced the income of the landlord.

3. The petition was resisted by the tenants on the ground that the demised premises was not in a dilapidated condition and was in a perfectly habitable condition. According to the tenants, there was no *bonafide* requirement of the landlord for the purpose of reconstruction and rebuilding. The landlord was already running a shop which is below the demised premises, which belied the claim of the landlord that the condition of the building was not good. The tenants also challenged the status of the petitioner therein as landlord of the demised premises, as according to them, the alleged purchase was in violation of the H.P. Tenancy and Land Reforms Act, 1972. It was also alleged by the tenants that the eviction petition lack material particulars and construction was not permissible in the area where the demised premises was situated.

4. The stand of the tenants was denied by way of rejoinder by the landlord who reiterated his stand and claimed that rebuilding and

reconstruction was permissible on old lines in the area where the demised premises was situated.

5. On the basis of pleadings of the parties, learned Rent Controller framed the following issues:-

"1. Whether the premises in question under the occupation and tenancy of respondent are *bonafide* required by the petitioner for the purpose of re-building and reconstruction and that such re-building and reconstruction cannot be carried out without the rented premises being vacated by the respondent? OPA.
2 Whether the present application is not maintainable? OPR
3 Whether there is no relationship of landlord and tenant between the applicant and respondent? OPR
4 Whether the applicant is stopped from filing the present application from his own acts, deeds and commissioners and acquiescence? OPR
5 Relief.

6. In terms of order dated 17.02.2014, the issues so framed were decided by learned Rent Controller as under:-

Issue No. 1 : Yes.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Relief : The petition is allowed as per operative pat of the order."

7. While allowing the petition, learned Rent Controller held that though the tenants had disputed relationship of landlord and tenant in the reply but when one of the tenants entered into the witness box as RW-5, he clearly admitted that the eviction petitioner was the landlord. Learned Rent Controller further held that in order to prove that demised premises were in a dilapidated condition and required reconstruction, the landlord had examined AW-4 Sh. Rajiv Verma, an Engineer by profession, who had inspected the premises in question. By relying upon the evidence of this witness, learned Rent Controller held that the evidence of this witness qua dilapidated

condition of the building, which remained consistent on record and replies given by said witness in his cross examination also demolished the arguments of the respondent that this witness had not actually inspected the premises in question, rather prepared his report at the instance of the landlord. Learned Rent Controller held that in addition, the tenants have examined RW-2 Surender Singh, Druaghtsman of M.C. Shimla and in his cross examination, this witness had proved two documents, i.e. Ext. P-X and P-Y, which were the inspection reports of the building conducted by the officers of the M.C. Shimla and the reports supported the contention of the eviction petitioner that the building in question was in a dilapidated condition. Learned Rent Controller also held that landlord had demonstrated before the Court his financial capacity to undertake demolition and reconstruction of the demised premises and as far as the issue of the tenants that permission sought for reconstruction of the building by the landlord stood rejected by the Municipal Corporation, Shimla, is concerned, said order was appealable and the landlord had the option to get the order of rejection corrected by way of an appeal or the landlord may apply to the authority with the prayer to reconsider but it was not incumbent upon the landlord to prove that he had obtained necessary sanction for the purpose of reconstruction from the competent authority for proving his bonafide for eviction of the tenants on the ground of reconstruction and rebuilding. Learned Rent Controller relied upon the judgment of Hon'ble Supreme Court in Civil Misc. Appeal No. 47-S/14 of 2003, decided on 08.07.2013, titled as R.S. Puran Mull Trust Vs. M/s Dyal Sons, in support of its findings.

8. In appeal, these findings were upheld by learned Appellate Authority. It was reiterated by the learned Appellate Authority that the landlord had financial resources to carry out reconstruction, as was clear from statement of accounts Ext. CW-1/F & Ex. AW-1/G and this proved the *bonafide* of the landlord and further sanction of the plan was not the

requirement of law for getting the eviction order. With regard to the issue raised by the tenants that there was common wall of the demised premises with adjoining building and therefore, the eviction order could not be passed, learned Appellate Court held that the same was for the landlord to settle with neighbours as to how he will get the common wall constructed but this was not a condition precedent for ordering the eviction. In this regard, learned Appellate Authority relied upon the judgment of the Hon'ble Supreme Court in *Jagat Pal Dhawan Vs. Kahan Singh (dead) by L.Rs. & others*, (2003) 1 SCC 191.

9. Feeling aggrieved, the tenants have filed the present revision petition.

10. Mr. Anuj Gupta, learned Counsel for the petitioners/ tenants has challenged the order of eviction as well as judgment passed by the learned Appellate Authority mainly on the ground that in the absence of there being a valid sanction for reconstruction granted by Municipal Corporation in favour of the landlord, the order of eviction passed by learned Rent Controller, as upheld by learned Appellate Authority, was not sustainable. He argued that the plans for reconstruction as submitted by the landlord were rejected by the Municipal Corporation as far back as in the year 2013 and till date neither any appeal stood preferred by the landlord against the rejection of the proposed plans not he had resubmitted any plan for reconstruction. Learned Counsel also relied upon the provisions of Sections 242 and 244 of the Municipal Corporation Act, 1994 and argued that in view of said statutory provisions also, the order and judgment under challenge were not sustainable. Learned Counsel also argued that the tenants were willing to give undertaking that they would vacate the demised premises immediately on expiry of two months as from the date of valid sanction being accorded in favour of the landlord by the statutory authority. No other point was argued assailing the

order of eviction and the judgment passed by learned Appellate Court on behalf of the petitioners.

11. On the other hand, Mr. Rajiv Saxena, learned Counsel for the respondent-landlord vehemently argued that there is no merit in the present petition for the reason that the contention of the tenants that the order and judgment under challenge are not sustainable for lack of valid reconstruction sanction is without any legal basis, as it is settled law that for the purpose of passing an eviction order, it is not a condition precedent that the landlord should have a valid sanction in his hand. Learned Counsel further submitted that otherwise also as the only argument raised by the petitioners herein is with regard to there not being any valid sanction in favour of the landlord, this means that the decision passed by the learned Courts below with regard to the property being in dilapidated condition which required reconstruction and which reconstruction was not possible without the vacation of the demised premises stood admitted by the tenants. Leaned Counsel further submitted that the prayer of the petitioners/tenants that they be permitted to continue to occupy the premises with the condition that they would vacate the same immediately on expiry of two months as from the date sanction is accorded in favour of the landlord by the competent authority, is not acceptable to the landlord for the reason that the use and occupation charges which were being paid by the tenants are extremely on the lower side and no offer has come forth from the petitioners/tenants that they are willing to pay use and occupation charges on the basis of rates as have been fixed by this Court in order passed with regard to properties which are less advantageously situated as the present demised premises is. Accordingly, a prayer has been made for dismissal of the present petition.

12. I have heard learned Counsel for the parties and carefully gone through the pleadings as well as documents appended therewith, including the order and judgment under challenge.

13. As primarily, two issues have been raised by learned Counsel for the petitioners in the present revision petition, i.e., (a) the impugned order and judgment being bad for want of valid sanction in favour of the landlord for reconstruction of the demised premises by the statutory authority; and (b) the contention that the petitioners/tenants be permitted to occupy the demised premises till the grant of valid sanction in favour of the landlord by the statutory authority. I will deal with these issues separately.

14. Coming to the only challenge which has been made before this Court with regard to non-sustainability of the order of eviction as well as the judgment passed by the Appellate Authority of there not being a valid sanction by the Municipal Corporation, Shimla, in favour of the landlord, this Court will first refer to the relevant statutory provisions as also the case law relied upon in this regard by the parties. Section 14 of the Rent Act *inter alia* provides that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in the case of a residential and non-residential building, if it becomes unsafe and unfit for human habitation or is required *bonafide* by him for carrying out repairs which cannot be carried out without the building or rented land being vacated or the building or rented land is required *bonafide* by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alteration cannot be carried out without the building or rented land being vacated.

15. Section 14(3)(c) of the Himachal Pradesh Urban Rent Control Act, 1987, reads as under:-

> *"14(3)(c). In the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or it has become unsafe or unfit for human habitation or is required bona fide by him for carrying out repairs which cannot be carried out without*

> *the building or rented land being vacated or that the building or rented land is required bona fide by him for the purpose of building or re-building or making thereto any substantial additions or alternations and that such building or re-building or addition or alternations cannot be carried out without the building or rented land being vacated."*

16. On the issue as to whether the premises in question under the occupation and tenancy of the tenants was *bonafide* required by the landlord for the purpose of rebuilding and reconstruction and the same could not be carried out without the rented premises being vacated by the tenants, as of now, there are concurrent findings in favour of the landlord and against the tenants returned by the learned Rent Controller, as upheld by the learned Appellate Authority. It is reiterated that during the course of arguments, these findings have not been agitated by the learned Counsel. The ground of challenge as was argued before this Court was absence of a valid sanction qua reconstruction of the demised premises. It is pertinent to mention at this stage itself that as far as the scheme of the H.P. Urban Rent Control Act in general and Section 14 thereof in particular is concerned, there is no condition precedent contained in the statutory provisions that an eviction petition on the ground referred to hereinabove is not maintainable in the absence of there being a valid sanction of reconstruction in favour of the landlord or that an order of eviction cannot be passed in the absence of any such approval/sanction.

17. In the State of Himachal Pradesh, there is in force 'the Himachal Pradesh Municipal Corporation Act, 1994'. It has been enacted to consolidate, amend and replace the laws relating to the establishment of Municipal Corporations for certain Municipal areas in the State of Himachal Pradesh. Chapter 14 of the said act deals with regulations. This Chapter contains sections 241 to 260 of the Act. Section 242 of the M.C. Act prohibits erection of building without sanction by providing that no person shall erect or

commence to erect any building or execute any of the works specified in Section 244, except with the previous sanction of the Commissioner. Section 244 of the same deals with applications for additions to, or repairs of building and provides that the same cannot be done without the sanction of the Commissioner. Thus, in view of the said provisions of the Municipal Corporation Act, it is a fact that the reconstruction of the demised premises cannot be carried out without the permission of the Commissioner.

18. Hon'ble Supreme Court of India in ***Jagat Pal Dhawan Vs. Kahan Singh (dead) by LRs and others***, (2003)1 SCC 191, while interpreting Section 14(3)(c) of the H.P. Urban Rent Control Act, 1987, held that said Section provides *inter alia* that a land lord may apply to the Controller for an order directing the tenant to put the landlord in possession of the tenancy premises in case of any building or rented land being required *bonafide* by him for the purpose of building or rebuilding which cannot be carried out without the building or rented land being vacated. The provision does not have as an essential ingredient thereof and as a relevant factor the age and condition of the building. The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the Local Authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However, still suffice it to observe, depending on the facts and circumstances of the given case, the Court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the *bonafides* of the landlord. Hon'ble Supreme Court also held that if a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction, obviously his requirement would remain a mere wish and would not be *bonafide*.

19. In ***Hari Dass Sharma Vs. Vikas Sood and others*** (2013) 5 SCC 243, Hon'ble Supreme Court has again held while interpreting Section 14 of the H.P. Urban Rent Control Act that once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved, was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto. The relevant paragraphs of this judgment of the Hon'ble Supreme Court are quoted herein below:-

> "*17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J., writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local*

authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

20. Hon'ble Coordinate Bench of this Court in ***Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel***, latest HLJ 2015 (HP)1096, while upholding the order of eviction of the tenant passed by the learned Court's below disposed of the revision petition in the following terms:-

"40. The tenant by way of instant revision has questioned the order dated 24.3.2014 passed by the learned Rent Controller (V), Shimla whereby pursuant to the execution proceedings having been carried out by the landlord, the tenant was granted three months' time to vacate the premises, however with the right of re-entry. Now, that the revision petition preferred by the tenant itself has been dismissed and the order passed by the appellate authority, has been upheld,

this revision is disposed of with the clarification that the eviction order shall not be put to execution unless the petitioner/landlord/ appellant produces before the Executing Court the building plan duly sanctioned/approved by a competent authority and it shall be open to the tenant to apply for re-entry into the building in accordance with the proviso to Clause (c) of Section 14 (3) of the Act introduced by the Amendment Act. Pending application(s) if any, stands disposed of. The parties are left to bear their own costs."

21. Similarly, another Hon'ble Coordinate Bench of this Court in ***Sanjeev Sood (Bhagra) Vs. Raj Kumar Sood and ors***., Civil Revision No. 100 of 2014, decided on 31.10.2017, while upholding the order and judgment of eviction disposed of the revision petition in the following terms:-

"14. Therefore, the own evidence of the petitioner-landlady discussed hereinabove, is suggestive of that respondent No. 1 never sub-letted the demised premises to his son respondent No. 2 and rather firm M/s New Gift Shoppe of Hindu Undivided Family of which respondent No. 1 is also a member, is still running its business there. Not only this, but such business in the shop is being run under the supervision and control of respondent No. 1. Both Courts below, therefore, have rightly appreciated the evidence available on record. The eviction petition filed by the petitioner-landlady, a such, has rightly been dismissed by both Courts below. The impugned judgment, as such, cannot be said to be legally and factually unsustainable and the same is accordingly affirmed."

22. In the backdrop of the statutory provisions of Section 14 of the Rent Act as well as the judgments of the Hon'ble Supreme Court referred to hereinabove, the contention of learned Counsel for the petitioners that the order of eviction as passed by learned Rent Controller and as upheld by learned Appellate Authority are not sustainable for want of valid sanction in favour of the landlord, cannot be accepted in law. In terms of the judgment of Hon'ble Supreme Court of India in *Jagat Pal Dhawan Vs. Kahan Singh and others (supra)*, this Court has no hesitation in holding that the approval of the plan of reconstruction by the statutory authority is not a condition precedent

for ordering the eviction of a tenant on the ground referred to in Section 14(3)(c) of the Rent Act. In other words, simply because the landlord herein has not been granted the approval for the purpose of reconstruction of the building, i.e. the demised premises, the same does not render the order of eviction as passed by learned Rent Controller, and as upheld by learned Appellate Authority, as bad in law. This cannot be used as a tool by the tenants to defeat the order of eviction. Though, there is no dispute that the reconstruction of the demised premises cannot be carried out until and unless the landlord does has a sanction in terms of Section 244 of the Municipal Corporation Act, 1994, however, non-availability of the sanction plan does not render the order of eviction to be un-executable.

23. It is relevant to mention at this stage itself that it is not as if the landlord never applied for the reconstruction sanction. Further, learned Counsel appearing for the respondent has made a statement in the Court of law that awaiting the outcome of the present proceedings, the landlord intends to do the needful immediately thereafter. As far as financial credibility of the landlord to undertake the process of reconstruction of the demised premises is concerned, the same has been found to be in favour of the landlord by both the learned Courts below. Accordingly, the plea of the tenants that the order and judgment under challenge are not sustainable for want of a valid sanction for reconstruction of the demised premises is rejected.

24. Now this Court will refer to the plea taken by learned Counsel for the petitioner that the petitioners/tenants be permitted to continue to occupy the demised premises till two months as from the date a valid sanction is granted in favour of the landlord by the statutory authority. In the present case, the demised premises is situated on the Mall Road, Shimla, which comprises of a big hall and a latrine for which rent of Rs. 1500/- per annum was being paid by the tenants to the landlord, inclusive of all taxes. As has been held by this Court hereinabove in the light of the judgments of the

Hon'ble Supreme Court, referred to hereinabove, a valid sanction is not a pre-condition for eviction of a tenant from the demised premises nor an order of eviction, can be made subservient to the grant of a valid sanction by the statutory authority. The judgment passed by the Hon'ble Coordinate Bench in *Sh. Lin Kuei Tsan Vs. Sh. Ashok Kumar Goel* (supra) was assailed before the Hon'ble Supreme Court and in terms of order dated 03.12.2019, passed in Civil Appeal No. 7925/2019, titled as *Ashok Kumar Goel Vs. Lin Kuei Tsann (D) Thr. LRs.*, the matter stood disposed of by the Hon'ble Supreme Court in the following terms:-

> *"The order of eviction passed against the tenant/respondent stands confirmed. The landlord/appellant is permitted to renovate his building to strengthen it, if he so chooses. He shall reinduct the respondent/tenant in basement and ground floor within 1 ½ years from the date of tenant vacating the premises for the purpose of getting the building renovated as per proviso to Clause (c) of Section 14(3) of the Himachal Pradesh Urban Rent Control Act, 1987. The tenant/respondent would hand over the possession of his portion to the landlord within two months from today. The appeal stands disposed of accordingly."*

25. As far as other judgments of the Hon'ble Coordinate Bench in case titled as Sanjeev Sood (Bhagra) Vs. Raj Kumar Sood and others (supra), is concerned, with due respect this Court states that the order of the Court that the tenant therein shall be evicted from the demised premises only upon production of necessary approvals granted by the statutory authority, is concerned, the same cannot be construed to be an order in rem which can be said to cover all similar cases, more so, in view of the judgments of the Hon'ble Supreme Court quoted hereinabove. Now incidentally during the course of hearing of the present petition, though, the learned Counsel for the petitioners has stated that the tenants be permitted to occupy the demised premises till the grant of valid sanction in favour of the landlord with the

undertaking that they would vacate the premises in question within two month post the grant of valid sanction on payment of use and occupation charges as presently were being paid by them, but no proposal came forth from the petitioners that they were willing to pay use and occupation charges as per the market rate or the rate recently fixed by Hon'ble Coordinate Bench(s) in this regard. In this case, the use and occupation charges as are being paid by the tenants to the landlord are Rs. 20000/- per month. A Coordinate Bench of this Court in CMP No. 7925 of 2021, filed in Civil Revision No. 163 of 2019, has determined the use and occupation charges of the demised premises therein at Rs. 500/- per square foot. This Court in terms of order dated 03.12.2021, passed in CMP No. 13786 of 2020 filed in Civil Revision No. 76 of 2020, titled as M/s Wardhan Corporation and others Vs. M/s Bhanu Mal and others, has fixed the use and occupation charges to be Rs. 1,25,000/- per month which demised premises are in close proximity of the demised premises, subject matter of the present petition. In this view of the matter, this Court is of the considered view that in the peculiar facts of this case, the petitioners cannot be permitted to continue to occupy the demised premises till the grant of valid sanction in favour of the landlord as use and occupation charges, which are being presently paid, did not commensurate with the use and occupation charges which the demised premises demand.

26. Accordingly, in view of above observations, this revision petition is dismissed. Pending miscellaneous application(s), if any, also stands disposed of accordingly. Interim order(s), if any, stand vacated.

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

Between:-
SHRI MATU RAM SON OF SHRI INDER,
RESIDENT OF VILLAGE KAUNDI, TEHSIL
BADDI, DISTRICT SOLAN, H.P.

…….APPELLANT

(BY MR. MANOHAR LAL SHARMA, ADVOCATE)

AND

SHRI LEKH RAJ SON OF SHRI GIAN CHAND, RESIDENT OF WARD NO. 5, NALAGARH, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

…….RESPONDENTS

{MR. AMRINDER SINGH RANA, ADVOCATE)

REGULAR SECOND APPEAL
No. 193 OF 2021
Decided on: 30.08.2022

Code of Civil Procedure, 1908- Section 100- Suit for recovery decreed by Ld. Trial Court and upheld by Ld. First Appellate Court- Held- Concurrent findings returned by both the Ld. Courts below to the effect that it stands established on record that an amount of Rs. 3.00 lac was borrowed by the deceased brother of the defendant-appellant from the plaintiff- Being pure and simple findings of fact no interference is required- Appeal dismissed. (Para 12, 13)

This appeal coming on for HEARING this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned Civil Judge, Court No. 2, Nalagarh, District Solan, H.P. in Civil Suit No. 109/1 of 2014, titled as Lekh Raj Vs. Matu Ram, dated 02.03.2020, in terms whereof the suit for recovery filed against the present appellant by the respondent has been decreed, as also the judgment and decree passed by the Court of learned Additional District Judge, Nalagarh, District Solan, H.P. in Civil Appeal No. 16-NL/13 of 2020, titled as Matu Ram Vs. Lekh Raj, dated 30.07.2021 whereby the appeal preferred

against the judgment and decree passed by learned Trial Court stands dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that the respondent-plaintiff (hereinafter to be referred as the 'plaintiff') filed a suit for recovery of an amount of Rs. 3,50,000/- with interest w.e.f. 18.04.2011, till realization, on the grounds that the plaintiff was having good relations with one Dalip Chand, brother of the deceased, who was running a transport business. Dalip Chand died and the defendant succeeded to his estate. During his lifetime, Dalip Chand was in need of money on account of his business requirements and he approached the plaintiff for the same. As the plaintiff was having good faith and trust on Dalip Chand, he lent a sum of Rs. 3,00,000/- to Dalip Chand and it was agreed that he would return the said amount within one year alongwith interest of Rs. 50,000/-. Dalip Chand issued a cheque bearing No.567626, dated 18.04.2011, for an amount of Rs. 3,50,000/-, drawn at PNB Nalagarh, in favour of the plaintiff to discharge this liability. The cheuqe was presented before the bank on 21.04.2011, but the same was dishonoured for want of funds. Thereafter, plaintiff filed a complaint under Section 138 of the Negotiable Instruments Act against Dalip Chand, but before said complaint could be decided, Dalip Chand died. Estate of Dalip Chand was succeeded by the defendant Matu Ram. In this background, after withdrawing the complaint, a suit was filed against the defendant who had succeeded to the estate of Dalip Chand, who as per the plaintiff was liable to discharge the legal liability on behalf of Dalip Chand.

3. The suit was resisted *inter alia* on the ground that the plaintiff was not having good relations with Dalip Chand. The factum of amount of Rs. 3.00 Lac having been borrowed by Dalip Chand from the plaintiff was also denied. Issuance of cheque by Dalip Chand to discharge this liability in favour of the plaintiff was also denied. The stand taken in the written statement was that Dalip Chand (deceased) was having a Committee business alongwith

other persons including the plaintiff and plaintiff was the head of the Committee and it was in the course of affairs of said Committee that the plaintiff had obtained several blank cheques from Dalip Chand as security. He (plaintiff) mischievously and with malafide intention filed the suit by forging the signatures of deceased Dalip Chand , who had never borrowed any amount from the plaintiff.

4. On the basis of pleadings of the parties, following issues were framed:-

"1. Whether plaintiff is entitled for recovery of Rs. 3,50,000/- alongwith interest, as prayed for? OPP
2. Whether the suit is not maintainable, as alleged? OPP
3. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPP
4. Whether the suit is time barred, as alleged? OPD
5. Whether plaintiff is stopped from filing the present suit due to his act and conduct, as alleged? OPD
6. Relief.

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1:		*Yes.*
Issue No. 2:		*No.*
Issue No. 3:		*No.*
Issue No. 4:		*No.*
Issue No. 5:		*No.*
Relief	*:*	*Suit of the plaintiff is decreed as per the operative part of the judgment.*

6. The suit of the plaintiff was decreed by learned Trial Court by holding that the evidence on record proved that the defendant had succeeded to the estate of the deceased. Learned Trial Court also took note of the fact that the cheque issued by the deceased in favour of the plaintiff was duly

exhibited by the plaintiff alongwith memo of dishonour of the same. Mutation of inheritance was also taken into consideration by the learned Trial Court which was exhibited on record as Ext. P-4. Learned Trial Court also held that the defence taken about the blank cheque was not proved and there was nothing on record to substantiate this plea taken by the defendant. Learned Trial Court also held that the defence taken by the defendant about forgery of signatures of Dalip Chand was also not proved and further the defendant being the successor of the estate of Dalip Chand was liable to discharge the liability of the Dalip Chand as defendant himself had admitted in his cross examination that he had inherited some part of estate of Dalip Chand. Learned Trial Court also held that the evidence led by the plaintiff demonstrated that Dalip Chand was in the business of transport and was in the need of money and he had approached the plaintiff for a loan and plaintiff had given a loan of Rs. 3.00 Lac to Dalip Chand in lieu of good relations which they shared with each other. The issue of the suit being time barred was also decided against the defendant.

7. In appeal, learned Appellate Court upheld these findings. Learned Appellate Court held that though the defence of the defendant was that the suit was time barred as it was filed on 19.04.2014, whereas it ought to have been filed on 18.04.2014, however, as the suit was for recovery and limitation to file the same was three years from the date when cause of action accrued, therefore, as from the date of death of Dalip Chand and as on the date when his estate was succeeded by the defendant, the suit was within limitation. It held that issuance of cheque attracts civil as well as criminal liability and in the case in hand, complaint under Section 138 of the Negotiable Instruments Act was preferred against Dalip Chand by the plaintiff during his lifetime and it was only on account of death of accused Dalip Chand that said complaint was withdrawn and the suit was filed after the estate of deceased was inherited by the defendant. With regard to the

contention of the appellant that the signatures of Dalip Chand were forged, learned Appellate Court also held that the said defence was liable to be rejected as there was nothing produced and proved on record by the defendant to substantiate this contention. Thereafter by referring to the provisions of Section 139 of the Negotiable Instruments Act and by observing that as appellant-defendant had succeeded to the estate of Dalip Chand, learned Appellate Court also, by upholding the judgment and decree passed by learned Trial Court, held that the appellant-defendant was liable to discharge the liability of Dalip Chand.

8. Feeling aggrieved, the defendant has filed this regular second appeal.

9. Mr. Manohar Lal Sharma, learned Counsel for the appellant has argued that the judgments and decrees passed by both the learned Courts below are liable to be set aside on the ground that the suit *per se* was not maintainable as the plaintiff on account of his indulging in the business of money lending had no right in law to file and maintain the suit in the absence of a legal authorization in his favour in this regard and the judgments and decrees passed by learned Courts below are liable to be dismissed on this count alone. No other point was urged.

10. Mr. Amrinder Singh Rana, learned Counsel for the respondent argued that the findings which have been returned by learned Courts below are pure and simple findings, returned on facts, on the basis of pleadings and evidence, which was led by the parties before the learned Courts below and there was no substantial question of law involved in the present appeal and the same is liable to be dismissed at this stage itself. With regard to the contention that the plaintiff was indulging in the business of money lending, Mr. Rana submitted that this neither was the case of the defendant before the learned Trial Court nor the defendant can be now permitted to raise this plea in the appeal, in the absence of pleadings and further the contention of the

appellant is otherwise ill founded for the reason that the plaintiff neither was nor is indulging in the business of money lending.

11. I have heard learned Counsel for the parties and also carefully gone through the judgments and decrees passed by both the learned Courts below as well as record of the case.

12. The facts as they stand enumerated hereinabove and the gist of the judgments passed by learned Courts below which also stand enumerated hereinabove, demonstrate that the suit for recovery was filed by the plaintiff against the defendant, calling upon the defendant to discharge liability of his deceased brother Dalip Chand, whose estate was inherited by the defendant. Now the defence which was taken by the defendant while opposing the suit was that neither he had inherited any estate of his deceased brother nor any money was ever lent by the plaintiff to his deceased brother and it was in fact a blank cheque of his deceased brother which was misused by the plaintiff by forging his signatures upon the same, which cheque had landed with the plaintiff as he was head of a Committee of which his deceased brother was also a member during his lifetime. There are concurrent findings returned by both the learned Courts below to the effect that it stands established on record that an amount of Rs. 3.00 Lac was borrowed by the deceased brother of the defendant-appellant from the plaintiff and to discharge this liability, a cheque for an amount of Rs. 3.50 Lac was issued by the deceased brother of the appellant in favour of the plaintiff, which when presented in the bank was dishonoured. There is no dispute on the issue that during the lifetime of Dalip Chand, proceedings were initiated under Section 138 of the Negotiable Instruments Act which were withdrawn after his death. This, therefore, removes any doubt which might be there in the mind of the Court that filing of the suit after the death of Dalip Chand was abuse of some cheque of deceased that might have been in the possession of the plaintiff. Now, there are concurrent findings returned by both the learned Courts below to the effect

that the defendant was not able to substantiate his contention that the signatures upon the cheque were forged by the plaintiff. A careful perusal of the judgments passed by learned Courts below demonstrate that these findings are clearly borne out from the record of the case. There is not even an iota of evidence placed on record by the defendant to substantiate this contention of his. As far as the arguments raised by learned Counsel for the appellant before this Court that the plaintiff was involved in the business of money lending is concerned, all that this Court can observe is that in the absence of there being any foundation of this plea in the written statement, the defendant cannot now rake up this issue before this Court in regular second appeal. During the course of arguments, this Court could not be satisfied by the learned Counsel as to why (a) this plea was not taken when the written statement was filed or (b) this plea was not incorporated by way of amendment either during the pendency of the suit before the learned Trial Court or after adjudication of the suit by the learned Trial Court in appeal before the learned first Appellate Court. Therefore, this Court is of the considered view that the contention which is now being raised is nothing but an afterthought and in the absence of there being any pleading to this effect and further in the absence of any evidence worth its name from which it could be inferred that the plaintiff was involved in the business of money lending, this plea otherwise is meritless.

13. Therefore, in view of what has been discussed hereinabove, as the findings returned by learned Courts below while decreeing the suit as also dismissing the first appeal, being pure and simple findings of fact and further as there is no substantial question of law involved in the appeal, this appeal is accordingly dismissed with cost. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

1. SHRI GIAN CHAND SON OF SHRI SADA RAM,
2. SHRI SHANKAR DASS SON OF SHRI SADA RAM,
3. SHRI ROSHAN LAL SON OF SHRI SADA RAM,
   ALL RESIDENTS OF VILLAGE RAMPUR, TEHSIL AND DISTRICT UNA, H.P.

.....APPELLANTS

(BY MR. N.K. THAKUR, SENIOR ADVOCATE WITH
MR. DIVYA RAJ SINGH, ADVOCATE)

AND

1. SHRI RAM PAL SON OF SHRI WATTNA,
2. SHRI RAJ SON OF SHRI WATTNA,
3. SHRI OMI SON OF SHRI WATTNA,
4. SHRI RAM LAL SON OF SHRI WATTNA,
   ALL RESIDENTS OF VILLAGE RAMPUR, TEHSIL AND DISTRICT UNA, H.P.

.....RESPONDENTS

{MR. R.K. GAUTAM, SENIOR ADVOCATE WITH MR.
JAI RAM SHARMA, ADVOCATE)

REGULAR SECOND APPEAL
No. 558 OF 2009
Decided on: 26.8.2022

Code of Civil Procedure, 1908- Section 100- Suit for declaration- Suit as well as first appeal dismissed- Held- Concurrent findings of fact to the effect that the plaintiff failed to demonstrate that he along with proforma defendants was in exclusive possession of the suit land as its owner- Appeal dismissed. (Para 11)

This appeal coming on for HEARING this day, Hon'ble Mr. Ajay Mohan Goel, delivered the following:-

J U D G E M E N T

By way of this appeal, the appellants challenge the judgment and decree dated 02.11.2007, passed by the Court of learned Civil Judge (Junior Division), Court No. 2, Una, H.P. in Civil Suit No. 127/1998, titled as Gian

Chand Vs. Ram Pal and others, in terms whereof a civil suit for declaration filed by the present appellants was dismissed by the learned Trial Court as also the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Una, District Una, H.P. in Civil Appeal No. 6/2008, dated 27.08.2009, titled as Gian Chand vs. Ram Pal and others, in terms whereof the appeal preferred by the appellants against the judgment and decree passed by learned Trial Court was dismissed.

2. This appeal was admitted by this Court on substantial questions of law No. 1, 2 and 3 given in the paper book, which are quoted as herein below:-

> *"1. Whether there can be any tenancy over the land which is not fit for cultivation and to sustain the plea of tenancy the consent of the owner or payment of rent are minimum requirement to be proved by the tenant?*
> *2. Whether the impugned judgments are vitiated on account of non-permitting the appellants/plaintiffs to place on record the affidavit executed by Shri Wattna, the predecessor-in-interest of the defendants affirming the fact that neither he nor his predecessor-in-interest cultivated the suit land?*
> *3. Whether the document which is necessary for enabling Court to pronounce the judgment for advancing substantial cause and the Courts are obliged to permit the production of such document as additional evidence and non-production of such document has caused a great prejudice to the cause of the appellants?"*

3. Brief facts necessary for the adjudication of this appeal are that one of the appellants, namely, Sh. Gian Chand filed a suit for declaration against the respondents herein in which other appellants were impleaded as proforma defendants for declaration that the plaintiff and proforma defendants No. 5 and 6 were owners in possession of land measuring 3 kanal 10 Marlas, bearing Khewat No. 502 min, Khatauni No. 626, Khasra No. 1776, as entered in jamabandi for the year 1984-86, situated in village Rampur, Tehsil and

District Una, H.P. (hereinafter to be referred as the 'suit land'). According to the plaintiff, entries in the name of predecessor-in-interest of the defendants were absolutely wrong, incorrect and against factual position on the spot. The consequential relief of permanent injunction for restraining the defendants from taking forcible possession of the suit land or part thereof was also prayed for. According to the plaintiff, he and proforma defendants were in possession of the suit land as owners and neither the defendants nor their predecessor in interest had any right, title or interest over the same. The predecessor-in-interest of the defendants, namely, Bhagwana had died 35 years back and after his death, Wattna son of Tulsi, had succeeded him as legal heir. Wattna executed an affidavit in which he stated that neither he nor Bhagwana, ever cultivated the suit land as tenant and entries in the name of Bhagwana are absolutely wrong and incorrect. Wattna died in the year 1994 and contesting defendants were his legal heirs. As per the plaintiff, the defendants on the basis of wrong revenue record were trying to take forcible possession of the suit land without any right to do so, despite repeated calls of the plaintiffs to desist from do doing so, they refused the request of the plaintiffs in this regard, which led to filing of the civil suit.

4. The suit was contested by the contesting defendants *inter alia* on the ground that neither the plaintiff nor the proforma defendants were owners in possession of the suit land. According to the defendants, Bhagwana, i.e. their predecessor-in-interest was coming in possession of the suit land as tenant on payment of rent for the last 50 years under the owners. After his death, father of the defendants, i.e. Wattna, succeeded the estate of Bhagwana and continued to cultivate the suit land as tenant on payment of rent, and thereafter became owners of the suit land by virtue of H.P. Tenancy and Land Reforms Act on the appointed day. As per the defendants, they succeeded the estate of their late father as owners in possession. According to them, there was no question of Wattna executing any affidavit as alleged by the plaintiff

and the same was a result of fraud and perpetrated by the plaintiff in connivance with the interested persons. It was also the case of the defendants that the plaintiff had filed a correction application against Bhagwana, which was dismissed on 17.02.1998. On these bases, the defendants resisted the suit.

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

1. *Whether the plaintiff and proforma defendants No. 5 and 6 are owners in possession of the suit land as prayed? OPP*
2. *Whether the plaintiff is entitled for the relief of declaration as prayed? OPP*
3. *Whether the plaintiff is entitled for the relief of permanent injunction as prayed? OPP*
4. *Whether the suit is not maintainable? OPD*
5. *Whether the plaintiff has no locus-standi? OPD*
6. *Whether this Court has jurisdiction? OPD*
7. *Whether the suit is within limitation? OPD*
8. *Whether the plaintiff is stopped to file the present suit due to his own acts and conduct? OPD*
9. *Relief.*

6. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1:		*No.*
Issue No. 2:		*No.*
Issue No. 3:		*No.*
Issue No. 4:		*Yes*
Issue No. 5:		*Yes*
Issue No. 6:		*Yes*
Issue No. 7:		*Yes*
Issue No. 8:		*Yes*
Relief	*:*	*The suit of the plaintiff stands dismissed as per the operative part of the judgment.*

7. The suit was dismissed by learned Trial Court by returning the findings that a perusal of the revenue record clearly demonstrated that land was in possession of the predecessor-in-interest of the defendants alongwith others. Learned Trial Court held that the plaintiff claimed that revenue entries qua the record of rights were wrong, however, the plaintiff did not bring any document on record to substantiate his claim. It held that in the absence of cogent and reliable evidence to demonstrate that the plaintiff was in possession of the suit land, it could not held so. Learned Trial Court also held that as there was nothing on record to ascertain the claim of the plaintiff that he was owner in possession of the suit land alongwith proforma defendants, therefore, it could not be so held in favour of the plaintiff. Learned Trial Court further held that as the plaintiff has failed to prove that defendants had no right over the suit land, therefore, decree of permanent injunction could not be granted against the defendants and further, evidence on record clearly demonstrated that the defendants alongwith plaintiff and proforma defendants were in possession of the suit land. Learned Trial Court also returned categorical findings that the record of rights also demonstrated that possession of the suit land was that of the plaintiff, defendants and proforma defendants and not exclusively that of the plaintiff. On these bases, learned Trial Court dismissed the suit.

8. Learned Appellate Court upheld these findings by holding out that the contention of the plaintiff was that he and proforma defendants were owners in possession of the suit land and defendants have nothing to do with the same, however, Ext. P-1 and D-1 to D-3 demonstrated that defendants/their predecessor-in-interest were in possession of the suit land on payment of rent to the owners. Learned Appellate Court held that as these entries were challenged by the plaintiff, therefore, onus was upon the plaintiff to prove that the same were wrong which the plaintiff failed to do. Learned Appellate Court also held that oral evidence on record seemed to be evenly

balanced, and therefore, the Court had to revert back to the documentary evidence or revenue entries which were against the plaintiff. With regard to the affidavit executed by Wattna, learned Appellate Court held that affidavit mark B was never filed by plaintiff on record at the time of filing the suit or at the time of settlement of issues and it was only after the evidence of the parties was over that he filed an application before the learned Trial Court to produce said affidavit in the Court by way of rebuttal evidence but the same was disallowed by the learned trial Court. While dismissing the application filed under Order 41, Rule 27 of the Code of Civil Procedure, learned Appellate Court held that sufficient explanation was not put forth by the plaintiff as to why this document was not filed earlier, when he was basing his claim on this very document. It held that the plaintiff could not be allowed to lead such evidence particularly when it was in the knowledge of the plaintiff from the very beginning. It also held that in case the application was allowed, the same will amount to re-opening the case causing prejudice to the opposite party, which cannot be allowed. Learned Appellate Court also held that otherwise also the affidavit was executed in the year 1991 by Sh. Wattna who died somewhere in the year 1994 but no effort was made by the plaintiff to get the revenue entries changed on the basis of this affidavit. Learned Appellate further Court held that said affidavit was not executed in the presence of any person who could identify the executants, which rendered the execution of the affidavit to be doubtful. On these bases, learned Appellate Court dismissed the appeal.

9. Feeling aggrieved, the appellants preferred this regular second appeal which, as already mentioned hereinabove, was admitted on the substantial questions of law quoted hereinabove.

10. I have heard learned Senior Counsel appearing for the appellants as well as respondents and gone through the judgments passed by both the learned Courts below as well as record of the case.

11. A perusal of the judgments passed by both the learned Courts below demonstrate that there are concurrent findings of fact which have been returned by both the learned Court below to the effect that whereas the plaintiff failed to demonstrate that he alongwith proforma defendants was in exclusive possession of the suit land as its owner, the defendants have demonstrated that they alongwith plaintiff and proforma defendants were in possession of the suit land. Learned Courts have also returned concurrent findings to the effect that revenue record clearly demonstrates that predecessor-in-interest of the defendants were tenants upon the suit land who were confirmed proprietary rights. Now as far as the issue as to whether there can be any tenancy over the land which is not fit for cultivation is concerned, this Court is of the considered view that a careful perusal of the plaint demonstrate that no such stand was taken by the plaintiff in the plaint. Therein, the case of the plaintiff was simply that he alongwith proforma defendants was exclusive owner in possession of the suit land and defendant, who were strangers qua the suit land were interfering in the same. With regard to the question as to whether the Court is obliged to permit the production of such document as additional evidence which is necessary for enabling the Court to pronounce the judgment is concerned, it is well settled law that the provision of Order 41, Rule 27 of the Code of Civil Procedure cannot be permitted to be used as a tool by either of the parties to fill up the lacunae. Additional evidence can be permitted by the Appellate Court only if the Court is satisfied that despite due diligence, the party concerned was not able to earlier produce the evidence before the Court. In the present case, the document, which was intended to be produced by way of additional evidence, was an affidavit purportedly executed by predecessor-in-interest of the defendants as far back as in the year 1991, which as per the averments made in the plaint was in the knowledge of the plaintiff even at the time when the suit was filed. There is no cogent explanation available in the entire record as

to why this document was not produced at the very first available instance by the plaintiff before the Court if the same was so important for the adjudication of the *lis*, as has been observed by learned Appellate Court while dismissing application under Order 41, Rule 27 of the Code of Civil Procedure. This Court reiterates that whether or not an application filed under Order 41, Rule 27 of the Code of Civil Procedure is to be allowed has to be tested not only from the perspective of due diligence exercised by the applicant but also from the perspective as to whether any prejudice would be caused to either party in case such an indulgence is shown in favour of the applicant who has otherwise failed to exercise due diligence. Now in the present case, by no stretch of imagination, it can be said that had the application been allowed, prejudice would not have been caused to the defendants, more so, in the teeth of the fact that the plaintiff failed to produce the said document on record despite the same being available with him even when the suit was filed. Further it cannot be said that the judgments passed by learned Courts below are vitiated on account of appellants not being allowed to place on record affidavit executed by Shri Wattna. This is for the reason that it is not for the Court to produce relevant evidence which is in favour of the parties before it. Onus is upon the parties to produce whatever evidence is with them to prove their cases as per their pleadings. If a party fails to exercise due diligence, and in such circumstances, if the prayer of a party to place on record a document is not accepted by the Court, then it cannot be said that the judgments passed by both the learned Courts below are vitiated on that count. Substantial questions of law are answered accordingly.

In view of discussion held hereinabove, this appeal is dismissed being devoid of merit. Pending miscellaneous application(s), if any, also stand disposed of accordingly. No order as to costs.

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

Between:-

1. SURESH KUMAR
2. RAMESH KUMAR
   BOTH SONS OF SHRI SANT RAM

3. SMT. CHINTA DEVI WD/O SHRI SANT RAM.

   ALL RESIDENTS OF VILLAGE AND PO NAGWAIN, TEHSIL SADAR, DISTT. MANDI, HP.

....APPELLANTS.

(SH. G.R. PALSRA, ADVOCATE)

AND

1. DURGA SINGH, SON OF SHRI PURAN CHAND
2. (DELETED VIDE ORDER DATED 24.9.2021).

....RESPONDENTS

(SH. SANJEEV KUTHIALA, SR. ADVOCATE WITH MS. ANAIDA KUTHIALA, ADVOCATE)

REGULAR FIRST APPEAL
NO. 289 OF 2008
Reserved on: 8.9.2022
Decided on: 15.9.2022

Code of Civil Procedure, 1908- Section 100- Section 26- Order 7 Rule 1 & 2- Suit for damages- Suit dismissed- Held- Plaintiffs have based their claim on tortious liability which arises from breach of duty imposed by law- The legal requirement to succeed in such claim would be to prove breach of legal duty by defendants- They owed a duty towards plaintiffs that no loss was caused to their property on account of digging of well- Defendants were under obligation

to take all due care to prevent such loss- As a necessary corollary the plaintiffs were required to prove the negligence or lack of due care in the conduct of defendants and sufferance of consequent loss by plaintiffs- Plaintiffs failed to prove that the damage to their house was caused due to digging of well- No fault can be found with the findings of Ld. Trial Court- Appeal dismissed. (Para 11, 22, 24)

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

J U D G M E N T

By way of instant appeal, appellants have assailed judgment and decree dated 14.8.2008, passed by learned District Judge, Mandi, Himachal Pradesh, in Civil Suit No. 12 of 2005, whereby the suit of the appellantshas been dismissed.

2. Parties herein are referred by the same status, as they held before the learned trial Court. The appellants were plaintiffs and the respondents were the defendants.

3. Plaintiffs filed suit for recovery of Rs. 10,00,000/- ascompensation on account of damage caused to their house, comprised inland bearing khata No. 178 min., khatauni No. 219 min, Khasra No. 1263/245, measuring 1-11-13 bighas, situated at mauja Nagwain, Tehsil Sadar, District Mandi, H.P. (*Hereinafter referred to as suit property)*.As per averments made in the plaint, defendants were owners of land comprised in khata No. 227, khatauni No. 273, Khasra No. 1278/243, measuring 1-16-15 bighas in the same revenue village. In fact, the suit property and land of defendants were contiguous, having common boundary.

4. Plaintiffs averred in the plaint that in 2004 defendantsstarted unscientific digging of a water-wellin Khasra No. 1278/243, which started causing damage to their house.As per plaintiffs, the well was being dug at a distance of 14-15 feet from their house, whereas the defendants had sufficient

land for the purpose. The land strata was stated to be sand mixture and black clay.It was alleged the digging work of defendants disturbed the land towards their house and caused its sinking. Plaintiffs filed Civil Suit 48/2004 against defendants for permanent prohibitory injunction. Despite grant of interim injunction in favour of plaintiffs, defendants continued to dig the well, which aggravated the damage to the house of plaintiffs. It developed cracks and became inhabitable. Though, the damage caused to the house of plaintiffs was estimated at Rs. 17,50,000/- but the plaintiffs filed a suit for recovery of Rs. 10,00,000/- only by restricting their claim.

5. Defendants contested the suit. It was submitted that the house of the plaintiffs was constructed with stones and mud mortar masonry. There was no damage to the house of plaintiffs due to digging ofwell by defendants. The well was stated to have been dug in scientific manner by placing RCC rings inside the well. It was specifically averred that the house of the plaintiffs was not constructed with proper specifications. The cracks in the house of plaintiffs had developed prior to the digging of well by the defendants. The plaintiffs were further accused of having no proper drainage to their house. It was also submitted that the well of defendants was far away from the house of plaintiffs. In entire village Nagwain, most of the people had constructed their own water wells.

6. On the basis of pleadings of the parties, following issues were framed: -

1. Whether the plaintiffs are entitled for recovery of damages for the amount of Rs. 10,00,000/-, as alleged? OPP.

2. Whether the suit is not legally maintainable? OPD.

3. Whether the plaintiffs have no cause of action to file the suit? OPD.

4. Whether the suit is not maintainable under Order 2 Rule 2 CPC and suit is liable to be stayed under Section 10 CPC.

5. Relief.

7. Plaintiffs examined nine witnesses, whereas defendants examined five witnesses. A number of documents also were proved by either side as per their respective cases. On conclusion of trial, learned trial Court decided issue No.1 in negative. Issues No. 2 and 3 were decided in affirmative and issue No.4 was decided partly in affirmative. Suit of the plaintiffs was accordingly dismissed.

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

9. Learned counsel for the appellantcontended that the plaintiffs had proved expert reports Ext. P-3, Ext. PW-7/A to Ext. PW-7/F and also site inspection report Ext. P-8. In addition, they had also examined PW-3 and PW-7 as expert witnesses and the entire said evidence proved that the loss suffered by plaintiffs to their house was solely on account for unscientific digging of well by defendants. He also contended that the impugned judgment and decree is result of complete mis-appreciation and misreading of evidence. It was also duly proved that cracks had appeared in the house of the plaintiffs only after digging of well by the defendants. In this regard, reliance has been placed on the statements of PW-3, PW-5 and PW-6 and PW-9.

10. On the contrary, learned counsel for the defendants has supported the impugned judgment and decree. It has been contended that the plaintiffs had miserably failed to prove their case, whereas the defendants had led trustworthy and cogent evidence. The expert witness of defendants, DW-2 and DW-3 had duly proved that the well was dug by defendants in scientific manner and the cracks in the house of plaintiffs were not due tothe

digging. He further asserted that the land underneath the house of plaintiffs was proved to be water logged with clay soil. In such kind of land, the mud mortar houses were likely to develop cracks on account of settlement of plinth.

11. Plaintiffs have based their claim on tortious liability which arises from breach of duty imposed by law. The legal requirement to succeed in such claim would be to prove breach of legal duty by defendants. They owed a duty towards plaintiffs that no loss was caused to their property on account of digging of well. Defendants were under obligation to take all due care to prevent such loss. As a necessary corollary the plaintiffs were required to prove the negligence or lack of due care in the conduct of defendants and sufferance of consequent loss by plaintiffs. The plaintiffs had pleaded in the plaint that defendants had indulged in reckless digging in unscientific manner, which caused the settlement of land and consequent damage to the house of plaintiffs.

12. First question would be whether plaintiffs had succeeded in proving that the cracks in their house had appeared after digging of well?

13. Plaintiff No.1 appeared as his own witness and stated that the cracks had developed in his house due to digging of well by defendants and prior to that there were no cracks. PW-5 Smt. Savitri Devi has also deposed to this effect. She stated that she had not seen cracks in the walls of house of the plaintiffs earlier. Further, PW-9 also corroborated plaintiff and PW-5 on this fact. The defendants could not prove the contrary. Thus, this fact can be stated to have been proved y plaintiffs.

14. Now the second question arises whether the cracks in the house of plaintiffs were result of digging of well by defendants?

15. There is no dispute that the water-well dug by the defendants was in their own land. The distance between house of plaintiffs and the well has been found to be approximately 15-20 feet. No presumption can be drawn from the mere fact of appearance of cracks in the walls of house of plaintiffs

that such damage was due to digging of well. The onus was on plaintiffs to prove such fact.

16. In order to prove the technical aspect of the matter, plaintiffs examined PW-3 Rajender Kumar as their witness. He simply proved on record the factum of spot inspection carried by him on 20.3.2005 and preparation of report Ext.P-3. As per this witness, he was posted as Junior Engineer in Agriculture Department for the last fifteen years. A glance at report Ext. P-3 reveals that the spot was visited by PW-3 in pursuance to the order passed by Court in Civil Suit 48/2004. It was observed that plaintiffs had constructed their house with local specifications and cracks had appeared. The soil underneath the house of plaintiffs was found to be sandy soil mixed with black clay having no stability due to water logging in the area. The report also mentioned that on inquiry and observation, the cracks in the house of plaintiffs were found to have appeared recently. The foundation of the house was found to have settled due to loose soil after digging for construction of water well by defendants.

17. In cross-examination, this witness admitted that he had not ascertained the depth of foundation of the house of plaintiffs. He admitted that in water logged area, if the foundations are not properly laid, cracks can develop in the walls. He further stated that he had not recorded any statement of the persons from whom he had made inquiries. He further admitted that the house of plaintiffs was situated adjacent to National Highway and cracks could develop due to vibrations also.

18. Plaintiffs examined another witness as expert. PW-7 Tej Ram Rana deposed that he inspected the site. He took measurement and obtained data on the basis of which, he prepared details of estimate, sanctioned plan, elevations and site plan etc. He identified said documents as PW-7/A to PW-7/F. As per this witness, when he visited the spot, the digging work of well was complete. In cross-examination, he submitted that he had not taken any

specific training for assessing the age of buildings. He has also disclosed in cross-examination that he had diploma in Civil Engineering and was an Architect. He also admitted that the land of plaintiffs was water logged. He feigned ignorance that defendants had placed RCC rings inside the well.

19. A witness can be termed as an expert on the basis of his qualification and experience. PWs 3 and 7 did not depose about their qualification and experience and its relevance to the subject on which they were deposing. In cross examination of PW-7, on one hand he stated himself to be a diploma holder in Civil Engineering and on the other he claimed himself to be an Architect. In view of such material on record none of them could be said to be experts and in such circumstances, it would not be safe to rely upon their opinion. Report Ext. P-3 had not pin pointed the cause of damage to the house of plaintiffs. Similarly, there is no specific report of PW-7. Since PW-3 and PW-7 were examined as expert witnesses they were required to base their opinion on some scientific/technical data, which they failed.

20. The plaintiffs could prove their case only on the basis of the evidence of experts. As stated above, the expert evidence of plaintiffs was not convincing. Report Ext. P-3 clearly mentioned that the house of plaintiffs was in water logged land having sandy and black clay, which has no stability. He admitted in cross-examination that in such type of strata the settlement of house was possible and cracks could be result of such settlement. PW-3 has not been able to justify as to on what basis he had found the cracks to be of recent origin. There is no mention in the report that what was the source of his opinion. Taking overall view of the evidence, produced by plaintiffs, it cannot be categorically held that the cracks had appeared in the house of plaintiffs due to digging of well by defendants.

21. In addition, there was no evidence of plaintiffs to suggest that the land on which the well was dug was not fit for the purpose. On the contrary,

it had been proved on record that most of the houses in the village had their own wells. The evidence also suggested that there was a difference of 15-20 feet between the house of plaintiff and the disputed well. The plaintiff while appearing as PW-1 had even admitted that even prior to digging of new well the defendants had their old well almost at the same place. Further there was also no evidence to suggest that the well was not dug in the manner, it should have been. In nut-shell, it was not proved that while digging the well, defendants were negligent or had not taken due care. The evidence on record rather suggested that the defendants had placed RCC rings inside the well while carrying out the digging process.

22. Since the plaintiffs failed to prove that the damage to their house was caused due to digging of well, their estimates of loss lost relevance.

23. Other witnesses examined by the plaintiffs were office bearers of Panchayat or revenue officials. Their testimonies could not render much help to the cause of plaintiffs in view of nature of fact in issue.

24. In view of material on record, there is no difficulty to hold that plaintiffs had failed to discharge necessary burden. Learned trial Court after detailed appreciation of entire evidence had concluded that the plaintiffs had failed to prove their case. No fault can be found with the findings of fact recorded by learned trial Court. The findings recorded by the learned trial Court are borne out from the evidence on record and cannot be said to be perverse.

25. In view of above discussion, there is no merit in the appeal and the same is accordingly dismissed, with no orders as to costs. Pending applications, if any, also stand disposed of. Records of the learned trial court below be returned forthwith.

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

Between:-
SHRI ARVIND CHAUDHARY,
SON OF SHRI C.N. CHAUDHARY,
RESIDENT OF HOUSE NO. 3309,
SECTOR 32-D, CHANDIGARH.

....APPELLANT.

(SH. ARJUN LALL, ADVOCATE)

AND

SHRI HARISH CHANDER, PROPRIETOR
M/S RAMA CEMENT AGENCY, LADWA,
DISTT. YAMUNANAGAR, HARYANA.

....RESPONDENT

(SH. VARUN RANA, ADVOCATE)

REGULAR FIRST APPEAL
NO. 240 OF 2002
Reserved on: 25.8.2022
Decided on: 31.8.2022

Code of Civil Procedure, 1908- Order 37 Rule 3- Where triable issues arise from the fair and reasonable defence, disclosed by defendant, ordinarily the leave should be granted- Different stands taken by the defendant in his application for leave to defend and in his deposition before Court casts serious doubt on the veracity of his defence- Defendant has withheld the best evidence, adverse inference was liable to be drawn- Appeal allowed- Suit of the plaintiff decreed. (Para 16, 27, 28)

Cases referred:

B.L. Kashyap & Sons Ltd. vs. M/s JMS Steels & Power Corporation & another, 2022 (1) Scale, 614;

Wada Arun Asbestos Pvt. Ltd vs. Gujarat Water Supply & Sewerage 2009 (2) SCC, 432;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgment and decree dated 17.7.2002, passed bylearned Additional District Judge, Sirmaur District at Nahan, H.P. in Civil Suit No. 1-N/1 of 2001/1998, whereby the suit of the appellant has been dismissed.

2. The parties herein shall be referred by the same status, which they held before the learned trial Court i.e. appellant as plaintiff and the respondent as defendant.

3. Plaintiff filed a suit for recovery of Rs. 3,91,984/- along with interest *pendente lite* and future before the learned District Judge, Sirmaur at Nahan under Order XXXVII of the Code of Civil Procedure (for short, the Code). According to plaintiff, defendant had borrowed a sum of Rs. 2,30,000/- from him in August, 1995 with a promise to return the said amount till December, 1995. Defendant had issued two post dated cheques dated 10.10.1995 and 5.12.1995 in the sums of Rs. 1,30,000/- and 1,00,000/- respectively, both drawn on State Bank of Patiala, Industrial Branch, Yamunanagar, Haryana. These cheques were issued with assurance that the cheques would be honoured on presentation. However, when the cheques were presented, those were dishonoured and remained unpaid, forcing the plaintiff to file the suit. Plaintiff also claimed interest at the rate of 24% per annum on the premise that the defendant had agreed to pay such sum of interest in case he failed to pay the amount within the agreed period. Accordingly, a sum of Rs. 1,61,984/- was calculated towards interest and by adding the same to principal amount of Rs. 2,30,000/-, the suit amount was calculated at Rs. 3,91,984/-.

4. Defendant entered appearance on 7.12.1995 and on the same day, notice of summons in Form 4A in 'Appendix B' of the Code was served upon the defendant through his counsel. Accordingly, defendant filed an application under Order XXXVIIRule 3 of the Code, seeking leave to defend on

the ground that the cheques, on the basis of which, the suit was filed were not issued in favour of plaintiff. Defendant specifically deniedreceipt of any amount as loan from the plaintiff. Healso asserted that the cheques were without consideration. As per defendant, the cheques were issued as security cheques on the asking of Sh. C. N. Chaudhary, father of plaintiff, who was dealing in steel Products. Since the defendant wanted to have business transactions with Sh. C.N. Chaudhary, therefore, in order to ensure the regular payments, defendant had issued security cheques. The cheques were issued in the name of plaintiff on the asking of Sh. C. N. Chaudhary. Defendant thus denied the allegations in the plaint and existence of any liability towards plaintiff.

5. Plaintiff contested the application of defendant, seeking leave to defend. The learned trial Court allowed the application of defendant and granted him leave to defend the suit in favour of defendant vide order dated 21.2.2000 and framed the following issues:

"1) Whether the suit U/O 37, Rule 2, CPC, by the plaintiff is not maintainable, as alleged. OPD

2) Whether the summons in Form IV-A in Appendix-B of the CPC have not been served upon the defendant in accordance with law, as alleged. OPD.

3) Whether the cheques dt. 5-12-1995 for Rs. 1,00,000/- and dt. 10-10-95 for Rs. 1.30 lac issued by the defendant have been without consideration. OPD

4) Whether this court has no jurisdiction, as alleged. OPD.

5) Relief."

6. Defendant examined himself as his own witness (DW-2). He has also summoned and produced the records of Income Tax Returnsof the

plaintiff through DW-1. The cheques, on the basis of which, the suit was filed were exhibited as Ext. P-1 and Ext. P-2. Previous statement of plaintiff in proceedings under Section 138 of the Negotiable Instruments Act, 1881, recorded in the Court of Judicial Magistrate, 1st Class was proved as Ext. DX.

7. Plaintiff examined himself as his own witness in rebuttal and closed the evidence.

8. Learned Additional District Judge, Sirmaur at Nahan dismissed the suit of the plaintiff vide judgment and decree impugned in the present appeal.

9. I have heard Mr. Arjun Lall, learned counsel for the plaintiff and Mr. Varun Rana, learned counsel for the defendant and have also gone through the records carefully.

10. At the outset, Sh. Arjun Lall, learned counsel representing the plaintiff laid challenge to the order dated 21.2.2000, passed by the learned Additional District Judge, Sirmaur at Nahan in Civil Suit No. 1-N/1 of 2001/1998, whereby the defendant was granted leave to defend the suit. He contended that no grounds were made out for leave to defend and thus, the suit was liable to be decreed at that stage only. In support of his argument, learned counsel for the plaintiff has placed reliance on the provisions of Section 105 of the Code which reads as under:

> *"(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.*
> *(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."*

11. He also placed reliance upon the following extract from the judgment passed by the Hon'ble Supreme Court in ***Wada Arun Asbestos Private Limited vs. Gujarat Water Supply and Sewerage*** *reported in* 2009 (2) SCC, 432 :-

> *"15. Where a conditional leave is granted and the conditions therefor are not complied with, a judgment in favour of the plaintiff can be passed. It is not in dispute that the first appeal was maintainable. Where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal as envisaged under Section 105 of the Code of Civil Procedure.*
>
> *21. We fail to persuade ourselves to agree with the contention of Mr. Chitale that although a revision from an order granting conditional leave was maintainable, the same could not have been a subject matter of challenge in an appeal from a decree as envisaged under Section 105 of the Code of Civil Procedure."*

12. On the other hand, Sh. Varun Rana, learned counsel for the defendant has contested the above said argument of learned counsel for the plaintiff on the ground that order dated 21.2.2000, passed by the learned trial Court has attained finality and could have been challenged by the plaintiff immediately after passing of the said order. It has also been submitted that even otherwise, order dated 21.2.2000 did not suffer from any illegality as the defendant had been able to make out grounds for grant of leave to defend.

13. On the consideration of the provisions of Section 105 of the Code as also the ratio of judgment in Wada Arun Asbestos Private Limited vs. Gujarat Water Supply and Sewerage,(supra), the contention raised on behalf of plaintiff needs to be upheld. Definitely, the order dated 21.2.2000 has affected the decision of the case. Had the defendant not been granted leave to defend, the suit would have been decreed in favour of plaintiff, whereas the same came to subsequently dismissed after entering into merits. Thus, plaintiff still

has a right to assail the order dated 21.2.2000 in appeal filed against the final decree in the suit.

14. The question, however, arises as to whether leave was rightly granted?

15. In ***B.L. Kashyap & Sons Ltd.*** vs. ***M/s JMS Steels & Power Corporation & another***, reported in ***2022 (1) Scale, 614***, the Hon'ble Supreme Court has held as under:-

> *"17.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.*
>
> *17.3. Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there*

remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious."

16. From the aforesaid exposition, it is clear that while dealing with the application for leave to defend, the correct approach isnot to proceed on the assumption that it should be allowed only in exceptional cases. Even in the case where triable issues arise from the fair and reasonable defence, disclosed by defendant, ordinarily the leave should be granted. Any doubt regarding probability of defence enables the Court to put the defendant to terms for granting leave but it cannot be used as the reason to deny the leave. Keeping in view the above principles, it cannot be said that defendant had not been able to make out a reasonable defence.Defendant had come out with a plea that he had not taken any loan from the plaintiff and the cheques had been issued by him in the name of plaintiff, on the asking of father of the plaintiff. Defendant had specifically pleaded that the cheques were handed over to the father of plaintiff as security cheques without date and the plaintiff had misused those cheques by writing the dates of his choice.

17. Learned trial Court had found the defence, raised by the defendant, to be probable and reasonable on the premise that the writing and ink of the dates mentioned in the cheques Ext. P-1 and Ext. P-2 was different than the writing and ink used for scribing name of the holder of the cheques and the amount mentioned therein. The above finding recorded by learned trial Court, in the order dated 21.2.2000, cannot be said to be illegal or perverse. It is also not a case where the order dated 21.2.2000 can be said to be without jurisdiction. In such view of the matter, no illegality and perversity has beenfound in order dated 21.2.2000.

18. Sh. Arjun Lall, learned counsel representing the plaintiff next contended that the dismissal of suit of the plaintiff in the given facts and circumstances of the casewas patently illegal. He argued that the initial burden to prove, the cheques Ext. P-1 and Ext. P-2, to be without consideration was on defendant. There was a specific issue framed in this behalf and the onus was rightly placed on defendant. He further laid challenge to the impugned judgment being result of clear mis-appreciation of oral as well as documentary evidence. Learned counsel for the defendant, to the contrary, has supported the findings returned by learned trial Court. His contention was that the defendant had duly discharged the initial burden by examining himself and also producing documents Ext. D-1 and Ext. D-2, besides previous statement of the plaintiff recorded in proceedings between the same parties as Ext. DX.

19. Noticeably, defendant had not disputed his signatures on the cheques Ext. P-1 and Ext. P-2. He had also not disputed that those cheques wereissued in the name of plaintiff with the amount filled therein. The only defence of defendant was that the dates were not written by him.The cheques, according to defendant, were undated and were given towards security to Sh. C. N. Chaudhary, father of plaintiff.

20. Section 118 of the Negotiable Instruments Act, 1881 reads as under:-

> *"**118 Presumptions as to negotiable instruments**. —Until the contrary is proved, the following presumptions shall be made:—*
>
> *(a) **of consideration**—that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*
>
> *(b) **as to date**—that every negotiable instrument bearing a date was made or drawn on such date;*

(c) ***as to time of acceptance***—*that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*

(d) ***as to time of transfer***—*that every transfer of a negotiable instrument was made before its maturity;*

(e) ***as to order of endorsements***—*that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*

(f) ***as to stamps***—*that a lost promissory note, bill of exchange or cheque was duly stamped;*

(g) ***that holder is a holder in due course***—*that the holder of a negotiable instrument is a holder in due course:*

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

21. Section 139 of the Act *ibid* reads as under:

*"**139. Presumption in favour of holder**.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

22. Thus, there is a presumption, though rebuttable, in favour of a cheque to the following effects:

(i) that the cheque was drawn for consideration,

(ii) it was made or drawn on such date as the cheque was bearing and the holder of the cheque was holder in due course and

(iii) that the holder of the cheque had received the cheque in whole or in part of any debt or other liability unless contrary is proved.

23. All above noted presumptions were also attached to cheques Ext.P-1 and Ext. P-2 and were required to be rebutted by defendant.

24. Defendant while appearing as DW-2 narrated such version in his examination-in-chief which was quite different tohis pleadings in application for leave to defend. He stated on oath that he had been dealing with Firm Arsh Casting and had been purchasing steel from the said firm. Plaintiff was its proprietor. It was the plaintiff, who had demanded the chequesfrom the defendant and thereafter he had issued the cheques Ext. P-1 and Ext. P-2 to the plaintiff without dates. He further stated that he had not taken any loan from the plaintiff and all his accounts with the firm 'Arsh Castings' were settled.

25. The shift in the stand of defendant is unexplainable. Such shift gains special significance in the suit under Order 37 of the Code. Had the defendant taken the same stand in his application for leave to defend, as was later taken by him in his examination-in-chief, therewas a clear possibility of different result. In his application for leave to defend, defendant had specifically mentioned that he had no dealings with the plaintiff and it was Sh. C. N. Chaudhary, father of the plaintiff, with whom, the defendant had been dealings. The cheques were issued by defendant on the asking of Sh. C. N. Chaudhary, whereas in his statement on oath, defendant stated that he did not even know that the father of plaintiffSh. C. N. Chaudhary had no share in the firm. In his application for leave to defend, the specific stand of the defendant was that he had issued the cheques as security on account of his business dealings with Sh. C. N. Chaudhary, whereas in his statement before the Court, he mentioned to have issued the cheques to the plaintiff, though without dates. Defendant had not made any mention of settlement of accounts in his application for leave to defend, whereas in his statement on oath, it was so stated.

26. While being cross-examined on behalf of plaintiff, the defendant stated that he had business dealings with Arsh Castings since 1991 but the cheques Ext. P-1 and Ext. P-2 were issued in 1995. It was also stated by this witness that he had entered the goods supplied to him by Arch Castings in the books maintained by him. He clarified that he paid the cash on bills received from the Firm against goods supplied to him. He also admitted that he had been provided with the receipts of payments executed by plaintiff and were duly entered in his account books.

27. The sole oral testimony of defendant, made in aforesaid manner, cannot be said to be sufficient to rebut legal presumption attached to cheques Ext. P-1 and Ext. P-2. The different stands taken by the defendant in his application for leave to defend and in his deposition before Court casts serious doubt on the veracity of his defence.

28. Further, the case of defendant was based on the hypothesis that he had business dealings with Arsh Castings. In his examination-in-chief, defendant had stated that the accounts were settled. In cross-examination, defendant specifically stated that he had maintained the account books and the entries with respect to dealings with Arsh Castings were also available. In these circumstances, the account books were the best evidence to prove the defence raised by defendant. Since the defendant had withheld the best evidence, adverse inference was liable to be drawn against him.

29. Learned trial Court has clearly misdirected itself by holding that the defendant had discharged its initial burden. The facts noticed above, were completely ignored by learned trial Court. Once the defendant had failed to discharge his burden, learned trial Court had no option but to decree the suit of plaintiff in terms of prayer made therein.

30. Noticeably, learned trial Court while deciding issue No.3, appears to have been swayed by the fact that there was difference of writing and ink in the dates mentioned on the cheques Ext. P-1 and Ext. P-2 and writing and ink

used for scribing other contents thereon. The learned trial Court had also erred in drawing adverse inference against the plaintiff for non-production of his accounts. Strangely, the learned trial Court had proceeded in the manner, as if the onus to prove issue No.3 was on plaintiff.

31. In view of above discussion, the present appeal is allowed. Consequently, the judgment and decree dated 17.7.2002, passed by the learned Additional District Judge, Sirmour, District at Nahan, H.P. in Civil Suit No. 1-N/1 of 2001/1998, whereby the suit of the appellant was dismissed, is set aside. The suit of the plaintiff is decreed for Rs. 2,30,000/- with interest at the rate of 9% per annum from 1.1.1996 till filing of the suit. Plaintiff is also held entitled to *pendente lite* and future interest at the same rate. Decree sheet be prepared.

Pending applications, if any, also stand disposed of. Records of the learned trial court below be returned forthwith.

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

Between:-
BAHADUR SINGH S/O SH. RAM NATH,
RESIDENT OF VILLAGE KHIUNCHA,
P.O. KOOT, 15-20, TEHSIL RAMPUR BUSHAHR,
DISTRICT SHIMLA, H.P.

APPELLANT/PLAINTIFF

(BY MR. C. N. SINGH, ADVOCATE)

AND

1. SMT. BALA DASSI, EX-WIFE OF
SH. BAHADUR SINGH, RESIDENT OF
VILLAGE KHIUNCHA, PO. KOOT, 15-20,
TEHSIL RAMPUR BUSHAHR,
DISTT. SHIMLA, H.P. PRESENTLY
RESIDENT OF KHANERI, NEAR GUPTA
GENERAL MERCHANTS ON NATIONAL

HIGHWAY, 22-KHANERI,
DISTRICT SHIMLA, H.P.

2. SH. VINAY KUMAR SON OF SH. BAHADUR SINGH, RESIDENT OF VILLAGE KHIUNCHA, P.O. KOOT, 15/20, TEHSIL RAMPUR BUSHAHR, DISTT. SHIMLA, H.P. PRESENTLY RESIDENT OF KHANERI, NEAR GUPTA GENERAL MERCHANTS ON NATIONAL HIGHWAY, 22-KHANERI, DISTRICT SHIMLA, H.P.

RESPONDENTS/DEFENDANTS

(MR. HAMENDER CHANDEL, ADVOCATE)

REGULAR SECOND APPEAL
No. 142 OF 2009
Reserved on: 15.9.2022
Decided on: 27.9.2022

Hindu Marriage Act, 1955- Section 29(2)- Customary divorce- Held- Plaintiff has miserably failed to plead and prove the existence of any such custom or its continuance- Appeal dismissed. (Para 16, 17)

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

J U D G M E N T

By way of this second appeal, appellant has assailed judgment and decree dated 26.11.2008 passed by learned District Judge, Kinnaur, Civil Division at Rampur Bushehr, H.P. in Civil Appeal No. 30 of 2008 whereby the judgment and decree dated 07.06.2008 passed by learned Civil Judge (Sr.Division), Rampur Bushehr, District Shimla in Case No. 15-1 of 2005 was affirmed.

2. Appellant was the plaintiff and respondents were defendants before the learned trial Court. The parties hereinafter shall be referred to by the status which they held before the learned trial Court.

3. Brief facts necessary for adjudication of appeal are that plaintiff and defendant No.1 were married to each. Plaintiff claims that by a customary divorce, their marriage stood dissolved, whereas defendant No.1 denies the factum of divorce and claims that her marriage with plaintiff stillsubsists. The status of defendant No.2 as son of plaintiff is admitted.

4. Plaintiff filed a suit against defendants for possession of premises consisting of one room, one bathroom and W.C. in the house constructed over the land comprised in KhataKhatauni No. 63/131, Khasra No. 1207/331, measuring 0-01-66 hectares, situate at ChakKhaneri, Tehsil Rampur, District Shimla, H.P. (hereinafter referred to as the 'suit premises').

5. Cause of action as pleaded by the plaintiff was that the defendants had forcibly taken possession of suit premises on13.03.2005. They were ousted by the plaintiff on 14.3.2005 but they again occupied the said premises. As per plaintiff, afterhis customary divorce with defendant No.1 she had no right, title or interest in the property exclusively owned by him.

6. Per contra, the suit was contested by the defendants by raising preliminary objections regarding maintainability and under valuation of suit. On merits, the factum of customary divorce was denied. It was asserted that defendant No.1 was legally wedded wife of plaintiff. It was the plaintiff, who had deserted defendant No.1 and her children. A daughter was also stated to be born to defendant No.1 from the loins of the plaintiff. It was submitted that the plaintiff had married another lady and was living with her. Plaintiff had a son from that other lady. Defendant No.1 alongwith defendant No.2 and her daughter had been residing in ancestral house of plaintiff, but the same collapsed due to rain and snow. Thereafter, they were provided shelter by Sh. Chhering Ram. Plaintiff did not take pains to enquire about the well-being of the defendants and minor daughter. Since the defendants had no other shelter, they had every right to live with plaintiff. As per the defendants, they were ready and willing to live in the company of the plaintiff.

7. On the basis of pleadings of the parties, learned trial Court framed the following issues:

1. *Whether relations inter-se the plaintiff and defendant No.1 as husband and wife have come to an end in pursuance of a customary divorce, as alleged? OPP*
2. *Whether the defendants have forcibly occupied the premises in question, as alleged? OPP*
3. *If issue No.2 is proved in affirmative, whether the plaintiff is entitled to a decree of possession of the suit premises, as alleged? OPP*
4. *Whether suit is not properly valued for Court fee and jurisdiction, if so, what is its correct valuation, as alleged? OPD*
5. *Whether the suit is not maintainable? OPD*
6. *Relief.*

Issues No. 1 to 5 were decided in negative and accordingly the suit of the plaintiff was dismissed.

8. Plaintiff assailed the judgment and decree passed by learned trial Court in first appeal, but again remained unsuccessful. Hence, the present appeal.

9. Appeal was admitted on 22.10.2011 on the following substantial questions of law:

1. *Whether the judgment /decree dated 26.11.2008 passed by the Court below is perverse, as findings are contrary to pleadings, as relevant material having been ignored and irrelevant material have been taken into consideration and thus findings are contrary to the admissions made by respondent/defendants and evidence on record, which as such has led to miscarriage of justice?*
2. *Whether the findings arrived by the learned Court below is perverse and thus liable to be set-aside as the Court below failed to appreciate the fact that customary divorce being an exception to the general law of divorce and when the*

appellant/plaintiff had specially pleaded and established the factum of dissolution of marriage between the party by way of custom?

3. *Whether the action of the respondent/defendant in the form of her forcefully illegally entering and taking possession of the suit property, can be declared as rightful, without following the procedure established by law, simply on the pretext that being a wife she is entitled for separate residence under the provisions of the Hindu Maintenance and Adoption Act?*

4. *Whether the first appellate Court below misread, misconstrued, misinterpreted the provisions of the law with regard to 'customary practices' in view of the fact that the stand taken by the appellant/plaintiff stands vindicated by the admission made by the respondent/defendant No.1 as such the findings of the two Courts below is perverse, erroneous and is error apparent on the face of record?*

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

11. The fact that the plaintiff and defendant No.1 are Hindu by religion is not denied. The core question around which the entire controversy revolves is regarding the existence of relationship between the plaintiff and defendant No.1. Admittedly, the plaintiff and defendant No.1 were married to each other. The plaintiff asserted that a customary divorce had taken place between him and defendant No.1.

12. Section 29 in The Hindu Marriage Act, 1955 reads as under:

> (1) A marriage solemnised between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.

> (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.
> (3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.
> (4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.

13. Thus section 29(2) of Hindu Marriage Act though saves right recognised by the custom regarding dissolution of Hindu marriage,but to prove the existence of any right on the basis of a custom, the propounded custom, its prevalence and continuity has to be specifically pleaded and proved with reasonable certainty.

14. Reverting to the facts of the case, the plaint was clearly deficient in culling out requisite pleadings in accordance with law. Plaintiff chose to plead the factum of divorce as under:

> ***"3. That defendant No.1 no doubt was the legally wedded wife of the plaintiff, but on account of differences defendant No.1 after the birth of defendant No.2 left the company of plaintiff and by way of customary divorce marriage stood dissolved with the result that even defendant No.2 remained in custody of defendant No.1 and his custody was never handed over to the plaintiff. Defendant No.2 is now 19 years old."***

15. Plaintiff relied upon documents Ext.PW-4/A and Ext. PW-4/B in support of his contention. Vide Ext.PW-4/A defendant No.1 had allegedly signed a writing in which it was committed on her behalf that she would not remain the wife of plaintiff and the plaintiff was free to marry again. Ext.PW-4/B is another document signed by defendant No.1 with a recital that the plaintiff would not suffer any curse from the side of defendant No.1. It is on the strength of these documents that customary divorce is stated to have taken place between the plaintiff and defendant No.1.

16. PW-3 Budhi Singh has been examined by the plaintiff to prove these documents and the customary divorce. In his examination-in-chief the witness stated that documents Ext PW-4/A and PW-4/B were prepared in his presence. About 20-21 years back the marriage between Bahadur Singh and BalaDassi was dissolved mutually. He further maintained that the custom to effect divorce mutually was prevalent since the time of princely states and was still being followed in the area. Earlier a piece of wood was broken to mark divorce now it is recorded in writing. However, in his cross-examination, this witness categorically admitted that now custom of family (mutual) divorce was not existing. Plaintiff while appearing as his own witness also stated that there was a custom of mutual divorce since the time of “Bushehr State” and as per custom his marriage with defendant No.1 was dissolved. No other witness was examined by the plaintiff to prove the existence of any such custom or its continuance etc.

17. In absence of necessary pleadings and proof as to custom, plaintiff had miserably failed to prove plea to that effect. There were no other examples proved on record to the effect that the practice or custom as claimed was applied or followed in any other case also. Both the learned Courts below have concurrently held so. No fault can be found with the findings returned by the learned Courts below in this regard.It being so, the relationship of husband

and wife between the plaintiff and defendant No.1 cannot be said to have ceased.

18. Another admitted fact of the case is that the plaintiff has married another lady and has a son from her. Plaintiff is residing with that other lady. This clearly shows the blatant neglect of defendants by the plaintiff. Defendants have never expressed intent to reside separately. They were ready and willing to live with plaintiff. It was the plaintiff, who was avoiding the defendants. Defendants have a right of shelter.

19. Similarly, both the courts below have held that forced entry of defendants in the suit premises was not proved. Again, there is no evidence to suggest the contrary, therefore, such findings also cannot be said to be perverse.

20. In view of above discussion, the substantial questions 1, 2 and 4 are answered in negative. As regards question No.3, since no forceful entry has been proved and further keeping in view the right of wife to reside with husband and corresponding duty of husband to provide her protection/residence, the same is answered accordingly.

21. Resultantly, the appeal fails and the same is dismissed with no orders as to costs. Judgment and decree dated 26.11.2008 passed by learned District Judge, Kinnaur, Civil Division at Rampur Bushehr, H.P. in Civil Appeal No. 30 of 2008 and judgment and decree dated 07.06.2008 passed by learned Civil Judge (Sr. Division), Rampur Bushehr, District Shimla in Case No. 15-1 of 2005 are affirmed.

22. Appeal is accordingly disposed of, so also the pending miscellaneous application (s), if any.

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

Between:-

1. MUNICIPAL CORPORATION, SHIMLA
   THROUGH ITS COMMISSIONER.

2. HEALTH OFFICER, MUNICIPAL CORPORATION,
SHIMLA.

....APPELLANTS

(BY MR. NARESH K. GUPTA, ADVOCATE)

AND

SH. NARESH KUMAR SOOD
S/O SH. REWAL CHAND SOOD,
SOLE PROPRIETOR,
M/S HIMACHAL AUTO SERVICE,
SANJAULI, SHIMLA.

...RESPONDENT

(MR. Y.P. SOOD, ADVOCATE)

REGULAR SECOND APPEAL
No. 208 OF 2009
Reserved on: 29.8.2022
Decided on: 01.09.2022

Limitation Act, 1961- Article 18- Suit for recovery- Held- Defendants were not having any obligation towards the plaintiff except to make payments for the services provided- The facts of instant case do not qualify the requirements of Article 1 of the Limitation Act- Suit of plaintiff would fall under the Article 18 which provided for a limitation of three years when the work was done- Appeal allowed. (Para 16 to 18)

Cases referred:

Hindustan Forest Company vs. Lal Chand and others AIR 1959 SC 1349;
KesharichandJaisukhalal vs. Shillong Banking Corporation Ltd. Shillong AIR 1965 SC 1711;

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

J U D G M E N T

By way of instant appeal, the appellants have assailed judgment and decree dated 24.12.2008 passed by learned District Judge, Shimla in Civil Appeal No. 47-8/13 of 2008 whereby the judgment and decree dated 29.5.2008 passed by learned Civil Judge, Senior Division, Shimla in Civil Suit No. RBT-III/1 of 2005/01 was affirmed and the suit of the respondent herein was decreed.

2. The parties herein shall be referred to by the same status which they held before the learned trial Court.

3. Brief facts necessary for adjudication of the appeal are that the plaintiff filed a suit for recovery of Rs.2,41,387.17 against defendants on the premise that the plaintiff was running a business of auto parts under the name and style of M/s Himachal Auto Services and the defendants had been obtaining his services in the form of repair of vehicles and purchase of spare parts etc. It was alleged that defendant No.1 had an open cash credit mutual and running account with plaintiff. The payments made by defendants to plaintiff, from time to time, were duly credited in the account books maintained by plaintiff in regular course of his business. The debit entries were also regularly shown in such account books as and when the bills were raised by the plaintiff against the repairs of their vehicles or supply of spare parts etc.

4. The suit was filed on 05.04.2001. It was claimed in the plaint that the cause of action had arisen initially on 28.4.1992 when the open mutual cash credit account was opened by defendants with plaintiff. Plaintiff further relied upon a detail of amounts payable by the defendants to the plaintiff w.e.f. the financial year 1992-93. By adding the balance carried forward in each of the financial year w.e.f. 1992-93, a total sum of Rs.2,53,852.12 was claimed as payable. Plaintiff admitted to have received a sum of Rs.47,627/- and Rs.58,985/- from defendants on 31.3.1999 and 19.10.2000, respectively. After deducting the amount so received and after

adding claimed interest at the rate of 18% per annum, the suit amount of Rs.2,41,387.12 was calculated.

5. The suit was contested by the defendants. The opening of cash credit open and mutual running account by the defendants with the plaintiff was specifically denied. It was submitted that the defendants placed orders in writing to the plaintiff for repair of their vehicles on need basis and payments were made in the regular course of business against the bills generated by plaintiff. As per defendants, the suit of the plaintiff was time barred as there was no open mutual and running account. Objection as to non-maintainability of the suit on account of want of notice under Section 392 of the H.P. Municipal Corporation Act was also raised.

6. On the pleadings of the parties, the learned trial Court framed the following issues:

1. *Whether the plaintiff is entitled to recover from the defendants the suit amount along with interest at the rate of 18% per annum, as alleged ?OPP*
2. *Whether the plaintiff has no cause of action? O.P.D.*
3. *Whether the suit is barred by time? OPD*
4. *Whether the suit is barred by the provisions of Section 392 of the H.P. Municipal Corporation Act? OPD*
5. *Relief.*

7. Issue No.1 was partly decided in affirmative and the suit of the plaintiff was decreed for a sum of Rs.1,47,240.12 alongwith interest at the rate of 9% per annum payable w.e.f. 19.10.2000 till realization of entire decretal amount. The learned lower Appellate Court also affirmed the findings returned by the learned trial Court and dismissed the appeal of the defendants.

8. This appeal was admitted on 04.12.2009 on following substantial question of law:

> *"Whether both the Courts below incorrectly applied Article of the Limitation Act, 1963 to hold the claim in the suit as within limitation*

inspite of the fact that bills raised pertained to the period from 1992 to 1999?

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

10. Noticeably, the suit amount included amounts pertaining to financial years 1992-93 onwards. Document Ext.PW-1/G as relied upon by learned trial Court provided the details of suit amount as under:-

"Detail of year-wise amount:

1.	1992-93	2292.12
2.	1993-94	8335.00
3.	1994-95	7646.00
4.	1995-96	19375.00
5.	1996-97	35787.00
6.	1997-98	69331.00
7.	1998-99	111086.00
	Total :	253852.12
	Amount received vide Ch.No.031976 dated 31.3.99 Without details of bills	47627.00
	Balance:	2,06,225.12
	Interest of above amount:	94,147.00
	Total amount :	3,00,372.12
	Amount received vide Ch. No. 154427 dated 19.10.2000	58,985.00
	Balance:	**2,41,387.12"**

11. Issue No.3 was specifically framed as to limitation of the suit on the objection raised in the written statement. Even otherwise, it was for the plaintiff to have proved that the amount claimed in the suit was within limitation.

12. In order to prove his suit within limitation, plaintiff had alleged existence of an open mutual running account with the defendants with a

purpose to take benefit of Article-1 of the Limitation Act, which reads as under:

1.	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

13. Learned trial Court held the existence of current, mutual and running account between the parties as proved. Learned lower Appellate Court also affirmed such findings. However, the findings so returned by both the Courts below cannot commend approval of this Court for the reasons firstly that the findings so returned on issue No.3 are without any reason and secondly, such findings were against settled position of law. It is trite law that in order to prove existence of open mutual running account, the party alleging such existence has to prove existence of the mutual obligations inter se the parties.

14. In ***Hindustan Forest Company vs. Lal Chand and others AIR 1959 Supreme Court 1349***, the Hon'ble Supreme Court has held as under:

> "7. *"The question what is a mutual account, has been considered by the courts frequently and the test to determine it is well settled. The case of the Tea Financing Syndicate Ltd. v. Chandrakamal, ILR 58 Cal, 649 :(AIR 1931 Cal 359), may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by Art 15 of the Indian Limitation Act. Rankin, C.J., laid down at p.*

668 (of ILR Cal): a p. 368 of AIR), the test,to be applied for deciding the question in these words:

> *" There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."*

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between' the parties was mutual for the following reasons:

> *" The point then reduces itself to the fact that the defendant company had advanced a certain amount of money to the plaintiffs for the supply of grains. This excludes the, question of monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs.13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff 's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."*

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had

agreed to pay for them and had in part made the payment in advance. There can be no question that in -so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments."

15. Similarly, in ***KesharichandJaisukhalal vs. Shillong Banking Corporation Ltd. Shillong AIR 1965 Supreme Court 1711***, the Hon'ble Supreme Court has held as under:

"9. *The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.*

10. Now in the leading case of HiradaBasappa v. GadigiMuddappa, 6 Mad. H.C. 142 at p.144, Holloway, Acting C. J. observed:

> *"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."*

These observations were followed and applied in Tea Financing Syndicate Ltd. v. ChandrakamalH.R. 58, Cal 649: (AIR 1931, Cal. 359) and Monotosh K. Chatterjee v. Central Calcutta Bank Ltd. 91

Cal. LJ 16, and the first mentioned Calcutta case was approved by this Court in Hindustan Forest Company v. Lal Chand 1960-1 SCR 563: (AIR 1959 SC 1349), Holloway, Acting C. J. laid down the test of mutuality on a construction of S. 8 of Act XIV of 1859, though that section did' not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasises the test of mutuality laid down in the Madras case.

11. In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions. the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to S. 45 (O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative."

16. Reverting to the facts of the case, there is neither any factual foundation nor any material to prove the existence of mutual obligations between the parties. The simplicitor case of the plaintiff was that he was providing services of vehicle repairs and sale of spare parts to the defendants

as per their orders and bills were being generated from time to time. Defendants were making part payments and the remaining balance was claimed by way of suit amount. Thus, the defendants were not having any obligation towards the plaintiff except to make payments for the services provided by him. In view of aforesaid exposition of law, the facts of instant case do not qualify the requirements of Article 1 of the Limitation Act.

17. In absence of the benefit of Article-1 of the Limitation Act, the suit of the plaintiff would fall under Article 18 which provided for a limitation of three years when the work was done. For clarity, the Article 18 of the Limitation Act is reproduced as under:

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18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years.	When the work is done.

18. Thus, the amount, if any, payable by defendants for the services availed or parts purchased during the period of three years immediately preceding date of filing of suit could be held to be within time. The relevant period would be 6.4.1998 to 5.4.2001. Perusal of Ext. PW-1/G reveals that during this period, a sum of Rs. 1,11,086/- was claimed as payable by defendants to the plaintiff. As per the admission of the plaintiff, he had received Rs.47,627/- and Rs.58,985/- on 31.3.1999 and 19.10.2000, respectively. This amount has not been shown to be paid against any specific bill. Thus, the plaintiff had failed to prove the liability of defendants to pay him any amount which could be said to be within the period of limitation. The findings on issue No.3, were thus clearly perverse. The substantial question of law as framed in the instant appeal is accordingly answered.

19. In result, the appeal is allowed. Judgment and decree dated 24.12.2008 passed by learned District Judge, Shimla in Civil Appeal No. 47-8/13 of 2008 affirming judgment and decree dated 29.5.2008 passed by learned Civil Judge, Senior Division, Shimla in Civil Suit No. RBT-III/1 of 2005/01, is set-aside and the suit of the plaintiff is dismissed with no order as to costs. Pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA

Between:-

1. SH. UTTAM RAM @ UTTAM SINGH
   SON OF SH. SINGH SON OF SH. LALA
2. SH. DHAMESHWAR SON OF SH. DHANDEV
3. SH. BHUSHAN SON OF SH. KHAJANA
   SON OF SH. LALA
   RESIDENTS OF VILLAGE GUDWAHAN,
   P.O. REWALSAR, TEHSIL SADAR,
   DISTRICT MANDI, H.P.

APPELLANTS/DEFENDANTS

(BY MR. R. L. CHAUDHARY, ADVOCATE)

AND

1. SMT. PURNU WIDOW OF LATE SH. DHANNA
2. SMT. ROSHNI DEVI, DAUGHTER OF LATE SH. DHANNA WIFE OF SH. PHABBA
3. SMT. CHANDI DEVI DAUGHTER OF LATE SH. DHANNA, WIFE OF JEET RAM ALL RESIDENTS OF VILLAGE AND POST OFFICE SARKIDHAR, TEHSIL SADAR, DISTRICT MANDI, H.P.
4. SMT. TULSI DEVI DAUGHTER OF SH. DHANNA WIFE OF KHEM CHAND. RESIDENT OF KHAKHRANA, TEHSIL SADAR, DISTRICT MANDI, H.P.
5. SMT. SARLA DEVI DAUGHTER OF DHANNA WIFE OF GIAN CHAND, RESIDENT OF TAKREHAD, POST OFFICE GEHRA, TEHSIL SADAR, DISTRICT MANDI, H.P.

RESPONDENTS/PLAINTIFFS

6. SH. PAWAN SON OF SH. DHANDEV,
MINOR THROUGH HIS FATHER
SH. DHANDEV, NATURAL GUARDIAN,
RESIDENT OF VILLAGE & POST OFFICE,
SARKIDHAR, TEHSIL SADAR, DISTRICT MANDI, H.P.

7. (a) NEERA DEVI WIDOW OF LATE DHAN DEV

7. (b) DHAMESHWAR SON OF LATE DHAN DEV

7.(c) PAWAN SON LATE DHAN DEV
ALL RESIDENTS OF VILLAGE AND POST OFFICE
SARKIDHAR, TEHSIL SADAR, DISTRICT MANDI, H.P.

8. MS. NIMA DAUGHTER OF SH. SINGH SON OF
SH. LALA, RESIDENT OF VILLAGE & POST OFFICE
SARKIDHAR, TEHSIL SADAR, DISTRICT MANDI, H.P.

9. SMT. KANTI WIDOW OF LATE SH. BHAGAT,
RESIDENT OF PANYALI, TEHSIL SARKAGHAT,
DISTRICT MANDI, H.P.

10. MS. ANJU @ MANJU DAUGHTER OF LATE
SH. BHAGAT, RESIDENT OF VILLAGE AND
POST OFFICE JANI, TEHSIL SARKAGHAT
DISTRICT MANDI, H.P.

11. MS. REENA DAUGHTER OF LATE SH. BHAGAT,
RESIDENT OF VILLAGE PANYALI, VPO GEHRA,
TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.

12. MS. SAPNA DAUGHTER OF SH. BHAGAT,
WIFE OF SH. NIKU, RESIDENT OF VILLAGE
AND POST OFFICE BHADRWAR, TEHSIL
SARKAGHAT, DISTRICT MANDI, H.P.

13. SH. VICKY SON OF SH. BHAGAT RAM,
MINOR THROUGH HIS FATHER SH. BHAGAT
RAM, SON OF SH. LALA, RESIDENT OF
VILLAGE PANYALI, P.O. GEHRA, TEHSIL
SADAR, DISTRICT MANDI, H.P.

14. SH. KHAJANA SON OF LALA, RESIDENT OF
VILLAGE GUDWAHAN, POST OFFICE,
REWALSAR, TEHSIL SADAR, DISTRICT MANDI, H.P.

..PROFORMA RESPONDENTS

(MR. G. R. PALSRA, ADVOCATE,
FOR RESPONDENTS NO. 1 TO 3).

REGULAR SECOND APPEAL
No. 261 OF 2009
Reserved on: 22.9.2022
Decided on: 30.9.2022

Indian Succession Act, 1925- Section 63- Will- Suspicious circumstance- Will proved as per the requirement of law- - Marginal witnesses have admitted their signatures on the Will and their testimonies were not shattered on the issue of execution of Will- even if the names of marginal witnesses were not typed, could not have been taken as a suspicious circumstance to discredit the entire execution of the Will- Appeal allowed. (Para 28)

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

J U D G M E N T

By way of this second appeal, the appellants have assailed judgment and decree dated 24.04.2008 passed by learned District Judge, Mandi, H.P. in Civil Appeal No. 10 of 2005 whereby the judgment and decree dated 01.12.2005 passed by learned Civil Judge (Sr.Division), Mandi, District Mandi, H.P. in Civil Suit No. 4/2002 has been reversed.

2. The parties hereinafter shall be referred to the same status which they held before the learned trial Court.

3. Saraswati had five sons namely Dhanna, Singh, Dhandev, Bhagat Ram and Khajana and also had six daughters, who were married. Dhanna had pre-deceased his mother.Plaintiffs are the successors of Dhanna. Defendants No. 6 to 9 were the other sons of Saraswati, whereas defendants No. 1 to 5 are the grand-sons of Saraswati.

4. After the death of Saraswati, a dispute arose in respect of her estate. Defendants No. 1 to 5 claimedinheritance to the estate of Saraswati on

the strength of registered Will dated 17.3.1997 executed by Saraswati. Plaintiffs raised dispute regarding executionof Will and alleged the same to be a document fabricated by the plaintiffs. It was also alleged that taking advantage of old age, illiteracy, feeble state of mind, physical incapacity of Saraswati, defendants had manipulated a forged Will dated 17.3.1997 in her name.It was further alleged that Saraswati had relinquished her share in favour of the plaintiffs. As per plaintiffs, they were in possession of the property which fell to the share of Saraswati.

5. Defendants contested the suit by filing separate written statements. Whereas, defendants No. 2 to 4 filed a separate written statement, defendants No. 1, 5 and 7 to 9 joined to file another written statement. The common grounds of objections were as to maintainability of the suit, cause of action, valuation, estoppel and limitation etc. On merits, the allegations levelled in the plaint were denied in generality. It was specifically pleaded that Saraswati had executed legal and valid Will dated 17.3.1997 in favour of defendants No. 1 to 5. The plea of Saraswati having relinquished her share in favour of plaintiffs was denied. The Will executed by Saraswati on 17.3.1997 was stated to be her genuine Will having been executed by Saraswati in sound disposing state of mind and further having been registered with the Sub Registrar, Mandi.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:

1. *Whether the deceased Saraswati Devi executed legal and valid Will dated 17.3.97 in a sound state of mind, in favour of defendants Nos. 1 to 5 as alleged? OPD*
2. *If issue No.1 is proved in affirmative, whether the alleged Will executed by Saraswati Devi, on dated 17.3.97 is forged and fictitious documents? OPP*
3. *If issue No.2 is proved in affirmative, whether the deceased Saraswati Devi, relinquished her share, in favour of the plaintiff, during her life time, if so its effect? OPP*

4. *Whether the plaintiffs are the joint owner in possession of the suit land alongwith the defendants Nos. 6 to 9, as alleged? OPP*
5. *Whether the plaintiffs are entitled for the relief of the permanent prohibitory injunction, as prayed? OPP*
6. *Whether the suit is not maintainable? OPD*
7. *Whether the plaintiff has no cause of action? OPD*
8. *Whether the suit is not properly valued for the purposes of Court fees and jurisdiction, if so, what is the correct valuation? OPD*
9. *Whether the suit is barred by limitation? OPD*
10. *Relief.*

Learned trial Court decided issues No.1 and 4 in affirmative, all other issues were decided in negative. The suit of the plaintiffs was accordingly dismissed. The Will dated 17.3.1997 was held to be legal and valid document having been executed by Saraswati in favour of defendants No. 1 to 5. Plaintiffs were also held to be joint owners in possession of the suit land alongwith defendants No. 6 to 9.

7. The plaintiffs assailed the judgment and decree passed by learned trial Court in First Appeal under Section 96 of the Code of Civil Procedure. Learned District Judge, Mandi, allowed the appeal of the plaintiffs vide impugned judgment and decree by setting aside the judgment and decree passed by learned trial Court. It was declared that the Will dated 17.3.97 was not valid and genuine and estate of Saraswati was held liable forinheritance in accordance with the provisions of Hindu Succession Act.

8. Defendants No. 1,2&5 have assailed he judgment and decree passed by learned lower Appellate Court by way of instant appeal.

9. The appeal was admitted on 06.09.2014 on the following substantial questions of law:

1. *Whetherdeceased Saraswati Devi has executed a valid and legal Will dated 17.3.1997 Exhibit DW-4/A in favour of*

appellants/defendants No. 1 to 5 as per the requirement of Sections 67 and 68 of Evidence Act and 63 of Indian Succession Act in view of documentary as well as oral evidences of DW-1 to DW-5?

2. *Whether the Ld. First Appellate Court has rightly reversed the well-reasoned judgment of the Ld. Trial Court while passing the impugned judgmentand decree ignoring the fact that neither the respondents/plaintiffs have questioned the authenticity of registration nor any witness was examined to this effect from the office of Sub Registrar?*
3. *Whether the Ld. First Appellate Court has based its findings on conjectures, surmises and hypothesis by mis-interpreting the evidences of DW1, DW2, DW3, DW4 and DW5?*
4. *Whether the respondents/plaintiffs have proved on record that Exhibit DW4/A is a result of fraud and mis-representation without questioning the authenticity of registration of the document?*
5. *Whether the Ld. First Appellate Court has rightly given undue weightage for the name written in Hindi of marginal witnesses in view of the registration of Ex. DW-4/A dated 17.3.1997, without questioning the authenticity of registration of the alleged document?*

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

11. Learned counsel for the appellants has contended that the impugned judgment and decree passed by learned lower Appellate Court is against well settled canons of law. The non-existent facts have been culled out as suspicious circumstances, by ignoring the fact that the execution of Will was duly proved in accordance with law.

12. Per contra, learned counsel for respondents No. 1 to 5/plaintiffs has supported the judgment and decree passed by learned lower Appellate Court being in accordance with law.

13. The original Will dated 17.3.1997 has been placed on record as Ext. DW-4/A. The perusal of this document reveals that it ostensiblyhad the thumb impression of Saraswati as the testatrix. Her thumb impression is also purportedly there on the first page of the Will and on the reverse of the pages where the stamps have been affixed by the office of the Sub Registrar, Sadar, Mandi. The document is in two pages. The marginal witnesses of the Will have been named as Jeet Ram and Dumnu Ram. Sh. Pushp Raj Sharma, Advocate, Mandi has been mentioned as identifier. The Will is stated to be scribed by the document writer Sh. Bhagirath Sharma at Mandi. The evidence of registration of the document in the office of Sub Registrar Sadar, Mandi is also visible on Ext. DW-4/A.

14. Plaintiff No.1 appeared as her own witness and was examined as PW-1. In her examination-in-chief, she stated that Saraswati was not keeping good health for 6-7 months before her death and for 2-3 months before death she was not even conscious. As per plaintiff No.1, Saraswati had grown old and the defendants had taken benefit of her old-age and had manipulated a forged Will.

15. Plaintiffs examined another witness named Bharvu. As per this witness, he was closely associated with Saraswati and he was never apprised by Saraswati about the execution of any Will by her. He also stated that before death, the mental state of Saraswati was not perfect and she was not in a position to execute the Will.

16. On the other hand, defendants examined DW-4 Dumnu Ram and DW-5 Jeet Ram as marginal witnesses of the Will. DW-4 stated that he had accompanied Saraswati, her son Khazana Ram and Jeet Ram to Mandi. Saraswati had got scribed her Will from Bhagirath. After typing the document, the same was read by Bhagirath to the Saraswati. She admitted the contents of the Will to be correct and affixed her thumb mark in front of the witnesses and the witnesses also signed the Will thereafter in her presence. Pushp Raj

was the Advocate. Thereafter, they went to Tehsil office, the "old lady" had handed over the document to Tehsildar and had stated that since her grand-sons were looking after her and hence, she had willed her property in their favour. DW-4 identified his signatures as well as signatures of other witness Jeet Ram. He also identified the thumb mark of Saraswati. In cross-examination, it was suggested to him that Saraswati was impersonated by Kagdu Devi and a forged Will was prepared.

17. DW-5 Jeet Ram was the other marginal witness. He deposed that Saraswati was his aunt. In 1997, he alongwith Khazana Ram, Singh, Saraswati and Dumnu Ram had visited Mandi. Saraswati had expressed her intention to execute Will in favour of her grand-sons. We had gone to Pushp Raj, Advocate. Thereafter, Saraswati told Bhagirath that she wanted to bequeath her property in favour of her grand-sons. Bhagirath scribed the Will, read over the same to Saraswati, who affirmed its contents in presence of the witnesses and also thumb marked the same in their presence. Both marginal witnesses also appended their respective signatures in her presence. All visited the Tehsil office and Saraswati presented the Will to Tehsildar. She disclosed to the Tehsildar that she had willed her property in favour of her grand-sons. There also the marginal witnesses were made to sign the document. Saraswati also appended her thumb impression again. As per this witness, Saraswati was in her senses. In cross-examination, the same defence was put to DW-5 that Khazana Ram in connivance with Pushp Raj, Advocate had got Saraswati impersonated by Kagdu Devi and it was Kagdu Devi, who had appended her thumb marks.

18. By examining both the marginal witnesses of the Will, defendants had complied with requirement of Section 68 of the Evidence Act. In addition to examination of marginal witnesses, defendants had also examined DW-2, who was working as Document Writer and had scribed the Will of Saraswati. Sh. Pushp Raj, Advocate was also examined as DW-1. Both these witnesses had

also deposed that the Will was scribed by Bhagirath on the asking of Saraswati. DW-1 Pushp Raj, Advocate knew Saraswati personally and had thus identified her.

19. The registration of Will Ext. DW-4/A under the Registration Act has not been denied. Plaintiffs had only contested the fact that the Will propounded by the defendants was not a genuine and valid document. Whereas in pleadings, the reason for alleging the Will to be a forged document was the old age, illiteracy and physical incapacity of Saraswati. In cross-examination, on the defence witnesses, a defence was set up that Saraswati had neither appended her thumb impression on the Will nor had presented the same before the Registrar. It was specifically put in the form of suggestion to the defendants' witnesses that Saraswati was impersonated by Kagdu Devi and it was Kagdu, who had thumb marked the Will.

20. Thus, the Will by Saraswati was proved to have been executed in accordance with Section 63 of Indian Succession Act and also became a piece of legal evidence on compliance of section 68 of Indian Evidence Act.

21. The first substantial question of law is accordingly decided in affirmative.

22. Learned lower Appellate Court has disbelieved the Will on following grounds:

(i) The statement of DW-1 Pushp Raj, Advocate was discrepant with respect to date of execution of Will.

(ii) The names of testatrix and identifier were typed on the second page of the Will, whereas the names of marginal witnesses were not typed and rather were written in hand.

(iii) Beneficiaries of the Will had actively participated in its execution.

(iv) The marginal witnesses were not having cordial relations with plaintiff No.1.

23. Learned lower Appellate Court considered the aforesaid circumstances as suspicious and had arrived at the conclusion that since defendants had failed to remove suspicion surrounding the execution of Will, the document Ext.DW-4/A was not the valid and genuine Will of Saraswati.

24. Before delving upon the findings recorded by learned lower Appellate Court, it will be apt to notice at this stage that learned lower Appellate Court had miserably failed to consider the most relevant and significantaspectsof the case

24.1 The document Ext. DW-4/A is a registered document. The factum of its registration has not been challenged. It bears an endorsement of the Registrar according to which the document was presented by Saraswati herself and was read-over and explained to her as per the requirement of Sections 58 to 60 of the Registration Act. Since there is legal presumption to the correctness of endorsement, learned lower Appellate Court could not have ignored the same.

24.2 Further, the plaintiffs had come up with specific defence that Saraswati was impersonated by Kagdu Devi.Save and except for suggesting this fact to the witnesses of defendants,no effort was made by plaintiffs to substantiate such plea. Admittedly, there were thumb impression marks on Will Ext. DW-4/A. In case plaintiffs wanted the Court to believe its plea of impersonation, they should have led evidence to establish their stand. No effort was made by plaintiffs to get the thumb impression on Will Ext. DW-4/A examined by an expert. It is trite that merely suggesting some fact in cross-examination to a witness and denied by such witness, will not be deemed to have been proved.

25. Thus, the statements of defendants'witnesses hadsufficiently proved that the Will Ext. DW-4/A bore the thumb impressions of Saraswati and was also presented for registration by her. That being so, the circumstances considered by learned lower Appellate Court as suspicious should have been considered in light of existence of proof of above noticed facts.

26. In addition to above, another fact clearly escaped the notice of learned lower Appellate Court. The Will was executed on 17.3.1997. Plaintiffs had alleged that Saraswati was not having sound disposing mind since 2-3 months prior to her death. No evidence was led as to the date of death of Saraswati. However, it was revealed from the evidence that Saraswati died somewhere in the year 2000. In this view of the matter, plaintiffs have miserably failed to prove that Saraswati was physically or mentally incapacitated from executing the Will in March, 1997. No material has been placed on record to show that her mental or physical health was not proper at the time of execution of Will.

27. DW-1 Pushp Raj, Advocate in his examination-in-chief stated that Saraswati had come to him on 12.03.1997 and the Will was executed. The discrepancy that instead of 17.03.1997, this witness mentioned the date of execution of Will as 12.03.1997 has been considered as a suspicious circumstance by learned lower Appellate Court. It has not been appreciated that the statement of DW-1 was recorded in the Court in August, 2005 i.e. after about eight years from the date of execution of the Will. DW-1 had represented Saraswati only as a professional Advocate and, as such, he was neither supposed to remember the exact date nor expected to do so. Even otherwise, the due execution of Will was proved by the marginal witnesses. Corroboration was provided by the scribe DW-2 Bhagirath. Additionally, the Will was a registered document. Keeping in view all attending circumstances, discrepancy in mentioning the date by DW-1 Pushp Raj, Advocate could not have been considered as a suspicious circumstance insofar as the execution of the Will is concerned.

28. In my considered view, learned lower Appellate Court has also attached more than required attention to the fact that the names of marginal witnesses were not typed on the Will, whereas the names of testatrix and identifier were typed. Learned lower Appellate Court has thus drawn an inference that the Will was not genuine. The cross-examination of DW-2 scribe of Will reveals

that no question was put to him in respect of non-typing of the names of witnesses. In absence of any such clarification being sought from DW-2, the inference drawn by learned lower Appellate Court cannot be said to be justified. The only important aspect was the execution of the Will in accordance with the provisions of section 63 the Indian Succession Act and placing it on record as legal piece of evidence as per Section 68 of the Evidence Act. Both the conditions stood satisfied in the case. DW-4 and DW-5 had admitted their signatures on the Will as marginal witnesses. Their testimonies were not shattered on the issue of execution of Will. In this view of the matter, even if the names of marginal witnesses were not typed, could not have been taken as a circumstance much less suspicious circumstance to discredit the entire execution of the Will.

29. As regards the participation of beneficiaries, it has come on record that DW-3 Khazana Ram one of the sons of Saraswati was accompanying her at the time of execution of Will. He had arranged the witnesses. Admittedly, Saraswati was old lady. She was not local resident of Mandi town where she could visit the Court premises or the office of the Sub Registrar of her own. The parties belonged to rural area having some distance from the town. In such circumstances, it was natural that Saraswati was accompanied by someone and there could not be a better person than her own son. Simply because the son of DW-3 Khajana Ram was one of the beneficiaries of the Will, does not vitiate the execution thereof. Further, the arrangement of witnesses by the son of testatrix also cannot be said to be a suspicious circumstance in the given facts of the case. The execution of Will, in the instant case was not an abrupt decision. Saraswati had to visit Mandi town for the purpose of execution and registration of Will. She could not have expected the persons known to her to be immediately available at the time of execution of Will, therefore, she had to arranged the witnesses in advance.

30. DW-4 and DW-5 had stated that they were not having cordial relations with plaintiff No.1. That by itself does not mean that they had been privy to a fraud or manipulated document. It is not the case that the marginal witnesses were not knowing the testatrix or her family. Had they been stranger having inimical relations with plaintiff No.1, there might have been some substance in drawing an inference as to such circumstance being suspicious.

31. In view of above discussion, the judgment and decree passed by learned lower Appellate Court below cannot be sustained. Substantial questions of law Nos 2 to 4 are accordingly answered in negative.

32. Resultantly, the appeal succeeds. Judgment and decree dated 24.04.2008 passed by learned District Judge, Mandi, H.P. in Civil Appeal No. 10 of 2005 is set-aside and the judgment and decree dated 01.12.2005 passed by learned Civil Judge (Sr. Division), Mandi, District Mandi, H.P. in Civil Suit No. 4/2002, is affirmed.

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

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

Between:-
BRIJ KISHORE CHOUHAN
SON OF LATE SH. KISHAN SINGH,
RESIDENT OF MOHAL AND
MAUZA BARA, TEHSIL DEHRA,
DISTRICT KANGRA, H.P.

..APPELLANT/PLAINTIFF

(BY MR. ROMESH VERMA, ADVOCATE)

AND

3. (i) SMT. KANTA DEVI, WIDOW OF
LATE SH. BALWANT SINGH,

(ii) SH. ANURAG S/O LATE SH. BALWANT SINGH
(iii)SH. AMAN DEEP SINGH S/O
LATE SH. BALWANT SINGH
ALL RESIDENTS OF VILLAGE AND POST OFFICE
BARA, TEHSIL DEHRA, DISTRICT KANGRA, H.P.
(iv) SMT. KAVITA DAUGHTER OF LATE
SH. BALWANT SINGH, R/O VILLAGE
AND POST OFFICE BARA, TEHSIL DEHRA,
DISTRICT KANGRA, H.P.
2. SMT. MOURAN DEVI WIFE OF SH. NANAK CHAND.
RESIDENT OF VILLAGE AND POST OFFICE BARA,
TEHSIL DEHRA, DISTRICT KANGRA, H.P.

...RESPONDENTS/DEFENDANTS

(MR. K.D. SOOD, SENIOR ADVOCATE, WITH MR. H.R. THAKUR, ADVOCATE, FOR RESPONDENTS No.1 (i) to 1(iv).

NONE FOR RESPONDENT NO.2).

REGULAR SECOND APPEAL
No. 481 OF 2009
Reserved on: 22.9.2022
Decided on: 28.9.2022

Specific Relief Act, 1963- Section 37- Suit for permanent prohibitory and mandatory injunction – Ld. Trial Court dismissed the suit of the plaintiff, however, in first appeal plaintiff succeeded partly- Held- As per the report of Local Commissioner no encroachment was found in the suit land- Findings of Ld. Courts below cannot be faulted- Appeal dismissed. (Para 12 to 14)

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

J U D G M E N T

By way of instant Regular Second Appeal, appellant has assailed judgment and decree dated 25.07.2009 passed by learned District Judge,Kangra at Dharamshala, H.P. in Civil Appeal No.130-G/XIII-2008whereby the judgment and decree dated 12.09.2008passed by learned

Civil Judge (Junior Division), Court No. 2, Dehra, District Kangra, H.P. in Civil Suit No. 26/2004 was partly modified.

2. Appellant was the plaintiff and respondents were defendants before the learned trial Court. The parties hereinafter shall be referred to by the status which they held before the learned trial Court.

3. Brief facts necessary for adjudication of appeal are that plaintiff filed a suit for permanent prohibitory and mandatory injunction against defendants seeking prayer to the following effect:

> *"It is therefore humbly prayed that decree of prohibitory, permanent and mandatory injunction restraining the defendants from interfering or raising any structure on the suit land comprising Khata No. 37, Khatauni No.38, Khasra No. 891, measuring 0-00-69 hectares, situated in Mohaal and Mauza Bara, Teh. Dehra, Distt.Kangra, as prayed in heading of the plaint may kindly be passed in favour of the plaintiff and against the defendants at their cost."*

4. Plaintiff filed the suit on the premise that he was owner in possession of the suit land measuring 0-00-69 hectares comprised in Khasra No. 891 in Mohal and Mauza Bara, Tehsil Dehra, District Kangra, H.P. (hereinafter referred to as the 'suit land') and he apprehended interference and encroachment on suit land as on 11.02.2004 the defendants allegedly had stacked building material on the suit land and had threatened to forcibly occupied the same.

5. In defence, the defendants raised preliminary objections qua maintainability of the suit, cause of action, estoppel and valuation etc. On merits, the ownership of plaintiff qua the suit land was not denied. The portion on which defendant No.1 claimed his possession was stated to becomprised in Khasra No. 884. It was further submitted that the old house of defendant No.1 was demolished and new house was being constructed on the

same area. The allegations of plaintiff that the defendant intended to raise construction on the suit land were specifically denied.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:

1. *Whether the plaintiff is entitled for relief of prohibitory and permanent injunction, as prayed for? OPP*
2. *Whether plaintiff is entitled for mandatory injunction, as prayed for? OPP*
3. *Whether the suit is not maintainable? OPD*
4. *Whether the plaintiff is estopped by his act, conduct and acquiescence form filling the suit? OPD.*
5. *Relief.*

Issues No. 1 and 2 were decided in negative, issue No. 3 was decided in affirmative, whereas issue No.4 was decided as not pressed. The suit of the plaintiff was accordingly dismissed. In first appeal plaintiff succeeded partly. Learned lower appellate court passed a decree of permanent prohibitory injunction in favour of plaintiff. As regards prayer for mandatory injunction, the same was denied. Hence,this appeal.

7. Instant appeal was admitted on 21.12.2009 on the following substantial questions of law:

1. *Whether the Court below has erred in replying upon report of the Local Commissioner Ext. OW-1/A when the same does not fall within the parameters of the instructions of the Financial Commissioner.*
2. *Whether the lower appellate Court has erred in not granting mandatory injunction regarding suit property in favour of the appellant?*

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

9. The specific relief claimed by the plaintiff was in respect of Khasra No. 891 measuring 0-00-69 hectares. The suit was preferred on apprehension that the defendants might violate the boundaries of Khasra No. 891 and might raise construction thereon. It was also averred that in case the defendants succeeded in raising construction on suit land, the same be ordered to be demolished by way of mandatory injunction. The allegations to such effect were specifically denied by the defendants. Their specific case was that the construction was being raised on Khasra No. 884 on the same location where old house of defendant No.1 existed.

10. Learned trial Court held that plaintiff had failed to proveinterference in the suit land as also encroachment thereon by the defendants. Reliance was placed on the demarcation report Ext. OW-1/A submitted by the Local Commissioner. During the demarcation OW-1 (Local Commissioner) had not found any encroachment on the suit land. The plaintiff raised objection to the report of Local Commissioner on the ground that the demarcation was not carried on the basis of old record. Learned trial Court had dismissed the objection of plaintiff vide detailed order dated 12.09.2008. It was held that the Local Commissioner had conducted the demarcation in accordance with laid procedure. The objection of plaintiff regarding omission to conduct demarcation on the basis of old record was rejected on the ground that as per rules the demarcation was to be conducted on the basis of latest revenue record and otherwise also plaintiff had not specifically challenged the authenticity of new records. The order passed by learned trial Court on the objection of plaintiff was not challenged.

11. The learned lower Appellate Court affirmed the findings of learned trial Court on re-appreciation of evidence. Again, reliance was placed on demarcation report Ext. OW-1/A. However, learned lower Appellate Court modified the decree passed by learned trial Court only to the extent that decree of permanent prohibitory injunction was granted in favour of the

plaintiff on the premise that the plaintiff had strong apprehension of interference into suit land by the defendants and such apprehension was sufficient to grant him decree of permanent prohibitory injunction. Defendants have not assailed the decree passed by learned lower appellate court, therefore, the same had attained finality as against defendants.

12. After going through the records, the findings of facts recorded by learned Courts below have been found to be in consonance therewith. The findings so recorded are borne from the records and cannot be said to be perverse.

13. The plaintiff, of his own, had made no effort to prove the extent of boundaries of the suit land. It was only by way of the demarcation conducted by the Local Commissioner that the boundaries of the suit land were ascertained. As per the report Ext. OW-1/A of Local Commissioner, no encroachment was found in the suit land by the defendants. The plaintiff objected to the report Ext.OW-1/A only on the ground that the demarcation was not carried out on the basis of old record. Learned trial Court after consideration of objections dismissed the same on the ground that in absence of challenge to the new revenue record, the plaintiff had no right to claim the conduct of demarcation on old records.

14. The Local Commissioner was also examined in the Court as OW-1. Plaintiff though cross-examined the Local Commissioner, but could not assail the demarcation report on legally tenable grounds. Since the demarcation was carried out by the competent Revenue Officer and there being nothing on record to prove his report to be not in accordance with law, the reliance placed on such report by both the learned Courts below cannot be faulted. Accordingly, the substantial questions of law framed in the appeal are decided in negative.

15. Resultantly, there is no merit in the appeal and the same is dismissed with no order as to costs. Judgment and decree dated 25.07.2009 passed by

learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No.130-G/XIII-2008is affirmed.

Appeal stands disposed of in the aforesaid terms, so also the pending miscellaneous application(s) if any.

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

Between:-
CHET RAM S/O SH. MAN SUKH
R/O VILLAGE CHIPANI PHATI
PEKHARI KOTHI NOHANDA,
TEHSIL BANJAR,
DISTRICT KULLU, H.P.

..APPELLANT/PLAINTIFF

(BY MR. K.R. THAKUR, ADVOCATE)

AND

1. THE STATE OF H.P.
THROUGH COLLECTOR,
KULLU DISTRICT KULLU, H.P.

2. THE DIVISIONAL FOREST OFFICER,
WILD LIFE DIVISION BANJAR
AT SHAMSHI, DISTRICT KULLU, H.P.

...RESPONDENTS/DEFENDANTS

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

REGULAR SECOND APPEAL
No. 595 OF 2009
Reserved on: 15.9.2022
Decided on: 26.9.2022

Specific Relief Act, 1963- Section 37- Suit for permanent prohibitory injunction- Held- Plaintiff has failed to prove infringement or encroachment on

the suit land by defendants- Suit rightly dismissed- Appeal dismissed. (Para 13 to 15)

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

J U D G M E N T

By way of second appeal, appellant has assailed judgment and decree dated 07.09.2009 passed by learned Additional District Judge, Fast Track Kullu, H.P. in Civil Appeal No. 16 of 2009 whereby the judgment and decree dated 26.12.2008 passed by learned Civil Judge (Sr. Divn.), Kullu, H.P. in Civil Suit No. 08 of 2008 was affirmed.

2. Appellant was the plaintiff and respondents were defendants before the learned trial Court. The parties hereinafter shall be referred to by the status which they held before the learned trial Court.

3. Brief facts necessary for adjudication of appeal are that plaintiff claimed himself alongwith his brothers to be owner in possession of Ghasni bearing Shumar No. (old) 12 and (new) 7 measuring 14 bighas situated at PhatiPekhariKothiNohanda, Tehsil Banjar, District Kullu, H.P.
(hereinafter referred to as the 'suit land'). It was alleged that defendant No.2 i.e. Divisional Forest Officer, Wild Life Division Banjar had started digging the suit land since 21.01.2008 with ulterior purposes to grab the same. As per plaintiff, defendant No.2 intended to raise a permanent structure over a portion of suit land. Accordingly, a prayer was made to restrain the defendants from carrying out any sort of construction over the suit land by digging the same or causing any kind of interference.

4. The suit was contested on behalf of the defendants. Preliminary objections as to suit being bad for want of notice under Section 80 CPC, maintainability, estoppel and valuation etc. were raised. On merits, it was submitted that the department of Forest was constructing a Guard Hut on the

land belonging to the State Government. Interference in the suit land was specifically denied.

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

1. *Whether the defendants started digging the suit Ghasni with intention to raise construction over the same, if so, its effect?OPP*
2. *Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP*
3. *Whether land in question belongs to the State of H.P. and in possession of Forest Department, if so, its effect? OPP*
4. *Whether the defendants were raising the Guard huts on the land belonging to the Sate of H.P., as alleged? OPD*
5. *Whether the plaintiff has no locus standi to file the present suit? OPD*
6. *Whether the suit is not maintainable in the present form? OPD*
7. *Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD*
8. *Whether the plaintiff has got no cause of action? OPD*
9. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD*
10. *Relief.*

Learned trial Court decided all the issues in negative and dismissed the suit of the plaintiff.

6. Plaintiff assailed the judgment and decree passed by learned trial Court in first appeal, but again remained unsuccessful. Hence, the present appeal.

7. Appeal was admitted on 22.04.2010 on the following substantial question of law:

1. *Whether the findings of the Court below are a result of complete misreading, misinterpretation of the evidence and material on record and against the settled position of law?*

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

9. Learned trial Court upheld the contention of plaintiff that he alongwith his brothers were the co-owners in possession of the suit land. However, the relief was denied to the plaintiff on the ground that he had failed to prove any interference in the suit land by the defendants. Such findings were rendered by the learned trial Court on appreciation of oral and documentary evidence on record. Learned trial Court found that there was no identification as to the boundaries of suit land which was a large chunk of land measuring 14 bighas. It was also noticed that the plaintiff while appearing as PW-1 had also submitted that no hut had been raised on the suit land. To similar effect was the statement of PW-3, who had also admitted that the defendants had not raised any hut on the suit land. PW-3 was the Revenue Officer.

10. Learned lower Appellate Court re-appreciated the evidence on record and concurred with the findings of fact recorded by the learned trial Court.

11. The suit was filed on 5.2.2008. As per the allegations in the plaint, defendant No.2 had started digging the suit land since 21.01.2008 with a view to raise permanent structure on it. The construction work was stated to be continuing till 02.02.2008. In his cross-examination, the plaintiff denied the suggestion that the Forest Department was raising construction on its own land. He asserted that the construction was being raised in the suit land. Simultaneously, he admitted that no shed had been constructed on the suit land. Noticeably, the statement of plaintiff was recorded on 11.9.2008. PW-3 Sohan Lal was examined by the plaintiff. He was the Field Kanungo. In the cross-examinationthis witness also admitted that Forest Department had not

constructed any structure on suit land. This witness was examined on 03.11.2008.

12. The plaintiff's witnesses were examined after about six months from the date of institution of suit. PW-1 and PW-3 both admitted in their respective cross-examinations that no hut of Forest Department had been constructed on the suit land. Plaintiff had also not made any effort to get the boundaries of the suit land ascertained so as to prove that there was any intrusion in the suit land by the defendants. The onus to prove issues Nos. 1 and 2 was on plaintiff, but he failed to discharge the burden.

13. The findings of fact recorded by both the learned Courts below are based on the evidence on record. Such findings cannot be said to be perverse or against the material on record. For claim of injunction, plaintiff had to prove the existence of right and its infringement by defendants.

14. As far as the ownership and possession of suit land was concerned, plaintiff had proved the same, but the other necessary ingredient was not proved. The interference or encroachment on the suit land by defendants could not be proved. In such view of the matter, substantial question of law as framed in the appeal is answered in negative.

15. In view of the above discussion, the appeal fails and the same is accordingly dismissed. Judgments and decrees passed by the learned Courts below are affirmed.

16. Appeal stands disposed of in the aforesaid terms, so also the pending application(s) if any.

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

Between:-

1. MOHAN SINGH SON
2. GURBAKSH SIGH SON
3. MANGAL SINGH SON

4. SUDERSHAN PARKASH SINGH SON

5. SMT. ISHARI DEVI WIFE
6. SMT. REKHA DEVI DAUGHTER
7. SMT. SANTOSH KUMARI DAUGHTER
8. SMT. RAJ KUMARI DAUGHTER
9. SMT. SUSHMA KUMARI DAUGHTER
10. MISS SUNITA DAUGHTER

OF SH. BANGALI RAM ALL RESIDENTS OF LALEHAR, TEHSIL AND DISTRICT KANGRA, H.P.

....APPELLANTS.

(SH. AJAY SHARMA SR. ADVOCATE WITH MR. ATHRAV SHARMA, ADVOCATE)

AND

TULSI RAM (SINCE DECEASED) THROUGH LRS

1 (A) OM PARKASH.

1 (B) SANJAY KUMAR, SONS OF LATE TULSI RAM.

BOTH RESIDENTS OF WARD NO.7, KANGRA, TEHSIL & DISTRICT KANGRA, H.P.

....RESPONDENTs

(SH. JANESH GUPTA, ADVOCATE)

REGULAR SECOND APPEAL
NO. 195 OF 2007
Reserved on:15.9.2022
Decided on: 27.9.2022

Code of Civil Procedure, 1908- Section 100- Order 41 Rule 27- Regular second appeal- Additional evidence- Production of documents at appellate stage- Due diligence- Held- Parties cannot lead evidence at appellate stage as a matter of right- Evidently copies of documents were produced before the Trial Court and thereafter evidence was closed and no effort was made to prove these documents in accordance with law- Ld. Lower Appellate Court should

have restrained itself from deciding the application for additional evidence before considering the merits of appeal- Appeal allowed. (Para 14, 18, 19)

Cases referred:

Himanshu vs. Bishan Dutt & others, 2006 (1) SLC 25;

State of Rajasthan vs. T. N. Sahani & others, (2001) 10 SCC 619;

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

J U D G M E N T

By way of instant appeal, appellants have assailed judgment and decree dated 23.9.2006, passed by learned Additional District Judge-II, Kangra at Dharmshala, in Civil Appeal No. 104 of 1999, whereby the judgment and decree dated 7.9.1999, passed by Sub Judge, Kangra in Civil Suit No. 67 of 1992, was affirmed.

2. Parties hereafter shall be referred to by their names, as find mention in the memorandum of parties in the civil suit filed before learned trial Court.

3. Brief facts for adjudication of the appeal are that Tulsi Ram filed a suit for decree of possession in respect of suit land, which was described as land comprised in khata No. 124 min, khatauni No. 233, khasra No. 1385, measuring 7 square meters, situated at Mohal Tehsil Chowk, Tehsil and District Kangra, H.P. (hereafter referred to as the suit land). The facts averred in the plaint were that the plaintiff was a perpetual tenant over the suit land on payment of rent at the rate of Rs. 40/- per month. The tenancy was claimed by plaintiff under Fateh Singh by virtue of agreement dated 21.12.1981. The plaintiff claimed himself to have remained in possession of suit land till December, 1991, whereafter, he alleged his illegal and forcible dispossession at the hands of defendants. It was submitted that the plaintiff had a structure standing over the suit land, having value of more than Rs. 20,000/-, which was also demolished by defendants by exercising force. As per plaintiff, defendant Bangali Ram had also instituted a suit for possession by demolition of structure against the plaintiff in respect of the suit land, but

during the pendency of the said suit, Tulsi Ram was forcibly dispossessed and thereafter his suit was withdrawn by Bangali Ram on 5.12.1991.

4. The suit was contested by Bangali Ram. Objections as to maintainability of the suit, non-joinder of necessary parties, valuation, estoppels etc. were raised. The suit was also stated to be barred under Order 2 Rule 2 CPC. On merits, Bangali Ram claimed himself to be the owner of the suit land on the basis of its purchase from previous owner in the year 1960. It was alleged that Tulsi Ram had occupied the suit land by deceitful means. He had given an undertaking to vacate the suit land but had failed. As per Bangali Ram, he had filed suit for possession but during its pendency on 17.8.1991, the "*Khokha*" (kiosk) raised by Tulsi Ram on suit land got demolished. Tulsi Ram had removed his belongings and vacated the land. The plea of tenancy raised by Tulsi Ram was also denied.

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

1. Whether the plaintiff is entitled to possession of the suit land/property as alleged? OPP.

2. Whether the plaintiff is entitled to claim damage if so, to what extent? OPP.

3. Whether the suit is not maintainable in the present form? OPD.

4. Whether the suit is bad for misjoinder of necessary parties? OPD.

5. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD.

6. Whether the suit is barred U.O. 2 Rule 2 CPC? OPD.

7. Whether the act and conduct of the plaintiff is bar to the present suit? OPD.

8. Whether the defendant is owner in possession of the suit property as alleged? OPD.

9. Whether the plaintiff has removed his structure voluntarily and vacated the land as alleged? OPD.

9A. Whether the plaintiff fabricated any document as alleged, if so, its effect? OPD.

The learned trial Court decided issues No. 1 and 2 in affirmative, whereas issues No. 3 to 9A were decided in negative. Accordingly, the suit of Tulsi Ram was decreed in following terms: -

> "*in view of the aforesaid discussions and decision on issues No. 1 to 9-A, the suit of plaintiff deserves to be decreed which is accordingly decreed for possession of the suit land comprised in Khata No. 124 Min, Khatauni No. 233, Khasra No. 1385 area measuring 7-00 C.M. (7 meters) situated at Mohal Tehsil Chowk, Kangra, Teh. & Distt. Kangra by demolition of the structure if found already raised thereon. The suit of the plaintiff is also decreed for recovery of Rs. 5000/- as damages on account of damages caused to Khokha. The suit of the plaintiff is decreed with costs. Decree sheet be drawn up accordingly and file after due completion be consigned to the records.*"

6. Bangali Ram assailed the judgment and decree, passed by learned trial Court in First Appeal under Section 96 of the CPC. During pendency of appeal, Bangali Ram died and was substituted through his Legal Representatives as appellants. Learned lower appellate Court affirmed the findings returned by learned trial Court and dismissed the appeal of Bangali Ram vide impugned judgment and decree, hence the instant second appeal on behalf of Legal Representatives of Bangali Ram.

7. The appeal was admitted by this Court on 18.7.2008 on following substantial questions of law:

1. *Whether impugned judgment and decree passed by the learned Addl. District Judge below stand vitiated on account of the fact application under Order 41 Rule 27 CPC stand decided separately in view of the judgment of Hon'ble apex Court, as such, are liable to be quashed and set aside?*
2. *Whether suit filed by the plaintiff is beyond the period of limitation and this aspect having been over looked by the courts below thereby vitiating the impugned judgments and decrees?"*

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

9. To support first substantial question of law, as noticed above, Sh. Ajay Sharma, learned Senior Counsel has placed reliance on judgment passed by Hon'ble Supreme Court in ***State of Rajasthan vs. T. N. Sahani & others***, reported in (***2001) 10 SCC 619***. The relevant extract of above judgment is noticed as under: -

> *"It may be pointed out that this Court as long back as in 1963 in K. for pronouncing the Venkataramiah v. Seetharama Reddy pointed out the scope of unamended provision of Order 41 Rule 27(c) that though there might well be cases where even though the court found that it was able to pronounce the judgment on the state of the record as it was, and so, additional evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed in additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended*

> *provision of Order 41 Rule 27(b) CPC can be invoked.* ***So, the application under Order 41 Rule 27 should have been decided along with the appeal.*** *Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage.* ***But taking a view on the application before hearing of the appeal, in our view, would be inappropriate.*** *Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law".*

10. On the strength of aforesaid observations, rendered by Hon'ble Supreme Court, learned Senior Counsel has argued that the learned lower appellate Court had erred in deciding the application of Bangali Ram under Order 41Rule 27 separately and before decision on the main appeal. He submitted that by way of application under Order 41 Rule 27 CPC, Bangali Ram intended to prove on record copy of sale deed by virtue of which he had purchased the suit land, statement of Tulsi Ram recorded in case Bangali Ram vs. Kuldeep and copy of affidavit of Tulsi Ram in case Mata Brijeshwari Mandir vs. Bangali Ram. He further submits that proof of sale deed by virtue of which Bangali Ram had purchased the suit land in 1960, would definitely have helped the learned lower appellate Court to pronounce judgment. The decision on the application of Bangali Ram prior to the decision of main appeal had caused serious prejudice to the rights of Bangali Ram, as the learned lower appellate Court did not have opportunity to assess the necessity and requirement of said sale deed at the time of passing of impugned judgment.

11. Per contra, Sh. Janesh Gupta learned counsel representing Tulsi Ram has contested the assertion made on behalf of Bangali Ram. He submitted that the contentions raised on behalf of the appellants were not

available to them in the facts and circumstances of the case. He further submitted that Bangali Ram had filed application under Order 41 Rule 27 CPC, seeking to produce additional evidence on record that he could not produce the documents mentioned in the application before learned trial Court despite due diligence and it was in the light of the submissions made in the application that the same was decided by learned lower appellate Court on its merits.

12. Record reveals that the learned lower appellate Court decide the application of Bangali Ram under Order 41 Rule 27 CPC vide order dated 17.7.2006. Learned lower appellate Court had taken note of the fact that the documents sought to be proved by way of additional evidence had been tendered by learned counsel for Bangali Ram during the proceedings before learned trial Court on 9.7.1998 and the evidence was closed as per statement made by learned counsel for Bangali Ram in that behalf. Learned lower appellate Court further observed that the learned trial Court had not refused to admit such documents in evidence. It was the defendant Bangali Ram, who had failed to take any steps to prove such documents and as such, no due diligence can be found on his part. The Court thus held that there was sufficient material on record to enable it to pronounce judgment. The application was accordingly dismissed.

13. Order 41 Rule 27 of the Code of Civil Procedure reads as under: -

> *27. Production of additional evidence in Appellate Court - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—*
>
> *(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or*

could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission".

14. It is more than settled that the parties cannot lead evidence at appellate stage as a matter of right. Any party seeking to lead additional evidence has to make out a case under any of the clauses of Order 41 Rule 27 CPC, as noticed above. Bangali Ram had sought to lead additional evidence only on the ground that despite due diligence, he could not lead the required evidence before learned trial Court. Such contention has been found to be incorrect. In this regard, no fault can be found in the order rejecting the plea of Bangali Ram to lead additional evidence. Evidently, copies of documents were produced before learned trial Court and thereafter, the evidence was closed. No effort was made to prove the documents in accordance with law.

15. Noticeably, learned lower appellate court, while deciding the application under order 41 rule 27 CPC, had observed as under:

".....parties have already lead sufficient evidence on record and the documents which are sought to be brought and proved on record including the documents sought to be proved on record being part of the record and the relevancy of those documents are to be decoded on the merits of the appeal and thereby the ***evidence already on record is sufficient to enable this court to pronounce judgment****."*

16. Thus, the question to be adjudicated herein is as to whether the adjudication of application under Order 41 Rule 27 before decision of main

appeal will vitiate the judgment and decree passed by learned lower appellate Court?

17. In T. N. Sahani's case (*supra*), the Hon'ble Supreme Court had made the observations keeping in view the provisions of clause (b) of Rule 27 of Order 41CPC. Said rule applies when the Court feels that the production of any document or examination of any witness is necessary to enable it to pronounce judgment. It was in such context that Hon'ble Supreme Court made observations to the effect that the Court had missed an opportunity of assessing the necessity of documents for adjudication of the main matter.

17. In ***Himanshu*** vs. ***Bishan Dutt & others***, reported in ***2006 (1) SLC 25***, a Division Bench of this Court held as under:-

> *"8. Undoubtedly, in Arjan Singh v. Kartar Singh and others (supra), their Lordships of the Supreme Court were seized of a situation where the appeal Court was exercising jurisdiction under clause (b). The fact that the appeal Court in that case was exercising jurisdiction under clause (b) is clearly borne out from the following observations in the judgment with respect to the order passed by the appeal Court. We quote:*
>
> > *"These two entries taken together if found genuine, would enable the Court to arrive at a just conclusion. It is, therefore, in the interest of justice that the additional evidence should be let in. I have taken action under Order 41, Rule 27(1)(b), Civil Procedure Code. This additional evidence would supply material to remove the defect pointed out in the judgment of the Court below, why two of the sons of Sehja Singh came to own equal shares of land of Pattar Kalan in the presence of their 3rd brother."*
>
> *9. The judgments in cases of State of Rajasthan v. T.N. Sahani, Arjan Singh v. Kartar Singh and others and Parsotim Thakur and others v. Lal Mohar Thakur and others, make it abundantly clear that all these cases related the exercise of jurisdiction by the appeal Court under clause (b) and none of these cases related to the exercise of jurisdiction by the appeal out*

under clause (a) or under clause (aa). Undoubtedly, a bare reading the three clauses in Rule 27 of Order 41 clearly suggests to us that so far as clause (a) and clause (aa) are concerned, the initiative has come from the party seeking to lead additional evidence either because the party feels that despite efforts by it the trial Court had refused to nit the evidence which ought to have been admitted (refer to clause (a)) or despite exercise of due diligence, the evidence not being in the knowledge of the party in the trial Court, it could not produce the same during the trial. In so far as the situations relatable to clauses (a) and (aa) and are concerned, in our considered opinion, application for production additional evidence can be filed by the party at any stage of the appeal, even before the stage of final hearing of the appeal. In coming to this, we have in our minds cogent reasons. The main reason is that the party knows that either with respect to the situation under clause (a) or with respect to a situation under clause (aa), the trial Court erred in not allowing the additional evidence and unless the additional evidence is produced the party's case cannot be properly put across. There is no reason for such a party to wait for the final hearing of the appeal because that would be a sheer wastage of time and the party would be well advised in such a situation to file an application for leading the additional evidence at the initial, rather earliest stage of the appeal itself. There can also be situations where the party understands its case very well and finds that unless the additional evidence is brought on the record the appeal cannot be effectively adjudicated upon. There can be numerous other reasons why a party would genuinely feel convinced about the imperative need of leading additional evidence at the very initial stage of the appeal because the party would be genuinely convinced that unless additional evidence was produced, the appeal by itself, based on the record of the trial Court would be imperfect or incomplete causing prejudice to the interests of the party.

10. In contradistinction to clauses (a) and (aa), as far as clause (b) is concerned, its ambit and scope is quite distinct because the expression "to enable it to pronounce the judgment" occurring in

clause (b) clearly suggests that only when the appellate Court has started hearing of the appeal and in the course of the hearing of the appeal feels that it requires any additional document to be produced or any additional witness to be examined, it may call for additional evidence. There might be actually situations and cases where even though the appeal Court finds that it would be able to pronounce the judgment on the basis of the record of the trial Court as it was, it might still consider that in the interests of justice something which remained obscure should be filled up so that it can pronounce the judgment in a more satisfactory manner. The requirement has to be of the Court and the requirement is always to enable the Court to pronounce the judgment for any substantial cause. In either case the requirement has to be of the Court. This is the plain meaning and clear interpretation of clause (b) and based on such interpretation, in our considered view, the legitimate occasion for the exercise of this jurisdiction is not any stage prior to the hearing of the appeal but the stage of the final hearing of the appeal when on examining the evidence as it stands some inherent lacuna or defect became apparent to the Appeal Court. There might be situations where the Appeal Court in the process of examining the evidence while hearing the appeal finds that some omission needs to be supplied and in such a situation it can ask for additional evidence to supply such an omission with a view to enabling it to pronounce the judgment."

18. As noticed above, Bangali Ram had made prayer for additional evidence by seeking aid of clauses (a) and (aa) of order 41 rule 27 CPC and the learned appellate court in addition to consideration of parameters for consideration of prayer under aforesaid clauses had also ventured to consider the prayer of applicant in context of clause (b) also. Once such exercise was made by learned lower appellate court, it should have restrained itself from deciding the application for additional evidence separately and before consideration of the merits of the appeal for its final adjudication.

19. Viewed from another angle, the appellants have been able to show prejudice to them by earlier disposal of application under Order 41 Rule

27 CPC. Issue No. 8 was framed by learned trial court is being reproduced once again as under:

> 8. Whether the defendant is owner in possession of the suit property as alleged? OPD

Had the learned lower appellate court considered application for additional evidence at the time of final adjudication of the appeal, it would not have missed an opportunity of assessing the necessity of documents for adjudication of the main matter. The first substantial question of law is thus decided in affirmative.

20. As regards the other substantial question of law framed by this Court on 18.7.2008, the same is answered in negative. There was no issue framed on limitation. In fact, there was no objection to that effect in the written statement. Limitation was not an issue before learned lower appellate Court. Even otherwise, from the facts and circumstances of the case, the issue of limitation cannot be made out.

21. In view of above discussion, the appeal is allowed. Judgment and decree dated 23.9.2006, passed by learned Additional District Judge-II, Kangra at Dharmshala, in Civil Appeal No. 104 of 1999 is set aside so also the order dated 17.7.2006 passed by said court on application under order 41 rule 27 of the Code of Civil Procedure. The matter is remanded back to the court of learned Additional District Judge-II, Kangra at Dharamshala to decide the application of appellants filed under order 41 rule 27 of the Code of Civil Procedure and appeal of the appellant afresh by hearing both together. Parties to appear before learned Additional District Judge-II, Kangra at Dharamshala on 21.10.2022.

The appeal is accordingly disposed of so also pending application(s), if any. Records be sent back forthwith.

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

Between:
SH. BRAHMA NAND, SON OF LATE JAGAT RAM, RESIDENT OF VILLAGE BATARI, TEHSIL ROHROO, DISTRICT SHIMLA, H.P.

....APPELLANT/PLAINTIFF

(MR. G.D. VERMA, SENIOR ADVOCATE WITH MR. B.C. VERMA, ADVOCATE)

AND

SH. BHRIGU NAND, SON O KEDAR NATH, RESIDENT OF VILLAGE BATARI, TEHSIL ROHROO, DISTRICT SHIMLA, H.P.

....RESPONDENT/DEFENDANT

(MR. ARVIND SHARMA,
ADVOCATE)

REGULAR SECOND APPEAL
NO. 29 OF 2008
Decided on: 31.8.2022

Code of Civil Procedure, 1908- Order 26 Rule 9- Suit for permanent prohibitory injunction- Held- Ld. Trial Court while exercising power under Order 26 Rule 9 CPC ought to have appointed Local Commissioner to ascertain the factual position on the spot- There were three different tatimas prepared by the revenue authority depicting different picture in all tatimas, court should have exercised power vested in it under Order 26 Rule 9 CPC to appoint Local Commissioner, who after visiting the spot may have given the correct report to the court enabling it to do the substantial justice- Appeal allowed- Matter remanded back to Trial Court with the direction to decide afresh. (Para 12)

Cases referred:
Om Prakash and Ors v. State of Himachal Pradesh and Ors, AIR 2001 HP 18;

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

JUDGMENT

Instant regular second appeal filed under Section 100 of the CPC, lays challenge to the judgment and decree dated 13.12.2007, passed by the learned Additional District Judge, Shimla, camp at Rohroo in CA No. 10-R/13 of 2005, reversing the judgment and decree dated 30.3.2005, passed by the learned Civil Judge (Sr. Div.), Court No.1, Rohroo, District Shimla, in CS No. 223/1 of 2003, whereby suit for permanent prohibitory injunction and mandatory injunction having been filed by the appellant/plaintiff came to be decreed.

2. Briefly stated facts of the case as emerge from the record are that plaintiff filed a suit for permanent prohibitory injunction against the defendant averring in the plaint that parties to the lis were previously having one common ancestor late Sh. Angi Ram, who had four sons namely Jagat Ram, Chanan Dev, Mohan Dev and Kedar Nand. Plaintiff averred that Angi Ram and his sons are now no more and parties to the suit are the legal heirs to the aforesaid persons namely Jagat Ram and Kedar Nand. Plaintiff alleged that land comprised in Khata Khatauni No. 139/335 min, khasra No. 1568, measuring 0-00-76 hectares situate in Chak Arhal though has been shown to be owned by the different co-sharers, but in the column of cultivation the *gair mumkin* house has been shown to be in the exclusive possession of the plaintiff as same fell in the share of late Sh. Jagat Ram, father of the plaintiff in the family partition took place *inter-se* predecessor-in-interest of the parties way back in December, 2008. Plaintiff claimed that he is coming in peaceful possession of the said house constructed over the suit land. Plaintiff also averred that land bearing khasra No. 1568/2 has been shown to be Makan and Kuthar. Similarly, over land bearing khasra No. 1585/5 disputed Kuthar of the plaintiff has been shown by the Patwari in tatima issued on 25.9.2000. He alleged that right from December, 2008, the Kuthar is shown in the peaceful possession of the late Shri Jagat Ram and thereafter, he is in the possession of the same. Similarly, plaintiff alleged that land bearing khasra

No. 1585/3 shown as disputed abadi has been kept joint between the parties towards land bearing Khasra No. 1568 and remaining khasra No. 1585/3 was kept joint of all the four brothers being common ukhal land common abadi, which is jointly being used by the parties to the suit and as such, defendant has no right to change the nature of the land. Plaintiff further claimed that land bearing khasra No. 1585/1 is in exclusive possession of the plaintiff in the shape of gair mumkin courtyard and as such, defendant has no right title and interest over the piece of land. Plaintiff claimed that in the year, 2000, defendant tried to interfere in the suit land and as such, he was compelled to file civil suit, which ultimately ended in compromise and case was withdrawn by the plaintiff after recording the statements of the parties. He alleged that defendant once again for the last 15 days in his absence has started the construction of the land bearing khasra No. 1585.

3. Case of the plaintiff came to be resisted by the defendant, who in the written statement alleged that khasra No. 1568 is owned by about 35 persons and share of the plaintiff out of area 0-00-76 comes out to be negligible. Defendant denied that disputed Kuthar is in existence on the Khasra No. 1558/5. He further alleged that tatima issued by the Patwari dated 29.11.2003 clearly reveals that Kuthar has been shown in Kharsa No. 1558/8. He alleged that compromise deed dated 2.11.2000 is being complied with in its letter and spirit by him and he has not deviated from the same in any manner. He further alleged that half portion of the wooden structure kuthar of the plaintiff is standing in the share of the defendant and as per compromise dated 2.11.2000 kuthar is in existence on the spot, however, he reserves his right to take balance portion of the share of the kuthar if the exigency so arises. While stating that he never changed the nature of the suit land, defendant also claimed that he constructed new house in khasra No. 1585/2 adjacent to house in khasra No. 1585/9 and the construction has been carried out by the defendant inside the stone wall of bara and ukhal,

khural and some vacant portion has been kept vacant as per the terms of compromise for the use of villagers. He also claimed that remaining portion of the wall of bara shown as khasra No. 1585/4 belongs to the defendant. He denied that *kuthar* and *gair mumkin sehan* remained in exclusive possession of the plaintiff. He also denied that he has raised roofing of GE sheets over the land comprised in khasra No. 1585/6 and there is *ukhal mustrika* as has been shown in spot tatima issued by *halqua patwari* on the spot.

4. On the basis of aforesaid pleadings adduced on record by the respective parties, learned trial court framed following issues:

> "1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as prayed ? OPP.
> 2.Whether the land bearing khasra No. 1568 fell in family partition in the share of the plaintiff and it is exclusive possession since samvat, 2008, as alleged? OPP.
>
> 3.Whether the land khasra No. 1585/3 having ukhal/khural over it was kept joint as alleged? OPP.
>
> 4. Whether the land khasra No. 1585/1 is in exclusive possession of the plaintiff? OPP.
>
> 5. Whether the defendant has retracted from the statement dated 2-11-2000, if so its effect?OPP
>
> 6. Whether the plaintiff is entitled for the relief of mandatory injunction? OPP.
>
> 7. Whether the suit is not maintainable?OPD
>
> 8.Whether the plaintiff is stopped from filing the suit on account of his acts, deeds and conducts? OPD
>
> 9.Whether the suit is hit by the principle of resjudicata? OPD.

10. Relief."

5. Subsequently, on the basis of pleadings as well as evidence led on record by the respective parties, learned trial Court, vide judgment dated 30.3.2005 decreed the suit of the plaintiff and passed decree of permanent prohibitory injunction in favour of the plaintiff and against the defendant. Court below also passed decree for mandatory injunction against the defendant to remove the roofing over the land comprising khata Khatauni No. 203/500 min khasra No. 1586/6 .

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, respondent/defendant filed an appeal in the court of learned Additional District Judge, Shimla, which came to be allowed vide judgment dated 13.12.2007 as a consequence of which, judgment and decree passed by the learned trial court came to be quashed and set-aside. In the aforesaid background, appellant/plaintiff has approached this Court in the instant proceedings, praying therein to set-aside the impugned judgment and decree passed by the learned first appellate court.

7. Vide order dated 28.2.2008, instant appeal came to be admitted on the following substantial questions of law:

> "1. Whether the findings of reversal recorded by the learned Additional District Judge are vitiated on account of misreading and mis-appreciation of the pleadings of the parties as well as oral and documentary evidence on record.
>
> 2.Whether the appellant having proved on record the violation of the terms and conditions of the Compromise, Ex. PW-1/A and statements of the parties, Ex.PW-1/B, at the time of passing of order Ex.PW-1/A, dated 17.12.2004, therefore, the findings of the learned trial court could not have been reversed.

3. Whether the learned Lower Appellate Court having observed that issues No.l to 4 and 6 could not have been clubbed because those were not interconnected, therefore, the case was required to be remanded back.

4.Whether the points for determination as involved in issues, as framed by the learned trial court, that is, issues No. 1 to 9 were required to be kept into consideration, while
reversing the decree of the learned trial court and since this has not been done, therefore, there has been failure to exercise the jurisdiction in accordance with law.

5. Whether the Tatimas Ex.PW-2/A and Ex. PW-2/B proved by the appellant on record by producing PW-2, Halqua Patwari, therefore, these documents have been misread and misconstrued and third Tatima, Ex.DX brought on record by the respondent was also required to be considered and discussed.
6.Whether the Tatimas, Ex. PW-2/A and EX. PW-2/B have been disbelieved by the learned Additional District Judge, therefore, in view of the controversy as involved about the extension of eaves and roof by the respondent, therefore, in order to do the substantial and complete justice, provisions of Order 26 Rule 9 C.P.C. should have been invoked, inter-alia to find out as to whether the compromise order, Ex. PW-1/A and Ex. PW-1/B have been complied with or not.

7. Whether the learned Lower Appellate Court has failed to exercise the jurisdiction in accordance with law by ignoring the grounds which weighed with the learned trial court for passing a decree and thus the findings recorded by him are liable to be set-aside."

8. I have heard the learned counsel for the parties and perused the entire record.

9. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by the learned first appellate Court while passing impugned judgment dated 13.12.2007, thereby setting aside judgment and decree dated 30.3.2005 passed by the learned Civil Judge Rohroo, this Court sees no reason/occasion to explore/ascertain the answers to the aforesaid substantial questions of law framed by this Court at the time of admission of the appeal because bare perusal of the judgment passed by the learned first appellate court itself reveals that learned trial court while decreeing the suit of the plaintiff failed to return separate findings with the reasons on each issue. Moreover, judgment passed by the learned first Appellate Court further reveals that there were three *tatimas* on record to show encroachment, if any, on the land of the plaintiff and these *tatimas* were actually prepared by one person at the instance of the court i.e. learned Sub-Judge, Rohroo in the present and previous suit. Apart from above, learned first Appellate Court has arrived at a conclusion that learned trial court though reproduced the evidence, but failed to assign any reason in support of its findings, on the basis of which, suit having been filed by the plaintiff came to be decreed. It would be apt to take note of para 13 of the judgment passed by the learned first appellate Court:

> " 13. The judgment and decree passed by the court below deserves to be set aside on the short ground that issue Nos. 1 to 4 and 6 all have been discussed together. This has created a confusion. The learned court below simply reproduced all the evidence, produced by the parties, but did not discuss by assigning reason why and which portion of the statement, the court believed and judgment does not clearly depict as to which of them was really acceptable and for what reasons."

10. Having carefully perused aforesaid finding returned by the learned first Appellate Court, this Court finds substantial force in the

submissions made by Mr. G.D. Verma, learned Senior counsel appearing for the appellant that once learned first Appellate Court had arrived at a definite conclusion that all the issues No. 1 to 4 and 6 have been discussed together and no separate finding has been recorded by the learned trial court qua each issue, it ought to have remanded the case back to the learned trial court with direction to return finding on each and every issue. Bare perusal of the aforesaid para itself suggests that on account of clubbing of issues No. 1 to 4 and 6, confusion arose in the mind of the learned first Appellate Court. It also emerges from the judgment passed by the learned first Appellate Court that there were two *tatimas* Ext.PW2/A and Ex.PW2/B placed on record by the plaintiff to prove his case with regard to encroachment over his land allegedly made by the defendant. Apart from above, third *tatima* Ext.DX was placed on record by the defendant. Interestingly, all these three tatimas were prepared by one Patwari though on different dates but on the directions passed by the learned Civil Judge, Rohroo, however learned first Appellate Court while reversing the decree of trial court was unable to decipher that on which tatima, learned trial court placed reliance while decreeing the suit of the plaintiff.

11. By now it is well settled that all the issues framed on the basis of pleadings are to be decided separately that too by issuing cogent and convincing reasoning. Though this Court finds substance in the findings returned by the learned first Appellate Court that on account of clubbing of issues and non-assignment of reasons by the learned trial court while deciding such issues, much confusion has arisen, but in that situation, there was no scope left for the learned first Appellate Court to reverse the judgment and decree passed by the learned trial court, rather best approach would have been to remand the case back to the learned trial court with direction to decide the same afresh. Reliance is placed on judgment passed by this Court

in ***Om Prakash and Ors v. State of Himachal Pradesh and Ors, AIR 2001 Himachal Pradesh 18***, wherein it has been held as under:

> "12. In the present case, trial Court has framed all the issues and was supposed to give separate findings on each issue, as admittedly the findings upon any one or more of them are not sufficient for the decision of the suit. By simply enumerating the evidence and law and thereafter giving conclusion whereby the case of one party is accepted and the other party is rejected, is no judgment in the eyes of law. In other words, the judgment which does not contain the reasons or grounds on the basis of which the Judge has come to his conclusion/decision for passing a Judgment and decree on the points in issue or controversy, is vitiated. It is all the more necessary, when the judgment is by the Court of fact and is appealable, to avoid unnecessary delay and protracted litigation. The Supreme Court in Fomento Resorts and Hotels Ltd. v. Gustavo Ranato da Cruz Pinto, AIR 1985 SC 736, has held in paragraph 27 as under :
>
> "In a matter of this nature where several contentions factual and legal are urged and when there is a scope of an appeal from the decision of the Court, it is desirable as was observed by the Privy Council long time ago to avoid delay and protraction of litigation that the Court should, when dealing with any matter dispose of all the points and not merely rest its decision on one single point."
>
> (Also see Ram Ranbijaya Prasad Singh v. Sukar Ahir, AIR 1947 Pat 334 (SB); Ambor Ali v. Nichar Ali, AIR 1950 Assam 79; Ahmed All v. Shaik Ahmed, AIR 1955 Hyderabad 268 and Swaminathan Ambalam v. P.K., Nagaraja Piliai. AIR 1973 Madras 110). There-' fore, by not deciding issues Nos. J to 5 separately by referring to material evidence on each issue for and against the parties and giving reasons for its acceptance or rejection, the impugned judgment is vitiated."

12. There is another aspect of the matter that once three *tatimas* prepared by one Patwari that too on the direction of the learned trial court were on record and yet question with regard to encroachment, if any, made by

the defendant over the land of the plaintiff could not be decided on the same, learned trial court while exercising power under Order 26 Rule 9 CPC ought to have appointed Local Commissioner to ascertain the factual position on the spot. Though at this stage, Mr. Arvind Sharma, learned counsel for the defendant vehemently argued that application, if any, under Order 26 Rule 9 CPC was to be filed by the plaintiff, but having carefully perused provisions contained under order 26 Rule 9 CPC, this Court is of the view that power under this provision is to be exercised by the court, especially when it deems it necessary for proper adjudication of the dispute for the purpose of elucidating any matter in dispute or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits. Since in the case at hand, there were three different tatimas prepared by the revenue authority depicting different picture in all tatimas, court should have exercised power vested in it under Order 26 Rule 9 CPC to appoint Local Commissioner, who after visiting the spot may have given the correct report to the court enabling it to do the substantial justice.

13. Though having taken note of the fact that in the instant proceedings, challenge has been laid to judgment passed by the learned first Appellate Court, this court ought to have remanded the case back to the learned first Appellate Court, but since this court has already formed an opinion that learned District Judge for the reasons stated in para-13 of the impugned judgment ought to have remanded the case back to the learned trial court, this court with a view to avoid further delay in proceedings deems it fit to remand the case back to the learned trial court with direction to decide the same afresh on the basis of evidence already available on record. However, learned trial court, if finds it necessary, may exercise power under Order 26 Rule 9 CPC to ascertain correct position on the spot.

14. Consequently, in view of the above, present appeal is allowed and judgments and decrees dated 30.3.2005 and 13.12.2007 passed by the courts

below are quashed and set-aside and matter is remanded back to the learned trial court with direction to decide the same afresh in terms of observations made herein above. Since matter is hanging fire for more than 20 years, this Court hopes and trusts that learned trial court would conclude the same expeditiously. Parties are directed to remain present before the learned trial court on 7.9.2022, enabling it to do the needful. In the aforesaid terms, present appeal is disposed of alongwith pending applications, if any.

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

Between:-

SMT. ROSHNI DEVI, WD/O LATE SH. JAGAT RAM, S/O SH. KHAJANA RAM, R/O VILLAGE DUGEWAR, PO KALHERA, TEHSIL BARSAR, DISTT HAMIRPUR, H.P.

....APPELLANT.

(SH.G. D. VERMA, SR. ADVOCATE WITH SH. B. C. VERMA, ADVOCATE)

AND

1. SMT. DOLIMA DEVI (deleted)
2. SH. RAKESH KUMAR, S/O LATE SH. MAN CHAND,
3. SH. RAJ KUMAR, S/O LATE SH. MAN CHAND,
4. SMT. RAJESH KUMARI, ALIAS SURESHNA,
5. SMT. REKHA DEVI, ALIAS BABLI,
6. SMT. ASHA RANI, ALIAS DIMPAL,
   ALL D/O LAE SH. MAN CHAND.

7. KMR. KUSHLA DAUGHTER OF LATE SH. MAN CHAND (BEING MINOR THROUGH HER MOTHER AND NATURAL GUARDIAN SMT. DOLIMA DEVI).

   ALL RESIDENTS OF VILLAGE THANA (KIARI) TAPPA-BANI, TEHSIL BARSAR, DISTT HAMIRPUR, H.P.

8. SMT. HARBANSO DEVI (deleted)

9. SMT. NARATO DEVI, W/O SH. JAI KISHAN R/O VILLAGE GHAT PANGA, TEHSIL BARSAR, DISTT HAMIRPUR, H.P.

....RESPONDENTS

(SH. K. D. SOOD, SR. ADVOCATE WITH SH. RAHUL GATHANIA, FOR R 2 TO 7 AND 9)

REGULAR SECOND APPEAL
NO. 49 OF 2007
Reserved on: 15.9.2022
Decided on: 21.9.2022

Code of Civil Procedure, 1908- Section 100- Plea of adverse possession- Held- The pre-requisite of plea of adverse possession is holding of possession by a person other than owner with hostile animus towards the owner- One who lives in the house of his in-laws as "Ghar Jawain" to look after them and survive on their assets cannot assert hostile animus towards his father-in-law- Appeal allowed. (Para 23)

Cases referred:

Nagubai Ammal and others vs. B. Shama Rao and others, AIR 1956, SC 593;

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

J U D G M E N T

Appellant is in appeal against the judgment and decree dated 18.12.2006, passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 10 of 2003, whereby the judgment and decree dated 30.12.2002, passed by learned Sub Judge, 1st Class, Barsar in Civil Suit No. 73/1998/92 has been reversed and the suit of the plaintiff has been dismissed.

2. Parties herein shall be referred by their names for the reason that due to long pendency of litigation, the original defendants have been substituted by number of legal representatives. Roshni Devi (appellant herein) was the plaintiff, whereas Khajana Ram and Man Chand were defendant No.1 and defendant No.2 respectively in civil suit before learned trial Court. Khajana Ram died and he was represented by his daughters Harbanso Devi and Narato Devi (respondents No. 2 and 3 before learned lower appellate

Court). Man Chand was survived by legal representatives, who were the appellants before learned lower appellate Court.

4. Roshni Devi claimed herself to be wife of Jagat Ram, son of Khajana Ram (defendant No.1). Jagat Ram, husband of Roshni Devi had predeceased his father. Roshni Devi had filed Civil Suit No. 266 of 1992 against Khajana Ram for maintenance being his daughter-in-law. In Civil Suit No. 266 of 1992, Roshni Devi had obtained injunction against Khajana Ram, restraining him from alienating, encumbering or charging the suit property.

5. During the pendency of Civil Suit No. 266 of 1992, Man Chand filed Civil Suit No. 219 of 1991 against Khajana Ram, seeking declaration that he had become owner of suit property by way of adverse possession. Khajana Ram was represented in said suit by his attorney Kishan Singh. By way of written statement filed in Civil Suit No. 219 of 1991, the claim of Man Chand was admitted on behalf of Khajana Ram. Kishan Singh (attorney of Khajana Ram) also made a statement before Civil Court that he had no objection in case the suit was decreed. Accordingly, a decree was passed by Civil Court on 26.12.1991 in Civil Suit No. 219 of 1991 and Man Chand was declared owner of suit property by way of adverse possession.

6. Roshni Devi filed another Civil Suit against Khajana Ram and Man Chand, challenging the decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 being result of collusion and fraud. The suit was numbered as Civil Suit No. 73/1998/92. It was alleged that Man Chand had colluded with Khajana Ram with a purpose to defeat the rights of Roshni Devi in pending Civil Suit No. 266 of 1992. Khajana Ram died on 24.7.1993. Roshni Devi amended here plaint by including her claim of inheritance as daughter-in-law of Khajana Ram and accordingly made additions to the prayer clause also.

7. The suit land in Civil Suit No. 266 of 1992, Civil Suit No. 219 of 1991 and Civil Suit No. 73/1998/92 was the same i.e. khata No. 124, khatauni No. 132, Khasra Nos. 819, 821, 836, 883, 884, 927 and 937, kita-7,

measuring 36 kanals, 2 marlas, situated in Tikka Thana, Tappa Bani, Tehsil Barsar, District Hamirpur, H.P.

8. In defence, jointly raised by defendants Khajana Ram and Man Chand, the status of Roshni Devi as wife of Jagat Ram was denied. The right of Roshni Devi claiming maintenance from Khajana Ram was contested. The decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 was stated to be a perfectly legal document.

9. During the pendency of Civil Suit No. 73/1998/92, Roshni Devi withdrew her suit for maintenance being Civil Suit No. 266 of 1992 on 27.3.1995.

10. Learned trial Court framed the following issued:

(1) Whether the judgment and decree dated 26.12.91 are a result of fraud and collusion etc. as alleged and not binding upon the plaintiff? OPP
(2) Whether the Plaintiff is entitled to the declaration prayed for? OPP.
(3) Whether the Plaintiff is entitled to a decree for possession asclaimed? OPP
(4) Whether the suit is not maintainable in the present form? OPD.
(5) Whether the Plaintiff has a cause of action?OPP.
(6) Whether the Plaintiff has the locus standi to sue? OPP.
(7) Whether the suit is bad for non-joinder and misjoinder of thenecessary parties? OPD
(8) Whether the Plaintiff is estopped from filing the present suit by heract and conduct? OPD.
(9) Whether the defendants are entitled to special costs under section 35ACPC as claimed. If so, their quantum?OPD.
(10) Whether this Court has no jurisdiction to decide the present suit?OPD.
(11) Whether the suit is time barred? OPD.
(12) Whether the suit is hit by the Principle of res judicata as alleged. If so its affect? OPD.

(13) Whether the plaint has not been filed in accordance with order 7 rule1 CPC as alleged. If so, its effect?OPD.
(14) Whether the plaintiff is the daughter in law of late Sh. KhazanaRam? OPD.
(15) Whether late Sh. Khazana Ram executed a valid will in favour of Sh.Rakesh Kumar etc. as allege. If so, its effect?OPD.
(16) Relief.

Issue Nos. 1, 2, 3, 5, 6 and 14 were answered in affirmative and issue No.4 was answered in negative and all other issues were answered as not presses. Learned trial Court decreed the suit to the following effects: -

> *"As a sequel of my findings on the various issues, the instant suit succeeded and the same is, therefore, decreed. I, accordingly, declare that the plaintiff is the owner of 1/3 share of the suit land (total measuring 36.2 kanals). A decree for possession of the land is also passed in favour of the plaintiff (who is its owner) and against the defendants. Further, the Judgment and decree dated 26.12.1991 rendered in Civil Suit No. 219 of 1991 titled as Man Chand Versus Khazana Ram are held to be a result of fraud and collusion, etc. The same do no bind the plaintiff or affect her rights. Keeping in mind the relations between the parties, they are left to bear their costs. Decree sheet be drawn."*

11. In first appeal, learned lower appellate Court reversed the findings recorded by learned trial Court and dismissed the suit of plaintiff. It was held that Roshni Devi had no right to claim maintenance under Section 19 of Hindu Adoption and Maintenance Act, 1956, as there wasno pleading and proof that the suit property was ancestral/coparcenry in the hands of Khajana Ram. On such count, Roshni Devi was held to be having no locus-standi or cause of action. According to learned lower appellate Court, Roshni Devi could have right to challenge the decree in Civil Suit No. 219 of 1991, had she been able to prove her right of maintenance. It was also held that collusion or fraud had also not been proved on record.

12. The instant appeal was admitted by this Court on 14.3.2008, on following substantial questions of law:-

1. Whether the claim of the appellant stands established on record for right of recovery of maintenance from the property in suit which admittedly belongs to father-in-law of the appellant late Sh. Khajana Ram?
2. Whether learned lower appellate Court having found and held that she is widow of late Sh. Jagat Ram, son of late Shri Khajana Ram, therefore, she has the right of succession in the estate of late Sh. Khajana Ram, especially in view of the fact that the respondents have already given up their claim on the basis of Will Exhibit DW-1/A, the alleged Will of late Sh. Khajana Ram in favour of contesting-respondents.
3. Whether suit filed by appellant bearing suit No. 266/92 having been filed on 9.7.1991, therefore, the subsequent suit as filed by Sh. Man Chand, son of Sh. Khajana Ram against Shri Khajana Ram on 9.7.1991 which was decided on 26.12.1991 on the admission of Shri Jagat Ram, therefore, this decree is collusive, void and no reliance could be placed thereon and therefore, upon the death of Sh. Khajana Ram, his natural legal heirs including appellant being widow has succeeded him?

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

14. Both the courts below have concurrently held Roshni Devi to be the wife of Jagat Ram and resultantly, the daughter-in-law of Khajana Ram. Such finding needs to be upheld, as nothing has been shown to termthe same as perverse.

15. Perusal of contents of plaint filed by Roshni Devi reveals that she sought the declaration regarding decree dated 26.12.1991, passed in Civil Suit No. 219 of 1991 in favour of Man Chand on the premise that Man Chand and Khajana Ram had colluded with a purpose to defeat her rights in pending Civil

Suit No. 266 of 1992. She did not make specific pleadings as to the base of her claim of maintenance against Khajana Ram or of his property, obviously for the reason that Civil Suit No. 266 of 1992 was already pending before Court of competent jurisdiction. Roshni Devi had relied upon the fact that Khajana Ram had been restrained by way of an interim injunction, passed in Civil Suit No. 266 of 1992 from alienating the suit land by way of sale, gift, exchange and mortgage etc. to any person and despite said order, he had suffered a decree by colluding with Man Chand. She had further averred that Khajana Ram was fully aware about the pendency of Civil Suit No. 266 of 1992 and interim order passed therein. It was specifically pleaded that Man Chand was son-in-law of Khajana Ram and the judgment and decree dated 26.12.1991 in Civil Suit No. 219 of 1991 had been obtained from the Court of Sub Judge 1st Class, Hamirpur by collusion, fraud and concealment of material fact on the ground of adverse possession. It was asserted that Khajana Ram was in possession of the suit land till his death. It was also submitted that Khajana Ram had already gifted some other land to Man Chand.

16. At this stage, it will be apt to make a reference to the lineage of Khajana Ram. He had one son namely Jagat Ram and three daughters namely Harbanso Devi, Narato Devi and Sarla Devi. Man Chand was the husband of Sarla Devi, who had predeceased her husband and father. Man Chand had remarried with Dolima Devi and had respondents No. 2 to 7 herein, as children from Dolima Devi. As noticed earlier also, Jagat Ram had also predeceased of his father.

17. The question arises whether learned District Judge was right in non-suiting Roshni Devi on the ground that she had not pleaded and proved her right of maintenance from Khajana Ram or his property?

18. The view taken by learned District Judge cannot be subscribed. At the time of passing of decree in Civil Suit No. 219 of 1991, admittedly Civil

Suit No. 266 was pending. In said suit i.e. Civil Suit No. 266 of 1992, Roshni Devi had sought a decree of maintenance from Khajana Ram and the suit property. The matter was pending before the Court of competent jurisdiction. It is in the context of pendency of Civil Suit No. 266 of 1992 that the challenge to decree in Civil Suit No. 219 of 1991 is to be seen.

19. It was not the case of Khajana Ram and Man Chand that they were not aware about the pendency of Civil Suit No. 266 of 1992. Khajana Ram had suffered an interim injunction order, whereby he was restrained form alienating the suit land by way of sale, gift, lease, mortgage and sale etc. In view of this, the novel idea appears t have been propounded to transfer the suit land in the name of Man Chand by suffering the decree.

20. Collusion in judicial proceedings is a secret arrangement between two persons that one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding, the claim put forward is fictitious. The contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and brne by the parties with the object of confounding third parties. These observations extracted from the judgment passed by Hon'ble Supreme Court in ***Nagubai Ammal and others vs. B. Shama Rao and others, AIR 1956, SC 593*** are apt to be noticed.

21. Another facet of the challenge by Roshni Devi was allegation of fraud and misrepresentation. In ***Nagubai Ammal (supra)***, it was further observed that when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the Court in his favour and against the opponent by practicing fraud on the Court. Such a proceeding is started with a view to injure the opponent and there can be no question of its having been instituted as the result of an understanding between the parties. **While in collusive**

proceedings the combat is a mere sham in a fraudulent suit it is real and earnest.

22. In view of above exposition, the plea of collusion and fraud could not co-exist, nonetheless one of the pleas if proved could have its own independent bearing on the merits of the case.

23. Some total of the pleadings raised by Roshni Devi reveals that her assertion was clear and unambiguous that Khajana Ram had suffered decree in Civil Suit No. 219 of 1991 only to defeat her claim in Civil Suit No. 266 of 1992. It being so, it will not be out of place to assess the merits of the claim of Man Chand in Civil Suit No. 219 of 1991. Admittedly, Man Chand was son-in-law of Khajana Ram. There is also no dispute that till passing of aforesaid impugned degree, Khajana Ram was shown to be owner in possession of the suit land. The pre-requisite of plea of adverse possession is holding of possession by a person other than owner with *hostile animus* towards the owner. In cross-examination of Roshni Devi while she appeared as her own witness, a suggestion was made to her that Man Chand was "*GharJawain"* of Khajana Ram. Similarly, when Man Chand appeared as DW-3, he specifically stated in his examination-in-chief that Khajana Ram was his father-in-law and he had been kept as *"GharJawain"*. In the context of Indian society, "*GharJawain"* is daughter's husband and is taken to be substitute for a son. One who lives in the house of his in-laws to take their care and survive on their assets.It being so, there coudnot be any *hostile animus* between the *"GharJawain"*(Man Chand)and his father-in-law(Khajana Ram).

24. There is another glaring fact on record, which negates the existence of *hostile animus* of Man Chand towards Khajana Ram. A Will was propounded by Man Chand as having been executed by Khajana Ram in respect of suit property in favour of sons of Man Chand. In case Man Chand had *hostile animus* to own the property of his father-in-law, there was hardly any need for creation of a Will or a claim on its basis. Though, subsequently,

the claim on the basis of Will was given up by Man Chand, yet the fact remains that a claim was setup to the property of Khajana Ram on the basis of Will.

25. The material as observed above, clearly suggests the nonexistence of basic ingredients of adverse possession. Had the merits of the claim of Man Chand on the plea of adverse possession been assessed at the touch stone of legal principles, the same would havefailed in all probabilities. It was only on the basis of admission made by the attorney of Khajana Ram that a decree was passed. In such circumstances, there cannot be any denial to the fact that had the decree not been collusive, it would not have been passed. It is also evidently probable that such a method was adopted to circumvent the injunction order suffered by Khajana Ram in Civil Suit No. 266 of 1992.

26. It is the collusiveness of a decree that makes it bad in law. Fair play is the hallmark of every law and legal system. No adjudication can survive which is actuatedby illegitimate means. Whether Roshni Devi had right to maintenance from Khajana Ram or his property could not be the determinative factor to hold existence of cause of action in her favour.

27. The existence of cause of action is to be seen at the time of filing of the suit. The institution of a suit by Roshni Devi could not be refused on the ground that she had no decree in her favour, declaring her right to have maintenance against Khajana Ram. It is equally true that suit has to be decided on the basis of cause of action, as existed on the date of filing of the suit.

28. Roshni Devi subsequently withdrew her suit No. 266 of 1992 on 27.3.1995, as Khajana Ram had died on 24.7.1993 and her cause of action in Civil Suit No. 266 of 1992 had ceased to exist.

29. In light of above discussion, learned District Judge had erred in dismissing the suit of Roshni Devi on the grounds that she did not have cause

of action to file the suit in absence of right of maintenance in her favour. The pendency of civil suit No. 266 of 1992 at the time of passing of decree in Civil Suit No. 2019 of 1991 was sufficient to afford cause of action to Roshni Devi.

30. The view subscribed by learned District Judge cannot be sustained for another reason that after the death of Khajana Ram, Roshni Devi would be one of his legal heirs, as wife of his pre-deceased son. The concept of *spes-successionis* under Section 6 of the Transfer of Properties Act bars the transfer by an heir apparent. This, however, cannot be construed to mean that an heir apparent will not have cause of action to challenge any illegal action of the person from whom the heir apparent is entitled to inherit, on the ground that it affected his/her rights available on inheritance. Since Roshni Devi was held to be wife of pre-deceased son of Khajana Ram, she being heir apparent would have another source of cause of action to assail the decree inCivil Suit No. 219 of 1991.

31. In light of above discussion, the substantial questions of law Nos. 2 and 3, as noticed above, are answered accordingly and question No.1 is rendered infructuous. The appeal succeeds. The impugned judgment and decree dated 18.12.2006, passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 10 of 2003 is set aside. The judgment and decreedated 30.12.2002, passed by Sub Judge, 1st Class, Barsar in Civil Suit No. 73/1998/92 is upheld, however, with the modifications that Roshni Devi will be entitled to inherit the estate of Khajana Ram strictly in accordance with Hindu Succession Act and will be held entitled to joint possession of the suit land till she gets her share partitioned.

32. The appeal is accordingly disposed in the aforesaid terms. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

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

Between:

1. ASHOK KUMAR, S/O SHRI KHAZANA RAM,
2. SUNITA DEVI, WIFE OF LATE SH. MADAN LAL,
3. HAPPY, SON OF MADAN LAL,
4. JYOTI DAUGHTER OF MADAN LAL

RESIDENTS OF VILLAGE KANJIAN, POST OFFICE KANJIAN, TEHSIL BHORANJ, DISTRICT HAMIRPUR, HP.

….APPELLANTS/DEFENDANTS

(MR. J.R. POSWAL, ADVOCATE)

AND

SUHRU RAM, SON OF SHRI SAHNU RAM, RESIDENT OF VILLAGE SANEHRU, POST OFFICE BHAMBLA, TEHSIL SARKAGHAT, DISTRICT MANDI, H.P.

….RESPONDENT/PLAINTIFF

(BY MR. VIJAY K. BHATIA,
ADVOCATE)

REGULAR SECOND APPEAL
NO. 265 OF 2014
Decided on: 30.8.2022

Code of Civil Procedure, 1908- Section 100- **Specific Relief Act, 1963**- Sections 38 & 39- **Transfer of Property Act, 1882**- Section 106- Suit for possession and permanent prohibitory injunction- Suit decreed- Held- Plaintiff owner in possession and there is nothing on record to prove ownership of defendant on suit land- Concurrent findings of facts and law recorded by both the courts below requires no interference. (Para 18, 20, 21)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264;

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

JUDGMENT

Instant Regular Second Appeal lays challenge to the judgment and decree dated 21.2.2014, passed by the learned Additional District Judge, Hamirpur, District Hamirpur, H.P., in CA No. 91 of 2012, RBT No. 28/2013, affirming the judgment and decree dated 10.9.2012, passed by the learned Civil Judge (Jr. Div.), Court No.4, Hamirpur, H.P., whereby civil suit having been filed by the respondent/plaintiff *(herein after referred to as "the plaintiff")* under Section 9, 26 Order 7 Rule 1 CPC read with Sections 38 and 39 of Specific Relief Act, 1963, and under Section 106 of Transfer of Property Act for possession, came to be decreed.

15. Briefly stated facts of the case as emerge from the record are that plaintiff filed a suit for vacant possession of slateposh house measuring 35'x12' and cowshed measuring 10'x8' situate over land comprised in khata No. 161 Min, Khatauni No. 190, Khasra No. 495, area 1K-08M situate at Tika Kanjian, Mauza Bamson, Tehsil Bhoranj, District Hamirpur, H.P., as per Jamabandi for the year, 2002-03 (in short "the suit land"). Besides above, plaintiff also filed suit for permanent prohibitory injunction restraining the appellants/ defendants (in short "*the defendants*") from changing the nature of the suit land/property and also for recovery of use and occupation charges @ Rs.1000/- per month for the preceding three years till handing over the vacant possession of the premises to the plaintiff.

16. Plaintiff averred in the plaint that as per copy of Jamabandi for the year, 2002-03 pertaining to the suit land, plaintiff is shown to be *gairmarusi* tenant over half share under *shamlaat* right holders Rajender Dev etc. He alleged that his father constructed slateposh house as well as chowshed over the suit land 80 years ago, which was rented out to Sh. Khazana Ram, predecessor-in-interest of the defendants for Rs100/- per

month. He alleged that after death of Sh. Khazana Ram, appellants-defendants being his LRs have been coming in possession over the suit property. He alleged that now since he has retired from his service, he is in bonafide need of the aforesaid house. Since despite there being several requests, defendants failed to vacate the suit property and threatened to demolish the house and construct a new house over the suit land, plaintiff approached the Civil Court by way of suit as detailed herein above.

17. Aforesaid claim came to be refuted by the defendants, who in their written statement, besides taking preliminary objections of maintainability and *locus standi* claimed on merit that they are owner in possession of the suit property. While specifically denying the claim of the plaintiff qua the ownership of the suit land, defendants submitted that plaintiff has no concern with the suit property. While admitting factum with regard to existence of the house over the suit land, defendants claimed that same is owned by them. They further claimed that plaintiff lives in District Mandi and neither he has paid any house tax nor electricity meter in his name at Village Kanjian. Defendants also denied that the abadi comprising of house and cowshed was given on lease to their predecessor-in-interest Khajana Ram, by predecessor-in-interest of the plaintiff. They also denied the payment of any rent to the plaintiff. On the basis of aforesaid pleadings adduced on record by the respective parties, court below framed following issues:

> "1. Whether plaintiff is entitled to the relief of vacant possession of the suit land, as alleged? ..OPP
>
> 2. Whether the plaintiff is entitled for relief of permanent prohibitory injunction, as prayed for ? OPP.
>
> 3. Whether the plaintiff is entitled for relief of mandatory injunction, as prayed for? ...OPP

4. Whether the suit is not maintainable? OPD

5. Whether the plaintiff has no cause of action to file the present suit as alleged ? OPD

6. Whether the plaintiff is stopped to file the present suit, as alleged? ...OPD.

7. Whether the suit is bad for mis-joinder of necessary parties, as alleged? OPD.

8.Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD.

9.Relief."

18. Subsequently, on the basis of pleadings as well as evidence led on record by the respective parties, learned trial Court, vide judgment dated 10.9.2012 decreed the suit of the plaintiff for possession of the slateposh house measuring 35'x12' and cowshed measuring 10'x8' situate over the suit land with consequential relief of permanent prohibitory injunction restraining the defendants from changing the nature of the suit property. Learned trial court also directed the defendants to handover the peaceful possession of the property to the plaintiff.

19. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, defendants-appellants filed an appeal in the court of learned Additional District Judge, Hamirpur, which also came to be dismissed vide judgment dated 21.2.2014. In the aforesaid background, defendants-appellants have approached this Court in the instant proceedings, praying therein to set-aside the impugned judgments and decrees passed by the courts below.

20. Vide order dated 17.10.2014, appeal came to be admitted on the following substantial questions of law:

"i). Whether the findings recorded by the learned Courts below are the result of mis-reading , misinterpreting and misconstruing of oral as well as documentary evidence available on record?

ii). Whether the judgments and Decree passed by Learned Courts below are sustainable in the eyes of law in view of the fact that Learned Courts below have failed to give its findings specifically in not arraying as necessary parties to Rajender Dev, Bada Ram and Longu Ram which are also shown to be non occupancy tenants?

iii). Whether the Learned Courts below have erred in holding that the notice under 106 of Transfer of Property Act has been duly served upon the appellants/defendants?

iv). Whether the findings of learned Courts below are correct to the extent of holding that in the absence of lease deed the impugned judgments and decrees cannot be sustained in the eyes of law?

v). Whether the findings returned by the Learned courts below are sustainable in the eyes of law in view of the fact that since the plaintiff has failed to prove his holding over the suit land as required under the provisions of section 2 (17) of Himachal Pradesh Tenancy and Land Reforms Act, 1972."

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

22. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the judgment and decree passed by the learned first appellate Court, this Court finds no merit in the submissions of the learned counsel for the appellants/defendants that both the courts below have failed to appreciate the evidence in its right

perspective, rather this court finds that both the courts below very meticulously have dealt with each and every aspect of the matter and as such, no scope is left for interference.

23. Mr. Poswal, learned counsel appearing for the appellants/defendants with a view to prove his aforesaid submissions made this Court to peruse the evidence led on record by the respective parties to state that it has come in the evidence that after a certain point of time, no rent was paid by the defendants. He further argued that since suit land was in the name of number of *hissedarans* and plaintiff not made all of them as party, suit filed by him ought to have been dismissed for non-joinder of necessary parties. Mr. Poswal, further contended that no evidence ever came to be led on record at the behest of the plaintiff to show that his predecessor-in-interest was owner of the property and same was given to the predecessor-in-interest of the defendants on rent and they were tenant on the same. He further submitted that there is overwhelming evidence suggestive of the fact that defendants were in possession of the suit property and electricity connection as well as water supply connection were in their names and house tax was also being paid by them.

24. Mr. Vijay Bhatia, learned counsel appearing for the respondent/plaintiff while supporting the impugned judgment and decree passed by the learned first Appellate Court argued that though in the case at hand, defendants were able to prove their possession over the suit property, but since they failed to lead evidence, be it oral or documentary with regard to ownership, suit of the plaintiff for possession rightly came to be decreed. Mr. Bhatia further submitted that since plaintiff was shown to be exclusive owner of khasra No. 495 in revenue record, there was no occasion for him to implead other hissedarans as party respondents. He further submitted that though suit land was entered under the tenancy of the plaintiff, but same stood abandoned due to non-cultivation. He further submitted that material

available on record clearly reveals that suit land is coming in the ownership of the plaintiff from the time of his ancestors and forefathers over which there exists slateposh house and cowshed, which were constructed by his father and were given on lease to Shri Khazana Ram, predecessor-in-interest of the defendants on monthly rent of Rs.100/-. He submitted that though defendants after the death of their father are coming in possession of the leased property, but since they did not pay the rent of the premises after December, 2000, he terminated the lease deed vide notice dated 27.5.2005 and as such, there is no occasion, if any, for the defendants being predecessor-in-interest of Khajana Ram to remain in possession of the suit property. Lastly, Mr. Bhatia, submitted that this Court while exercising power under Section 100 CPC has very limited jurisdiction to re-appreciate the evidence, especially on account of concurrent findings recorded by both the courts below.

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

26. Since this Court is required to examine the entire evidence as well as pleadings adduced on record to explore the evidence to the aforesaid substantial questions of law framed by this Court and all the substantial questions of law are interlinked, same are being taken up together for consideration.

27. As per claim of the plaintiff, he is shown to be gairmarusi over the suit land to the extent of half share under its tikadharans Rajender Dev etc., as per Jamabandi for the year 2002-03. With a view to prove aforesaid claim, plaintiff examined three witnesses including himself as PW1. He deposed that house was constructed by his father 80-90 years ago and same was leased out to Sh. Khazana Ram, predecessor-in-interest of the defendants. He further deposed that after the death of Sh. Khazana Ram, defendants are

in possession of the suit land. He also stated that defendants did not pay any rent for the last three years.

28. PW2 Sh. Kartar Chand while corroborating the aforesaid version of the plaintiff, categorically stated that plaintiff is owner in possession of the suit land and same was leased out by the plaintiff's predecessor-in-interest to the predecessor-in-interest of the defendants. PW3 Sh. Ishwar Dass proved on record the site plan Ext.PW3/A.

29. Defendants with a view to rebut the claim of the plaintiff, examined six witnesses in his defence including himself. While deposing as DW1, he reiterated his version made in the written statement that defendants are owner in possession of the house and cowshed situate over the suit land. He deposed that house was constructed by Sh. Khazana Ram, predecessor-in-interest of the defendants. He also deposed that defendants are paying the house tax of the suit property and there is electricity meter in the name of Khajana Ram, predecessor-in-interest of the defendants.

30. DW2 Balam chand, Pardhan, Gram Panchayat, Kanjayan, DW-3 Pawan Kumar, Panchayat Secretary, Gram Panchayat, Kanjyan, DW-4 Manohar Lal, JE HPSEB, Sub-Division, Bhoranj and DW5 Karmi Devi, UP Pardhan, Gram Panchayat Kanjyan also proved on record house tax receipts and electricity bills of meter No. KJ-99.

31. DW6 also corroborated the version putforth by DW1. Careful perusal of Jamabandi Ex.P1 placed on record reveals that nature of the land is *shamlaat tika* and plaintiff is shown to be *gairmarusi* tenant over the same to the extent of half share under its *tikadharans* Rajender Dev etc. Over remaining half share, Bada Ram and Longu Ram are shown to be g*airmarusi* tenants. Though defendants have claimed themselves to be owner in possession of the suit land, but such fact has been specifically denied by the plaintiff. Plaintiff has though admitted possession of the defendants over the suit land, but apart from above, there is nothing on record to prove ownership

of the defendants on the suit land. Though evidence led on record by the defendants proves that they are in possession of the cattle shed and house, but there is no document adduced on record on their behalf to prove their title. No doubt, electricity bill as well as house tax receipts are in the name of the defendants, but these documents nowhere prove ownership, if any, of the defendants over the suit land.

32. On the other hand, evidence led on record by the plaintiff especially revenue record clearly establishes ownership of the plaintiff over the suit land and as such, court below rightly held him entitled to relief of permanent prohibitory injunction, restraining the defendants from changing nature of the suit property and raising construction thereon. Mr. J.R. Poswal, learned counsel for the defendants-appellants, argued that tenancy in favour of the plaintiff had come to an end on account of non-cultivation of the land. However, there is no material worth credence available on record with regard to abandonment of occupancy right by the predecessor-in-interest of the plaintiff or the plaintiff himself. No doubt, evidence ocular as well as documentary placed on record by the plaintiff proves possession of the defendants over the suit property, but ownership of the defendants cannot be proved merely on the basis of oral evidence. Interestingly, legal notice dated 27.5.2005 issued by the plaintiff to the defendants terminating the lease and calling upon them to vacate the premises, establishes factum with regard to ownership of the plaintiff, to which defendants never responded, as a consequence of which, lease stands terminated by virtue of the notice dated 27.5.2005.

33. Having carefully perused entire evidence available on record, this Court finds no illegality and infirmity in the impugned judgments and decrees passed by the courts below and as such, no interference is called for. At this stage, Mr. Bhatia, learned counsel, contended that this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially

in view of the concurrent findings of facts and law recorded by the courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264,*** relevant para whereof reads as under:-

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation 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 plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., 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."

34. It is quite apparent from the aforesaid exposition of law that concurrent findings of facts and law recorded by both the learned courts below cannot 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 the learned courts below, rather same are based upon correct appreciation of evidence and as such, same deserve to be upheld.

35. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Substantial questions of law are answered accordingly. Hence, the appeal fails and dismissed accordingly. There shall be no order as to costs.

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

Between:-

1. SMT. USHA DEVI DAUGHTER OF LATE SH. BALDEV RAJ, AND WIFE OF SH. PIAR CHAND, RESIDENT OF VILLAGE BHARATWAN, P.O. BHARARI, TEHSIL BHORANJ, DISTT. HAMIRPUR, H.P.

2. SMT. RAMA DEVI D/O LATE SH. BALDEV RAJ, W/O SH. ANIL KUMAR, R/O VILLAGE BIHAR, P.O. MAHAL, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

3. SMT. SUNITA DEVI, D/O LATE SH. BALDEV RAJ, AND W/O SH. RAJ KUMAR, R/O VILLAGE MANWIN, P.O. LANG MANWIN, TEHSIL BHORANJ, DISTT. HAMIRPUR, H.P.

....APPELLANTS.

(SH. ROMESH VERMA, ADVOCATE)

AND

1. SMT. SAVITRI DEVI WIDOW OF LATE SH. CHATARBHUJ,

2. SH. PARKASH CHAND,

3. SH. RATTAN LAL,

4. SH. RAKESH KUMAR,

SONS OF LAE SH. CHATARBHUJ.

5. VEENA DEVI,

6. MEENA DEVI,

BOTH DAUGHTERS OF SH. CHATARBHUJ,

ALL RESIDENTS OF VILLAGE THARA, P.O. MUNDKHAR, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

7. SMT. KAUSHALYA DEVI WIFE OF SH. CHANDI RAM, RESIDENT OF VILLAGE KHAUKHNEHRA, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

8. SUSHILA DAUGHTER OF SH. BALDEV RAJ, WIFE OF SH. KAMLESH KUMAR SHARMA, SON OF SH. RAM DASS, RESIDENT OF VILLAGE KALASI, P.O. DAWLA, TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P.

....RESPONDENTS

(SH. K. D. SOOD, SR. ADVOCATE WITH SH. RAHUL GATHANIA, FOR R 1TO 6)

REGULAR SECOND APPEAL
NO. 599 OF 2008
Reserved on: 7.9.2022
Decided on:14.9.2022

Code of Civil Procedure, 1908- Sections 96 and 100- Ld. Lower Appellate Court considered the evidence of both the civil suits while passing the impugned judgment and decree- Held- The procedure adopted by learned District Judge has definitely caused prejudice to the appellants herein- Appeal allowed. (Para 15)

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

J U D G M E N T

By way of instant appeal, appellants have assailed judgment and decree dated 1.9.2008, passed by learned District Judge, Hamirpur in Civil Appeal No. 128 of 1991, whereby the judgment and decree dated 1.10.1991, passed by learned Sub Judge, 1st Class (II), Hamirpur in Civil Suit No. 27 of 1986 has been reversed.

2. Parties hereafter are being referred by the names of original plaintiff and defendants for lucidity.

3. Baldev Raj, the predecessor-in-interest of appellants filed Civil Suit No. 27 of 1986 on 5.2.1986 before learned Sub Judge, 1st Class (II), Hamirpur against his brother Chaturbhuj, the predecessor-in-interest of respondents No. 1 to 6 herein, seeking declaration to the effect that the suit land detailed in the plaint was jointly owned by Baldev Raj and Chaturbhuj and even the share of their deceased brother Ram Rath was jointly inherited by them. Relief of permanent prohibitory injunction was also sought on the ground that Chaturbhujhad started claiming the estate of late Ram Rath exclusively on the basis of Will propounded by him. Initially, the suit was filed only against Chaturbhuj as defendant No.1, however, later on respondent No.7 herein Kaushalya Devi got herself impleaded as defendant No.2, claiming to be the widow of deceased Ram Rath.

4. Respondent No.7 herein Kaushalya Devi also instituted another suit bearingCivil Suit No. 119 of 1986 impleading Baldev Raj and Chaturbhuj as defendants. She had claimed the estate of deceased Ram Rath as his widow and also had laid challenge to the Will dated 24.12.1985 of deceased Ram Rath as propounded by Chaturbhuj.

5. Civil Suit No. 27 of 1986 filed by Baldev Raj was decreed by learned trial Court vide judgment and decree dated 1.10.1991. The suit land was held to be the joint property of Baldev Raj and Chaturbhuj. Will of Ram Rath as propounded by Chaturbhuj was held to be not proved.

6. The Civil Suit No. 119 of 1986, filed by Kaushalya Devi was dismissed vide separate judgment and decree of the same date i.e., 1.10.1991.

7. Chaturbhuj assailed the judgment and decree dated 1.10.1991 in Civil Suit No. 27 of 1986 before learned District Judge, Hamirpur and his appeal was registered as Civil Appeal No. 128 of 1991. Kaushalya Devi also assailed the judgment and decree dated 1.10.1991 in Civil Suit No. 119 of 1986 before learned District Judge, Hamirpur and her appeal was registered as Civil Appeal No. 149 of 1991.

8. Learned District Hamirpur, decided both the civil appeals i.e. Civil Appeal No. 128 of 1991 and Civil Appeal No. 149 of 1991 by a common judgment and decree dated 1.9.2008, which is impugned in the instant appeal. Whereas, appeal No. 128 of 1991 of Chaturbhuj was allowed, Civil Appeal No. 149 of 1991 of Kaushalya Devi was dismissed. Resultantly, Civil Suit No. 27 of 1986 also stood dismissed.

9. Kaushalya Devi did not assail the judgment and decree dated 1.9.2008, passed by the learned District Judge, Hamirpur in Civil Appeal no. 149 of 1991 before this Court.

10. Learned District Judge held the Will dated 24.12.1985 of deceased Ram Rath to be legal and valid and consequently legal heirs of Chaturbhujwere held entitled to the estate of deceased Ram Rath.

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

12. Sh. Ramesh Verma, learned counsel for the appellants at the very outset contended that the impugned judgment and decree cannot be sustained as the same has been passed by taking into consideration evidence in Civil Suit No. 119 of 1986. According to him, the course adopted by learned District Judge was unknown in procedural law. He further contended that Civil Suit No. 27 of 1986 and Civil Suit No. 119 of 1986 were neither consolidated nor decided by a common judgment. Both these suits were

decided separately on the basis of the evidence recorded in each of the suits. None of the parties had agreed that the evidence in one suit be also read in the other.

13. The contention of learned counsel for the appellants so far as factual part of it is concerned, has not been contested by the learned counsel for the respondents.

14. Perusal of impugned judgment and decree reveals that learned lower appellate Court considered the evidence of both the civil suits i.e. Civil Suit No. 27 of 1986 and Civil Suit No. 119 of 1986 while passing the impugned judgment and decree. To hold that Will dated 24.12.1985 was a legal and valid Will of deceased Ram Rath, learned District Judge had placed reliance on the evidence in Civil Suit No. 119 of 1986. On the basis of such evidence in Civil Suit No. 119 of 1986, issue No.4 in Civil Suit No. 27 of 1986 had been decided against the legal heirs of Baldev Raj, which otherwise stood decided in his favour by learned trial Court on the ground that the defendant Chaturbhuj had not led any evidence on said issue.

15. The contention raised by the learned counsel for the appellants herein is liable to be upheld.The procedure adopted by learned District Judge, Hamirpur was not in accordance with law. He could not legally transpose evidence of one suit in another, merely because he had chosen to decide the appeals arising out of two separate suits, by a common judgment. The mode adopted by learned District Judge has definitely caused prejudice to the appellants herein. In this view of the matter, the impugned judgment and decree, passed by learned District Judge, Hamirpur in Civil Appeal No. 128 of 1991 cannot be sustained and is liable to be set aside. The learned District Judge was required to decide the said appeal on the basis of records of Civil Suit from which the appeal had arisen. In case of conflicting decision on identical issues in two separate suits between same parties, the law provided for separate procedure and remedies.

16. In view of above discussions, the appeal is allowed. The judgment and decree dated 1.9.2008, passed by learned District Judge, Hamirpur in Civil Appeal No. 128 of 1991 is set aside. The matter is remanded to the learned District Judge, Hamirpur to decide Civil appeal No. 128 of 1991 afresh in light of observations made hereinabove. Parties are directed to appear before learned District Judge, Hamirpur on **10.10.2022**. Since original suit was filed in the year 1986, it is expected from learned District Judge that the appeal shall be decided expeditiously. Pending applications, if any, also stand disposed. Records be sent back forthwith.

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

Between:-

HIMACHAL PRADESH FINANCIAL CORPORATION, NEW HIMRUS BUILDING, CIRCULAR ROAD, SHIMLA-1 THROUGH ITS MANAGING DIRECTOR.

.....APPELLANT

(BY MR. ATHARV SHARMA, ADVOCATE)

AND

1. NARENDER NARAIN SHARMA, S/O SH. OM PRAKASH SHARMA, RESIDENT OF PREM BHAWAN, SOLAN, H.P.

.....RESPONDENT

2. PROFESSOR KRISHAN KUMAR SHARMA, S/O LATE SH. OM PRAKASH SHARMA R/O DHINGRA COTTAGE, TILAK NAGAR, SHIMLA, H.P.

..... PROFORMA RESPONDENT

(BY MR. V.S. CHAUHAN, SENIOR ADVOCATE,
WITH MR. RIJUL CHAUHAN,
ADVOCATE, FOR R-1)

REGULAR SECOND APPEAL
No.4 of 2009

Decided on: 23.09.2022

Code of Civil Procedure, 1908- Sections100 & 11**- Himachal Pradesh Public Moneys *(*Recovery *of Dues)* Act, 1973**- Civil suit for permanent prohibitory injunction and declaration that right of appellant to recover loan amount had become time barred- Suit was dismissed however appeal was allowed- Appellant Corporation was permitted to withdraw the suit for recovery and thereafter resorted to recovery proceedings under the Himachal Pradesh Public Moneys (Recovery *of* Dues) Act- These recovery proceedings were questioned by the plaintiff in the civil suit- Held- The findings of the Ld. First Appellate Court about preclusion of the appellant Corporation's loan recovery claim in light of its withdrawing the civil suit, the abandonment of the appellant Corporation's loan claim, there being no fresh cause of action for initiating recovery proceedings under the Act and the recovery proceedings under the Act having been instituted beyond the period of limitation etc. are not proper and need to be relooked - Matter remanded to the learned First Appellate Court. (Para 4)

Cases referred:

Himachal Pradesh Financial Corporation Vs. Anil Garg and others (2017) 14 SCC 634;

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

J U D G M E N T

A civil suit was filed by respondent No.1 for permanent prohibitory injunction and declaration that right of appellant to recover loan amount due to it from him had become time bared and in the facts of the case, recovery proceedings initiated by the appellant were otherwise also illegal. The civil suit was dismissed by the learned Trial Court. The appeal filed by the plaintiff was allowed by the learned First Appellate Court, giving cause of action to defendant No.1 to institute the present Regular Second Appeal. For convenience, the parties are referred to as per their status before the learned Trial Court.

2. **Facts** of the case are as under: -

2(i) The plaintiff (respondent No.1) instituted a civil suit for declaration and permanent prohibitory injunction against defendant No.1 (appellant). The case put forth by the plaintiff was that:-

2(i)(a). Defendant No.1(appellant) had sanctioned and advanced a term loan of Rs.1,71,000/- to the plaintiff on 08.12.1982 for purchase of a truck. The loan amount was to be repaid in 20 quarterly installments commencing from 10.03.1983 and payable by 06.12.1987. The plaintiff defaulted in repaying the loan amount. Vide notice dated 19.03.1988, the plaintiff was called upon to pay the entire loan amount to the tune of Rs.2,31,394/-. The plaintiff, on 12.04.1988, though deposited Rs.80,000/-,however, defendant No.1 instituted civil suit No.115 of 1989 in this Court for recovery of a sum of Rs.2,71,394/- alongwith interest.

2(i)(b). During pendency of the civil suit in this Court, the defendant agreed to receive a sum of Rs.74,699.38/- inclusive of interest up to 17.12.1991. Statement of account to this effect (Ex. DX) was also placed on record. The plaintiff even deposited a sum of Rs.20,000/- on 31.12.1991 with the defendant No.1 vide receipt Ex. DY.

2(i)(c). On account of change in the pecuniary jurisdiction, the civil suit was transferred to the Court of learned District Judge.The parties were directed to appear there on 12.04.1995. The civil suit was assigned to the Court of learned Additional District Judge.

2(i)(d). On 21.12.1995, defendant No.1 moved an application under Order 23 Rule 1, Order 13 Rule 7 read with Section 151 of Code of Civil Procedure for withdrawing the civil suit. The said application was allowed by the learned Court on 15.01.1996 (Ex. PW-2/A) in absence of the plaintiff.

2(i)(e). The defendant No.1 thereafter initiated proceedings under the Himachal Pradesh Public Moneys (Recovery of Dues) Act, 2000 (Act in short) against the plaintiff. Demand Notice was issued to the plaintiff on 22.02.1997, wherein a sum of Rs.4,41,404/- was shown as due and payable by the

plaintiff to defendant No.1. The Assistant Collector First Grade also issued notice to the plaintiff for making payment of loan amount.

The plaintiff contended that the act of defendant No.1 initiating the recovery proceedings against him under the Act was illegal, invalid and arbitrary. It was also urged that the defendant No.1 had agreed before this Court to receive a sum of Rs.74,699.38/- in lump sum as full and final settlement of its claim. Plaintiff had even deposited a sum of Rs.20,000/- with defendant No.1. hence, defendant No.1 had no right to recovery any amount from the plaintiff under the Act. Another submission of the plaintiff was that recovery of loan amount had become time barred.

2(ii). Defendant No.1 besides taking preliminary objections qua maintainability, jurisdiction, valuation, estoppel etc. contended that the plaintiff had failed to repay the loan amount necessitating defendant No.1 to institute the civil suit for recovery of outstanding amount to the tune of Rs.2,71,394/- in this Court in the year 1989. Defendant was directed by the Court in that suit to calculate the loan amount by charging simple interest @ 14.5%. The orders were complied with by the defendant. The outstanding amount, as per directions of the Court, was calculated in the sum of Rs.74,699.38/- The defendant denied that it had agreed to recover only the amount of Rs.74,699.38/- from the plaintiff. According to the defendant, plaintiff was liable to pay compound interest in terms of the provision in theHypothecation Deed (Ex. DA). Further case of the defendant was that after transfer of the case to the learned District Judge Shimla, the suit was withdrawn by the defendant on 15.01.1996 with a view to initiate recovery proceedings against the plaintiff under the provisions of the Act. This reason was clearly stated in the application seeking to withdraw the suit. After withdrawal of the suit, a demand notice, Ex. PW-2/B for a sum of Rs.4,41,404/- was sent by the defendant-Corporation to the plaintiff. According to the defendant, certificate for recovery of outstanding loan

amount was justly issued in terms of the Act. The defendant denied that recovery of loan amount had become barred by time and that it was estopped to recover the loan amount.

2(iii). The parties led evidence on the issues framed in the civil suit. On consideration of the pleadings, the evidence and the arguments, learned Trial Court dismissed the suit. Learned Trial Court held that the defendant-Corporation is an instrumentality of the State that deals with public money, therefore, a public oriented approach had to be adopted in the matter. Defendant Corporation can effectively operate if there is regular realization of the installments. In case the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of financial arrangements of the Corporation. Since the plaintiff had admittedly failed to repay the loan as per schedule of Hypothecation Deed (Ex.DA) and had not paid any amount towards the loan since the year 1991, therefore, the recovery proceedings initiated by the defendant against the plaintiff under the Act were held to be legal and valid. Learned Trial Court also held that immediately after withdrawing its civil suit, the defendant resorted to recovery proceedings under the Act within the prescribed limitation period. Defendant's claim was not barred by limitation.

2(iv). Learned First Appellant Court allowed the appeal preferred by the plaintiff and held that cause of action arose in favour of the defendant Corporation to institute the suit for recovery of loan amount lastly on 06.12.1987. Defendant Corporation accordingly instituted the civil suit for recovery of the amount within limitation period i.e. within three years from the date of cause of action. The defendant-Corporation did not opt to recover the amount under the Act. The Appellate Court further held that after withdrawal of the suit on 15.01.1996, the defendant Corporation has not been able to prove a fresh cause of action enabling it to initiate proceedings for recovery under the Act within three years from the date of fresh cause of

action. The Court was also of the view that by unconditionally withdrawing its civil suit on 15.1.1996, the defendant in terms of provisions of Order 23 Rule 4(9) CPC was precluded from instituting fresh suit in respect of such matter or part of such claim. The Court observed that the defendant had withdrawn the civil suit without seeking permission of the Court either to file fresh suit or to initiate recovery proceedings under the Act for same cause of action. The Court concluded that the defendant-Corporation was neither entitled to institute fresh suit nor the recovery proceedings under the Act on the same cause of action and in respect of same subject matter. Learned First Appellate Court also noticed objection of the plaintiff against the merits of defendant's recovery claim under the provisions of the Act. On the basis of this view, the decree for declaration was passed in favour of the plaintiff to the effect that right of defendant No.1 to recover the loan amount due from the plaintiff, had become time barred and as such was not recoverable under the Act. It was further ordered that recovery proceedings started under the Act were illegal. Decree for permanent prohibitory injunction, restraining the defendant Corporation from recovering the loan amount from the plaintiff under the Act was also passed.

3. It is in the above background that the plaintiff Corporation has filed the instant Regular Second Appeal. This appeal was admitted on 01.11.2010 on following substantial questions of law:-

> *"1. Whether the first Appellate Court below committed illegalities in non-suiting the appellant/defendant on the ground of limitation thereby vitiating the impugned judgment and decree?*
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> *2. Whether after withdrawal of a suit being prosecuted as per provisions of the Code of Civil Procedure, another remedy if available in law can be stated to be abolished as has been observed by learned First Appellate Court below, if not, impugned judgment and decree stands vitiated in law?*
>
> *3. Whether as per clauses of the hypothecation deed, when recall notice Ex.PW-2/B is issued thereby demanding the amount due in*

full is the starting point of limitation and Court below having misread the same, vitiated the impugned judgment and decree?"

4. I have heard learned counsel for the appellant (defendant No.1) and learned senior counsel for the plaintiff (respondent No.1) and with their assistance, have seen the relevant record.

The substantial questions of law are covered by a decision of the Hon'ble Apex Court in ***(2017) 14 SCC 634,*** titled ***Himachal Pradesh Financial Corporation Vs. Anil Garg and others.***The High Court in this case had held that civil suit was unconditionally withdrawn for inexplicable reasons and without any liberty for initiating appropriate legal proceedings. It amounted to abandonment of claim for recovery of loan. The High Court also concluded that initiation of fresh proceedings for recovery of loan under the Act would be against public policy and will amount to abuse of process of law. Doctrine of election was also invoked against the Corporation. Recovery was also held to be time barred as no action was taken for recovery of loan from 1996 to 2002.

The appellant Corporation's submissions before the Hon'ble Apex Court were that the civil suit for recovery was withdrawnby it from the Court to initiate fresh proceedings under the Himachal Public Moneys (Recovery of Dues) Act, 1973 as being a special law, it provided for more speedier and effective remedy.Absence of any liberty in the withdrawal orderwas not relevant. There was no bar under the Act to the proceedings. The remedy under Section 3(1)(d)(iv) of the Act was independent and without prejudice to any other mode of recovery under any law for the time being in force, which will include a suit. The High Court had wrongly applied the principle of "public policy" to restrain recovery of public loan.It was also contended that the doctrine of election had no application to the facts of the case.

The Hon'ble Apex Court held that proceedings in civil suit for recovery are essentially different from the recovery proceedings under the Act. The application for withdrawal stated that it was being done to pursue remedies under the Act. Section 3(1)(d)(iv) of the Act provided that the remedy under it was without prejudice to any other remedy available under any other law. Appellant-Corporation did not intend to abandon its money claim by withdrawing the suit. There had been no abandonment of the claim by the appellant Corporation. The language of withdrawal order cannot be determinative without considering the background facts. Withdrawal of the civil suit was no bar to proceedings under the Act. It would be contrary to public policy to prevent the Corporation from recovering the loan. The recovery proceedings were not time barred. It was also observed that the Act provides for recovery of certain dues as arrears of land revenue by sending a certificate to the Collector, mentioning dues with the request that the sum together with cost may be recovered. The proceedings in a recovery suit and recovery under the Act as arrears of land revenue are under different laws governed by different procedures. It will be appropriate to extract relevant paras of the judgment.

On abandonment of claim due to withdrawal of the case and institution of fresh proceedings, it was observed as under: -

> *"13. The question whether there has been an abandonment of the claim by withdrawal of the Suit is a mixed question of law and fact as held in Ramesh Chandra Sankla vs. Vikram Cement, (2008) 14 SCC 58. The language of the order for withdrawal will not always be determinative. The background facts will necessarily have to be examined for a proper and just decision. Sarguja Transport Service (supra) cannot be applied as an abstract proposition or the ratio applied sans the facts of a case. The extract below is considered relevant observing as follows (Vikram Cement case):-*

"62..... '9.....While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit....."

14. *The application for withdrawal stated that it was being done to pursue remedies under the Act. Undoubtedly the proceedings under the Act are more expeditious for recovery as compared to a Suit, which after decree is required to be followed by Execution proceedings. Section 3(1)(d)(iv) of the Act provided that the remedy under it was without prejudice to any other remedy available under any other law. The Appellant, therefore, never intended to abandon its claim by withdrawing the Suit. The language of the withdrawal order cannot be determinative without considering the background facts.*

15. *The bar under Order 23 Rule 1 would apply only to a fresh Suit and not proceedings under the Act. In Sarva Shramik Sanghatana vs. State of Maharashtra, (2008) 1 SCC 494, the application under Section 25-O of the Industrial Disputes Act, 1947 for closure of undertaking was withdrawn as attempts were made for settlement of the matter. Settlement not having been possible, the Management filed a fresh application. It was opposed as barred under Order 23 of the Code of Civil Procedure since the earlier application was withdrawn unconditionally with no liberty granted, relying on Sarguja Transport Service (supra). The argument was repelled holding that the proceedings under the Industrial Disputes Act were not a Suit and that withdrawal was bonafide to explore amicable settlement. It was not a withdrawal made malafide or for Bench hunting holding as follows:-*

> *"22. No doubt, Order 23 Rule 1(4) CPC states that where the plaintiff withdraws a suit without permission of the court, he is precluded from instituting any fresh suit in respect of the same subject-matter. However, in our opinion, this provision will apply only to suits. An application under Section 25-O(1) is not a suit, and hence, the said provision will not apply to such an application."*

16. *In Vikram Cement the earlier petition was dismissed as not pressed and the second application was opposed as not maintainable. Dismissing the objection it was observed as follows: (SCC p.80, para 65)*

> *"65. It is thus clear that it was not a case of abandonment or giving up of claim by the Company. But, in view of the office*

objection, practical difficulty and logistical problems, the petitioner Company did not proceed with an "omnibus" and composite petition against several workmen and filed separate petitions as suggested by the Registry of the High Court."

Following observations were made regarding difference between suit for recovery and recovery proceedings instituted under the H.P. Public Moneys (Recovery of Dues) Act:-

"17. The Act provides for recovery of certain dues as arrears of land revenue by sending a certificate to the Collector, mentioning the sum due requesting that the sum together with costs may be recovered. The High Court erred in holding that the H.P. Public Moneys (Recovery of Dues) Act, 2000 repealing the earlier Act did not contain any provision that the remedy was without prejudice to the rights under any other law. The proceedings in a Suit and recovery under the Act as arrears of land revenue are under different laws governed by different procedures. A Suit is instituted in a Court of law and is governed by the Code of Civil Procedure while the proceedings under the Act are before the executive statutorily empowered. In C.C.E. vs. Ramdev Tobacco Company, (1991)(2)SCC 119, the distinction was noticed as follows :-

> *"6.....There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one....."*

18. That the proceedings in a Suit could not be equated with a certificate proceeding was further noticed in ESI Corpn. vs. C.C. Santhakumar observing :-

> *"25.....Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court....."*

On public policy vis-à-vis doctrine of election, the Hon'ble Apex Court held as under: -

"19. The phrase 'public policy' is not capable of precise definition. In P.Rathinam v. Union Of India, (1994) 3 SCC 394, it was observed:-

> *"92. The concept of public policy is, however, illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc...."*

Broadly it will mean what is in the larger interest of the society involving questions of righteousness, good conscience and equity upholding the law and not a retrograde interpretation. It cannot be invoked to facilitate a loanee to avoid legal obligation for repayment of a loan. The loanee has a pious duty to abide by his promise and repay. Timely repayment ensures facilitation of the loan to others who may be needy. Public policy cannot be invoked to effectively prevent a loanee from repayment unjustifiably abusing the law. Invocation of the principle of doctrine of election in the facts of the case was completely misconceived."

On point of limitation, it was held as follows:-

"20. The High Court factually erred in holding that the truck loan was time-barred because the appellant took no steps for recovery of the dues from 1996 till 2002 overlooking the certificate dated 3-9-1994."

Hon'ble Supreme Court concluded as under:-

"21. In conclusion, it is held that the proceedings in a Suit are essentially different from proceedings under the Act. The withdrawal of the Suit was no bar to proceedings under the Act. There was no bar under the Act to the proceedings. There had been no abandonment of claim by the Appellant. It would be contrary to public policy to prevent the Appellant from recovering the loan. The recovery proceedings were not time barred. The order of the High Court is held to be unsustainable and is set aside. The auction notice dated 13.01.2005/15.01.2005 under Section 85 of the Act shall now proceed in accordance with law and be concluded at the earliest expeditiously."

In the instant case, the appellant Corporation in its application (Mark DB) seeking withdrawal of the suit stated the reason for withdrawing the suit as *'the plaintiff corporation has decided to initiate recovery proceedings under the H.P. Public Moneys (Recovery of Dues) Act, 1973 or the State Financial Corporations Act, 1951 against the defendants. Therefore, the plaintiff corporation has decided to withdraw the present suit pending in this Court.'* The appellant Corporation was permitted to withdraw the suit for recovery of loan amount on 15.01.1996. The Corporation thereafter resorted to recovery proceedings under the Himachal Pradesh Public Moneys (Recovery of Dues) Act. The demand notice was issued to the plaintiff on 22.02.1997. These recovery proceedings were questioned by the plaintiff in the civil suit.

In light of the legal position settled by the Hon'ble Apex Courtin the aforesaid judgment, the findings of the learned First Appellate Court about preclusion of the appellant Corporation's loan recovery claim in light of its withdrawing the civil suit, the abandonment of the appellant Corporation's loan claim, there being no fresh cause of action for initiating recovery proceedings under the Act and the recovery proceedings under the Act having been instituted beyond the period of limitationetc. are not proper. These findings need to be relooked into in light of facts of the case to be examined viz-a-viz the legal positon settled by the Hon'ble Apex Court. Hence, this appeal is allowed. The judgment and decree passed by learned First Appellate Court on 26.08.2008 in Civil Appeal No.22-S/123 of 2008 is set aside. The matter is remanded to the learned First Appellate Court for fresh decision in accordance with law. Parties through their learned counsel are directed to appear before the learned First Appellate Court on 04.11.2022. Record be returned forthwith.

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

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

Between:

1. SH. RAJUL BHARGAVA SON OF SH. RAMESH BHARGAVA, RESIDENT OF BHARGAVA ESTATE, TUTI KANDI, SHIMLA THROUGH HIS FATHER AND GENERAL POWER OF ATTORNEY SHRI RAMESH BHARGAVA, SON OF SH. GIRDHARI, LAL BHARGAVA, RESIDENT OF BHARGAVA ESTATE, TUTI KANDI, SHIMLA, HP.
2. SH. RAHUL BHARGAVASON OF SH. RAMESH BHARGAVA, RESIDENT OF BHARGAVA ESTATE, TUTI KANDI, SHIMLA THROUGH HIS FATHER AND GENERAL POWER OF ATTORNEY SHRI RAMESH BHARGAVA, SON OF SH. GIRDHARI, LAL BHARGAVA, RESIDENT OF BHARGAVA ESTATE, TUTI KANDI, SHIMLA, HP.

.....PLAINTIFFS-APPELLANTS

(BYMR. AJAY KUMAR, SENIOR ADVOCATE WITH
MR. ROHIT, ADVOCATE)

AND

1.SH. VIJAY KUMAR KOHLI SON OF SURAJ PARKASH KOHLI, PRAKASH COAL COMPANY TUTI KANDI, SHIMLA, H.P.

2. SMT. VINOD KOHLI, WIFE OF SH. VIJAY KUMAR KOHLI, RESIDENT OF GAYTRI COTTAGE/ BHARGAVA COTTAGE NO.1 TUTI KANDI, SHIMLA, H.P.

.....DEFENDANTS/RESPONDENTS

(BYMR. B.R. VERMA, ADVOCATE)

REGULAR SECOND APPEAL
No. 288of 2006
Reserved on: 15.9.2022
Decided on: 23.9.2022

Code of Civil Procedure, 1908- Section100- Regular second appeal- Suit for injunction- Suit dismissed by Ld. Trial Court so also the first appeal by Ld.

First Appellate Court- Held- For claiming decree of injunction, plaintiffs were required to prove firstly the existence of their right and secondly, the obstruction- The material on record suggest existence of both- Appeal allowed. (Para 17)

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

J U D G M E N T

Appellants are in second appeal against judgment and decree dated 07.04.2006, passed by learned Additional District Judge, Fast Track Court Shimla in Civil Appeal No. RBT(FTC) No. 96-S/13 of 2005/02, titled as Rajul Bhargava and anr. Vs. Vijay Kumar Kohli and anr., whereby the appeal of the appellants has been dismissedbyaffirming the judgment and decree dated 01.08.2001, passed by learnedSub Judge 1st Class Court No. (1) Shimla, in Civil Suit No. 80/1 of 1998, titled as Rajul Bhargava and anr. Vs. Sh. Vijay Kumar Kohli and anr.

2. Parties hereafter shall be referred to by the same status as they held before learned Trial Court. Appellants herein were the plaintiffs and respondents herein were the defendants before the learned Trial Court.

3. Plaintiff No.1 claimed himself to be the owner of property comprised in Khewat No. 144, Khatoni No. 263 min, and Khatoni No. 264 min, Khasra Nos. 1135,1144,1136,1143 measuring 380.78 sq. mts.and plaintiff No.2 claimed ownership of property comprised in Khewat No. 143, Khatoni No. 260 , Khasra Nos. 1164, 1165, 1145 to 1149 measuring 108.18 sq. mts. both lands situated at MauzaKhar(TutiKandi) Tehsil and District Shimla, H.P.

4. The suit was filed in respect of Khasra Nos. 1144, 1145 and 1146 on the premise that Khasra Nos. 1144,1145 and 1146 provided approach to the other parts of property of plaintiffs and their tenants.

5. Plaintiffs had averred thaton 10.07.1998, defendants had illegally and unauthorizedly collected bricks and stones on khasra No. 1145

and 1146 and also in front of stairs case comprised in khasra No. 1144 and had thereby tried to create obstruction in the egress and ingress to the ground floor of the property of the plaintiffs. Defendants were stated to have no right over aforesaidkhasra numbers and their actions were alleged to be against the rights of the plaintiffs. Accordingly, a decree of permanent prohibitory injunction was prayed against defendants restraining them from interfering with the peaceful occupation and possession and enjoyment of property comprised in Khasra Nos. 1144, 1145 and 1146 of the plaintiffs.

6. In defence, defendants filed their written statement. It was alleged that plaintiffs had suppressed material facts. The plea of estoppel was also raised.On merits, it was submitted that vide agreement to sell dated 07.06.1989, plaintiff No. 2 had sold old Khasra Nos. 549/513/342/1 and 546/334/1i.e open land and built up structure known as Cottage No.2 to defendant No.2 on receipt of entire consideration amount. It was further submitted that in part performance of aforesaid agreement, the actual and physical possession of sold property was handed over to defendant No.2. The corresponding newkhasra number of aforesaid sold land were mentioned as 1145, 1146, 1147 and 1149. On the strength of agreement dated 07.06.1989, the exclusive right over Khasra Nos. 1145 and 1146 was asserted. As far as Khasra No. 1144 was concerned, it was denied that plaintiffs or their tenants were using the approach through said khasra number. It was rather submitted that exclusive right of user of khasra No. 1144 had been granted to defendant No. 2 as an ingress and outgress to the basement portion of Cottage No. 2.

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

1. *Whether there exits any passage from Khasra Nos. 1144, 1145 and 1146 to the properties of the plaintiff as alleged ?*
.....OPP

2. *Whether the plaintiff is entitled to relief of permanent prohibitory injunction, as prayed?*
……OPP

3. *Whether the plaintiff is estopped from filing the suit?*
…….OPD

4. *Whether the plaintiff has no cause of action, as alleged?*
……OPD

5. *Relief.*

8. Issue Nos. 1 to 4 were decided in negative and consequently the suit of the plaintiffs was dismissed. Learned Trial Court dismissed the suit of the plaintiffs,firstly by taking into consideration the fact that none of the plaintiffs had appeared as witness rather it was one Ramesh Chand Bhargava, who appeared as PW-1 in the capacity of General Attorney of plaintiffs and secondly,learned Trial Court placed reliance on the fact that the plaintiffs had otherwise failed to prove the allegations. As far as, PW-1 Ramesh Chand Bhargava was concerned, he was stated to have not made any submission with respect to existence of passage on Khasra Nos. 1144,1145and 1146. The other witnesses of the plaintiffs Sh. Om Prakash Gupta as PW-2 had stated that defendant had kept bricks and stones on the stair and had closed the path. As per PW-2, the path was closed even on the date the witness had made statement in the Court. Taking notice of all these facts learned Trial Court held that plaintiffs had failed to establish on record the existence of any passage on the spot and any threat to obstruct the said path by defendants.

9. In first appeal, learned Lower Appellate Court maintained the judgment and decree passed by learned Trial Court but on different premise. It was held that the plaintiffs had suppressed the material facts and therefore, had also not appeared in the witness box. Reliance was placed upon the agreement Ext. DW1/A executed between plaintiff No. 2 and defendant No.2,

wherein, area within Khasra Nos. 1145 and 1146 was reserved for use of path.Further, the path and steps shown in blue portion in plan Ext. DW1/B was held to be used by defendants. Applying the principle, that theperson notapproaching to the Court with clean hands is not entitled to relief of injunction, the appeal of the plaintiffs was dismissed.

10. The instant appeal has been admitted on following substantial questions of law:-

> *"2. Whether there has been complete misreading of documentary evidence of the appellants, namely, Ext. PW1/C PW1/D, PW1/E, PW1/G and PW1/H resulting into palpably erroneous conclusions by the Courts below and if so to what effect?*
>
> *3. Whether the appeal No 2 had at any point of time granted any right of passage to the defendants as claimed by the when the khasra N. 1144 did not belong to the said appellant and could the defendants claim any right on the property of the appellant No. 1 in the absence of any grant by him?*
>
> *4. Whether both the Court below have totally misinterpreted the pleadings, evidence and the law resulting into illegal findings and resultant miscarriage of justice to the appellants and if so to what effect?*
>
> *5. Whether a mere agreement of sale creates any vested right in the property subject matter of such agreement of sale?"*

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

12. At the time of hearing Mr. Ajay Kumar, learned Senior Advocate fairly admitted that as far as Khasra No. 1145 and 1146 are concerned, they were sold to defendant No. 2 and thereafter plaintiff possibly could not stake any claim without reserving any right in that behalf. He, however, assailed the judgments and decrees passed by both the Courts below in respect of KhasraNo. 1144. As per Mr. Ajay Kumar, learned Senior Advocate, there was sufficient material on record suggesting existence of right of passage over Khasra No. 1144 of the plaintiffs and its obstruction was almost admitted by defendants.

13. On the other hand, Mr. B.R. Verma, learned counsel for the respondents has supported impugned judgments being in accordance with the facts of the case and law applicable thereto.

14. It is not in dispute that an agreement to sell was executed between plaintiff No. 2 and defendant No. 2 on 07.06.1989 in respect of the property comprised in Khasra No. 546, 334/1 and Khasra No. 549,523 and 342/1. Perusal of agreement Ext. DW1/A reveals that the property agreed to be sold by virtue of aforesaid agreement was identified on site plan Ext. DW-1/B.Parties have been in agreement on factual aspect that the passage /stair case in Khasra No. 1144 found mention at clause-6 of the agreement,and the purchaser was grantedrightof passage through said Khsra No 1144. On the strength of this recital, learned counsel for the defendants submits that the exclusive right of this stair case was also given to defendant No. 2, hence, the claim of plaintiffs over such passage was without any basis.

15. This Court is not persuaded to subscribe to the contention raised on behalf of leaned counsel for the defendants, for the reason that Clause-6 of Ext. DW1/A does not provide exclusive right of user of passage over khasra No. 1144 to defendant No. 2. It only mention that purchaser shall have a right of user. This finds strength from the fact that khasra No. 1144 was not sold or agree to be sold vide agreement Ext. DW1/A. Admittedly, it belongs to plaintiff No. 1. In case, the exclusive rights were to be given to defendant No. 2 in respect of Khasra No. 1144, it also wouldhave found mention in the description of land agreed to be sold to defendant No. 2, vide agreement Ext. DW1/A.

16. As noticed above, agreement DW1/A was executed in 1989. It is not known whether sale deed was subsequently executed or not.

17. For claiming decree of injunction, plaintiffs were required to prove firstly the existence of their right and secondly, the obstruction. The material on record suggest existence of both.The Khasra No. 1144 was in

ownership of plaintiff No.1. Defendant No. 2 had been granted only a right of user, which cannot be construed to mean that plaintiffs had surrendered all their rights in said portion of property. The moment defendants claimed their exclusive right over Khasra No. 1144 and denied the right of plaintiffs, amounted to obstruction and warranted the grant of injunction.

18. Substantial question of law Nos.3 to 5are answered accordingly and substantial question of law No. 2 is rendered infructuous.

19. Accordingly, judgment and decree dated 07.04.2006, passed by learned Additional District Judge, Fast Track Court Shimla in Civil Appeal No. RBT(FTC) No. 96-S/13 of 2005/02, titled as Rajul Bhargava and anr. Vs. Vijay Kumar Kohli and anr., affirming the judgment and decree dated 01.08.2001, passed by learned Sub Judge Ist Class Court No. (1) Shimla in Civil Suit No. 80/1 of 1998, titled as Rajul Bhargava and anr. Vs. Sh. Vijay Kumar Kohli and anr. isset aside. The suit of the plaintiffs is decreed only to the extent that plaintiffs were entitled to a decree of permanent prohibitory injunction against the defendants restraining them from interfering in the right of user of the plaintiffs on passage/stair case over Khasra No. 1144 situated inMauzaKhar (TutiKandi), Tehsil and District Shimla, H.P.

20. The appeal is accordingly disposed of, with no order as to costs.

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